

DONELL L. PRINCE
P.O. Box 1024
Hackensack, New Jersey 07602-1024
(862) 290-4537
Pro Se Plaintiff

Plaintiff
Donell L. Prince

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY- NEWARK

FILE NO.: 2:09-CV-5429
JUDGE: Hon. Jose L. Linares

vs.

Defendant (s)

Thomas Aiellos et al

CIVIL ACTION
WITH JURY DEMAND
AMENDED
NOTICE OF MOTION
PURSUANT TO RULE
RULE 56 & 12 (c)

To: Clerk of United States District Court
Hon. Joseph A. Dickson - Magistrate Judge
Hon. Jose L. Linares
United States District Court
District of New Jersey- Newark
M.L. King, Jr. Federal Bldg. & U.S. Courthouse
50 Walnut Street - P.O. Box 419
Newark, New Jersey 07101-0419

RECEIVED

JUL 09 2013

AT 8:30 _____ M
WILLIAM T. WALSH, CLERK

Chad L. Klasna, Esq.
c/o Callahan & Fusco, LLC
72 Eagle Rock Avenue, Suite 320
East Hanover, New Jersey 07936

PLEASE TAKE NOTICE that the undersigned pro se plaintiff,
Donell L. Prince hereby moves before the United States District
Court, District of New Jersey - Newark, on/or about _____, 2013
or thereafter pursuant to Rule 56 & _____, asking the court to
enter Summary Judgment in plaintiffs Donell Prince's favor,
and against the defendant Thomas Aiellos.

PLEASE TAKE FURTHER NOTICE that pro se plaintiff shall
rely upon the attached Statement of Undisputed Facts, Breif

with Memorandum of Law and Certifications/Affidavits in support of Motion for Summary Judgment.

Dated: July 3, 2013

By: Donell Prince
Donell L. Prince, Pro se Plaintiff

CERTIFICATION OF FILING AND SERVICE

Pro Se Plaintiff Donell Prince certifies that copies of this Motion was filed with the court clerk and mailed to the following counsel of record.

To: Clerk of United States District Court
Hon. Joseph A. Dickson - Magistrate Judge
Hon. Jose L. Linares
United States District Court
District of New Jersey- Newark
M.L. King, Jr. Federal Bldg. & U.S. Courthouse
50 Walnut Street - P.O. Box 419
Newark, New Jersey 07101-0419

Chad L. Klasna, Esq.
c/o Callahan & Fusco, LLC
72 Eagle Rock Avenue, Suite 320
East Hanover, New Jersey 07936

By: Donell Prince
Donell L. Prince, Pro se Plaintiff

AMENDED INDEX

Notice of Motion:
Certification:

Procedural Background.....3-10

Legal Standards.....11-20

Statement of Material Facts:

Undisputed or Disputed Facts.....1-18

Arguments for Summary Judgment on facts.....1-10

Affidavits:

Statements.....1-15

Exhibits.....1-3

DONELL L. PRINCE
P.O. Box 1024
Hackensack, New Jersey 07602-1024
(862) 290-4537
Pro Se Plaintiff

Plaintiff
Donell L. Prince

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY- NEWARK

FILE NO.: 2:09-CV-5429
JUDGE: Hon. Jose L. Linares

vs.
Defendant (s)

CIVIL ACTION
AMENDED CERTIFICATION IN SUPPORT
OF MOTION PURSUANT TO
RULE 56 & 12 (c)

Thomas Aiello et al

1. I pro se plaintiff, Donell L. Prince hereby certifies that this Motion is submitted, pursuant to Rule 56, asking the court to enter Summary Judgment in plaintiff's Donell Prince's favor, and against the defendant Thomas Aiello in this matter.

Procedural Background

2. As the court is aware, on October 23, 2009, plaintiff filed the original Complaint and a Amended Complaint on February 16, 2010, naming (28) defendants and some john doe's, in an action at law to redress the deprivation of federal rights under color of law, statute, ordinance, regulation, custom, or usage of a right, privilege, and immunity secured to plaintiff (s) by the Fourteenth Amendment to the Constitution of the United States under the Civil Rights Act, Title 42 U.S.C. § 1983.

3. On or about January 6, 2010 , Notice and Request to Waive Service of Summons was mailed out to all defendants, and on February 11, 2010 the clerk signed and stamped Summons and returned same to plaintiff and plaintiff served as many

defendants as possible.

4. And thereafter in May 2010 and October 2010, with court permission a Second & Third Amended Complaint were filed pursuant to Civil Rights Act, Title 42 U.S.C. § 1983.

5. Attorneys for defendants filed Motions to Dismiss, under Rule 12(b)(6) as follows;

(a) By Kenneth Hayes on behalf of his clients defendant Bergen Regional Medical Center and Erica Schiffman, M.D.,

(b) Richard Malagiere, PC, on behalf of his cleints defendants, Det. W Inglima, Lt. Lee, Lt. Plunket, Officer C. Toomey, Officer T. Gervasi badge #218, Officer J. Gervasi D.C.I. division, Internal Affairs Captain Walsh, Sgt. A. Trezza badge; Court Administrator Janice Behnke; Deputy Court Administrator Elizabeth P.;

(c) By Karen Boe Gatlin Esq., of Breslin & Breslin on behalf of thier client defendant, Bergen County Jail and John Doe member (s) of Bergen County Jail staff.

(d) The law office of Wayne J. Positan Esq., on behalf of his clients defendants, Bergen County Prosecutor; Prosecutor Ostuni; John Doe member (s) of Bergen County Prosecutor's staff.

(e) By George A. Prutting, Jr., on behalf of his clients defendants Care Plus of New Jersey and E. Fahey.

(f) By Vincent L. Galasso Esq. on behalf of his cleints defendants, Thomas Aiellos, Det. A Gutierrez, Det. A Ferraoili.

6. On October 8, 2010 Hon. Jose L. Linares, ordered some of plaintiffs claims dismissed and also granted leave for plaintiff to amend his conspiracy to maliciously prosecute and

equal protection claims by October 29, 2010.

7. On/or about December 22, 2010 Hon. Jose L. Linares, ordered plaintiffs claims dismissed as its relates to conspiracy to maliciously prosecute and equal protection claims dismissed against all but one defendant and ordered this matter to proceed as to plaintiffs claims for maliciously prosecute against sergeant Thomas Aiello, ordered an Answer to be filed for same.

8. On 1/3/11 an Answer to amended complaint and third amended complaint was filed for defendant Thomas Aiello, by attorney Vincent Galasso.

9. By order dated May 12, 2011, Magistrate Judge Cecchi set scheduling orders for discovery in this matter, wherein the court informed parties that all discovery dispute or issues were to filed no later than November 7, 2011 and same would be done informally by letter, no motions. A problem came up dealing with discovery time set by the court in this matter, this came about when plaintiffs deposition which was set for July 13, 2011 was postponed by defendant Aiello attorney Vincent L. Galasso, because the city of Hackensack was to hire new attorney to take over this matter for city, and said new attorney was to contact plaintiff after taking over the case to reschedule, see letter dated July 12, 2011 attached. By letter dated October 24, 2011, the plaintiff was informed for the first time by Chad L. Klasna Esq. of Callahan & Fusco LLC, the new attorneys for defendant Aiello that they had take over case. By letter dated November 1, 2011, to Magistrate Judge Cecchi, the plaintiff asked the court for some relief in the form of

addition discovery time in this matter.

10. The plaintiff also filed motions to request District Court Judge Jose L. Linares to grant reconsideration of prior order and a Stay in the plaintiff case for a few months to deal with health/medical issues related to plaintiff and his doctors death. These motions for temporary stay and reconsideration were denied.

11. Thereafter Hon. Michael A. Hammer - Magistrate Judge granted additional discovery time with phone conference and by order, a second phone conference took place on 1/24/12 with Hon. Michael A. Hammer and parties and as part of conversation plaintiff informed judge and defendant attorney that plaintiff could be amending complaint and was trying to get records.

12. Thereafter on February 8 & 21, 2012 plaintiff filed motion and amended motion to Amend Complaint in plaintiff's civil rights action pursuant to Rule 15(a)(2) & 15(c), to add new parties of Housing Authority of Bergen County, employee's and/or former employee's of same Courtney Hoehl, Robert Colombini, Ann Stein, Lynn Bartlett as it relates to the damages for the loss plaintiff's rental assistance; and requested temporary stay in discovery until motion was ruled on.

13. Thereafter Magistrate Judge Michael A. Hammer, order dated May 22, 2012, denying plaintiff motion to Amend Complaint in plaintiff's civil rights action pursuant to Rule 15(a)(2) & 15(c); and denied temporary stay in discovery until motion was ruled on.

14. Thereafter on June 5 & 11, 2012 plaintiff filed motion

and supplemental under Rule 72 dealing with plaintiff's objections to the Order by Magistrate Judge Michael A. Hammer dated May 22, 2012, denying plaintiff motion to Amend Complaint in plaintiff's civil rights action pursuant to Rule 15(a)(2) & 15(c); and temporary stay in discovery until motion was ruled on. Plaintiff respectfully request that Hon. Jose L. Linares and/or the court, consider plaintiffs objections and then allow plaintiff to Amend his Complaint to add new parties of Housing Authority of Bergen County, employee's and/or former employee's of same Courtney Hoehl, Robert Colombini, Ann Stein, Lynn Bartlett as it relates to the damages for the loss plaintiff's rental assistance, which is in the interest of justice and is required by the entire-controversy doctrine, and would not prejudice defendant Aiellos and in fact would limit his damages by the re-instatement of my Section (8) rental assistance etc.

15. Thereafter a third phone conference took place on 6/14/12 with Hon. Michael A. Hammer - Magistrate Judge, plaintiff Donell Prince and defendant attorney Chad L Klasna and by order ordered fact discovery closed; requested parties submit letter by July 12, 2012 addressing their respective positions on whether either party will seek to introduce expert testimony; and to discuss settlement.

16. Thereafter on July 10, 2012 plaintiff filed motion under Rule 210 & 56 to deal with issue of collateral estoppel as it relates to probable cause from prior litigation with parties which is a question of law for the court.

17. Thereafter on or about July 10-11 2012, District Court

Judge Jose L. Linares, denied plaintiff motion and supplemental with transcripts of phone conferences, filed June 5 & 11, 2012, under Rule 72 dealing with plaintiff's objections to the Order by Magistrate Judge Michael A. Hammer dated May 22, 2012, denying plaintiff motion to Amend Complaint in plaintiff's civil rights action pursuant to Rule 15(a)(2) & 15(c); and temporary stay in discovery until motion was ruled on.

18. Thereafter on July 24 2012, Magistrate Judge Michael A. Hammer denied plaintiff motion with out prejudice from motion under Rule 210 & 56 to deal with issue of collateral estoppel as it relates to probable cause from prior litigation with parties which is a question of law for the court.

19. Thereafter on August 3, 2012, plaintiff filed motion for reconsideration of order dated July 10-11 2012, by District Court Judge Jose L. Linares, denying plaintiff motion and supplemental with transcripts of phone conferences, with Magistrate Judge Michael A. Hammer filed June 5 & 11, 2012, under Rule 72 dealing with plaintiff's objections.

20. Thereafter on September 1, 2012, plaintiff received a copy of District Court Judge Jose L. Linares, order denying plaintiff reconsideration motion which was signed and filed on August 23 & 24 2012 and mailed out on August 29, 2012.

21. Thereafter on September 7, 2012, Magistrate Judge Michael A. Hammer, ordered the telephone status conference to be held on September 28 2012 to be adjourned until October 31, 2012 and thereafter adjourned until January 11, 2013.

22. Thereafter a phone conference took place on 1/11/13

with Hon. Michael A. Hammer - Magistrate Judge, plaintiff Donell Prince and defendant attorney Chad L Klasna and ordered any motion by plaintiff related to experts to be filed by 2/8/13, defendant response by 2/19/13 and reply by 2/25/13.

23. Thereafter on February 8, 2013, plaintiff filed motion pursuant to Rule 706. to request the court appoint expert witnesses in the matter of Donell Prince vs. Aiello, File# 2:09-CV-5429.

24. Thereafter on March 18, 2013, plaintiff motion pursuant to Rule 706. to request the court appoint expert witnesses in the matter of Donell Prince vs. Aiello, File# 2:09-CV-5429, was denied, by Magistrate Judge, Michael A. Hammer.

25. Thereafter a phone status conference was ordered for 5/8/13 by Magistrate Judge, Michael A. Hammer, with pro se plaintiff Donell Prince and defendant attorney Chad L Klasna and thereafter, by letter dated 4/22/13 from defendant attorney Chad L Klasna, said phone status conference was rescheduled to 5/23/13, before Magistrate Judge Joseph A. Dickson.

26. On 5/23/13 a phone status conference took place before Magistrate Judge Joseph A. Dickson, pro se plaintiff and defendant's attorney Chad L Klasna, wherein Judge Joseph A. Dickson ordered that defendant shall file its dispositive motion by 7/1/13 and plaintiff may file its dispositive motion by 7/1/13 or file cross motion for Summary Judgment against defendant in accordance with rules of court and parties shall file opposition and reply papers in accordance with rules or request addition time pursuant to rules.

27. On June 28, 2013, defendant Aiello's attorney Chad L. Klasna requested a 30-day extension of time to file Summary Judgment motion, claiming he was leaving law firm and new attorney needed additional time to prepare and file motion; thereafter by Order dated July 1, 2013, Judge Joseph A. Dickson granted 30-day extension of time to file defendant Aiello's Summary Judgment motion,

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: July³, 2013

By: 
Donell L. Prince, Pro se Plaintiff

Court's Jurisdiction

This Court has subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) & 1343, this being an action authorized by law to redress the deprivation of federal rights under color of law, statute, ordinance, regulation, custom, or usage of a right, privilege, and immunity secured to plaintiff (s) by the Fourth & Fourteenth Amendment to the Constitution of the United States under the Civil Rights Act 42 U.S.C. § 1983. Also this Court has jurisdiction over state claims based on the principles of supplemental jurisdiction under 28 U.S.C. § 1367.

Summary Judgment Standard

A party seeking summary judgment must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1366 (3d Cir. 1996); *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1219 n.3 (3d Cir. 1988), cert. denied, 490 U.S. 1098 (1998); *Hersh v. Allen Prods. Co.*, 789 F.2d 230, 232 (3d Cir. 1986). The threshold inquiry is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (noting that no issue for trial exists unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict in its favor). When deciding the existence of a genuine

issue of material fact exist, a Court must view the underlying facts and draw all reasonable inferences, doubts, and issues of credibility in favor of non-moving party; Summary judgment motions thus require judges to assess how one-sided evidence is, or what a fair-minded jury could reasonably decide; see *Williams v. Borough of West Chester, Pa.*, 891 F.2d 458, 460 (3d Cir. 1989); *Meyer v. Riegel Products Corp.* 720 F.2d 303, 307 (3d Cir. 1983); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Pennsylvania Coal Ass'n v. Babbitt*, 63 F.3d 231, 236 (3d Cir. 1995); *Hancock Indus. v. Schaeffer*, 811 F.2d 225, 231 (3d Cir. 1987).

Rule 56(e) of the Federal Rules Of Civil Procedure provides in relevant part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e). The rule does not increase or decrease a party's ultimate burden of proof on a claim. Rather, " the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." *Anderson*, 477 U.S. at 255.

Under the rule, a movant must be awarded summary judgment on all properly supported issues identified in its motion, except those for which the non-moving party has provided evidence to

show that a question of material fact remains. see *Colotex*, 477 U.S. at 324. Put another way, once the moving party has properly supported its showing of no triable issue of fact and of an entitlement to judgment as a matter of law, for example, with affidavits, which may be "supplemented ... by depositions, answer to interrogatories, or further affidavits " its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushite*, 475 U.S. at 586 and *Anderson*, 477 U.S. at 247-48, (stating that by its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.")

What the non-moving party must do is "go beyond the pleadings and by its own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial., see *Colotex*, 477 U.S. at 324. and *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888 (1990), stating that the object of rule 56(e) is not to replace conclusory allegations of the complaint ... with conclusory allegations of an affidavit., *Anderson*, 477 U.S. at 249; *Big Apple BMW, Inc. v. BMW of N. Am. Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993) stating that to raise a genuine issue of material fact,... the opponent need not match, item for item, each piece of evidence proffered by the movant," but must exceed

the mere scintilla, threshold and... offer a genuine issue of material fact; as stated in *Orsatti v. New Jersey State Police*, 71 F.3d 480, 484 (3d Cir. 1995) the non-movant's burden is rigorous: it must point to concrete evidence in the record, mere allegations conclusions, conjecture, and speculation will not defeat summary judgment.

The Local Civil Rules supplement the Federal Rules of Civil Procedure and provide that " each side shall furnish a statement which sets forth material facts as to which there exists or does not exist a genuine issue." L. Civ. R, 56.1, under the rule, ' facts submitted in the statement of material facts which remain uncontested by the opposing party are deemed admitted.' However, "the parties statements pursuant to local rule 56.1 cannot bind the court if other evidence establishes that the stipulated facts are in error.

42 U.S.C. § 1983 standard

A plaintiff may have a cause of action under 42 U.S.C. § 1983 for certain violations of his or her constitutional rights.

Section 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privilege, and immunity secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

Thus, to establish a violation of 42 U.S.C. § 1983, a plaintiff must demonstrate that the challenged conduct was committed by (1) a person acting under color of state law and (2) that the

conduct deprived him of rights, privilege, and immunity secured by the Constitution or laws of the United State; see *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), overruled in part on other grounds by *Daniels v. Williams*, 474 U.S. 327 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970); *Piecknick v. Pennsylvania*, 36 F.3d 1250, 1255-56 (3d Cir 1994).

Malicious Prosecution standard

In order to state and establish a claim for Malicious Prosecution as a Constitutional violation, the plaintiff must show that:

- (1) Defendant initiated a criminal proceeding;
- (2) the criminal proceeding ended in plaintiff's favor;
- (3) the proceeding was initiated without probable cause;
- (4) Defendant acted maliciously or for a purpose other than bringing plaintiff to justice; and
- (5) Plaintiff suffered a deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding.

see *Johnson v. Knorr*, 477 F.3d 75, 81-2 (3d Cir. 2007); *Camiolo v. State Farm Fire and Casualty C.*, 334 F.3d 345, 362-363 (3d Cir. 2003) (citing *Estate of Smith v. Marasco*, 318 F.3d 497, 521 (3d Cir. 2003); *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 (3d Cir. 1998) (holding that a malicious prosecution claim is grounded in the Fourth Amendment concept of "seizure". In *Albright v. Oliver*, (1995) the U.S. Supreme Court concluded that alleged constitutional violations as a result of malicious prosecution under § 1983, are properly analyzed under both the procedural due process clause of the Fourteenth Amendment and the "objective reasonableness standard of the Fourth Amendment, but not the "open-ended" substantive due process clause of the Fourteenth Amendment.

The Fourth Amendment to the U.S. Constitution, proscribes unreasonable seizure of any person, person's home (including its curtilage) or personal property without a warrant' the Amendment, also protects against unreasonable seizure of their persons, including a brief detention.

The Fifth Amendment to the U.S. Constitution provides; Nor shall any person... be deprived of life, liberty, or property, without due process of law.....;

The Fourteenth Amendment to the U.S. Constitution, section one provides; Nor shall any state deprived any person of life, liberty, or property, without due process of law.....;

The Fifth & Fourteenth Amendment to the U.S. Constitution proscribes that, the prohibitions of the Due Process Clauses apply only to the actions of state actors...; and that Procedural due process, protections extends to all government proceedings that can result in an individual's deprivation, whether civil or criminal in nature; Due Process is the legal requirement that the state must respect all of the legal rights that are owed to a person and when government harms a person without following the exact course of the law, this constitutes a due-process violation.

Additionally all Circuit Courts, to consider the question have unanimously held that evidence of malice, that is, misrepresentation, withholding, or falsification of evidence, fraud, perjury, or other bad-faith conduct, is itself probative of a lack of probable cause, see Moore v. Hartman, 571 F.3d 62, 67 (D.C. Cir. 2009); Cases cited as Hinchman v. Moore, 312

F.3d 198, 205-06 (6th Cir. 2002) and Hill v. McIntyre, 884 F.2d 271, 275 (6th Cir. 1989), "Falsifying facts to establish probable cause to arrest and prosecute an innocent person is of course patently unconstitutional..."; and see Orsatti v. New Jersey State Police, 71, F.3d 480, 483 (3d Cir. 1995) (The right to be free from arrest except on probable cause, was clearly established in 1988 & 1989.)"

Immunity from Suit Standards:

Immunity under state law; "A state statute that creates immunity from suit under state law does not define the scope of immunity from suit under federal law." Bates v. Paul Kimball Hosp., 346 Fed. App'x. 883, 885 (3d Cir. 2009); citing Bolden v. SEPTA, 953 F.2d 807, 818 (3d Cir. 1991); "Federal rights cannot be denied by the passage of state legislation see Mancini v. Lester, 630 F.2d 990, 994 (3d Cir. 1980); Martinez v. California, 444 U.S. 277, 284 n. 8 (1980).

Qualified & Absolute Immunity Standard:

Notwithstanding the 42 U.S.C. § 1983 statute's imposition of liability to "every person", courts have limited its application according to common-law immunities recognized at the time of enactment. Burns v. Reed, 500 U.S. 478 484 (1991) and Pierson v. Bay, 386 U.S. 547, 554 (1967); Specifically, the courts have applied two kinds of immunities in § 1983 actions, qualified & absolute immunity, most public officials are entitled only to qualified immunity, which operates to shield them from suit for their good-faith conduct, see Yarris v. County of Delaware, 465, F.3d 129, 135 (3d Cir. 2006) and Harlow v.

Fitzgerald, 457 U.S. 800, 807 (1982). Qualified immunity shields officials from suit for their objectively reasonable conduct, see *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009); The doctrine operates "to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful." *Hope v. Pelzer*, 536 U.S. 730, 740 (2002); While the doctrine of qualified immunity presents many close questions, all agree that it affords no protection to "the plainly incompetent and those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The Supreme Court has suggested a two-step inquiry to determine whether a defendant official is entitled to the protection of qualified immunity: "First, a court must decide whether facts plaintiff alleged or shown make out a violation of a constitutional right. and if so then, "Second, the court must decide if the right at issue was clearly established at the time of the defendant's alleged misconduct." and while not mandatory, it continues to provide a useful framework for conducting a qualified immunity analysis *Brandt v. Monte*, 626 F. Supp. 2d 469, 485 (D.N.J. 2009) (citing *Pearson*, 129 S.Ct. at 815-16); The District Courts are required to view and credit the facts/version in the light most favorable to the plaintiff as cited in *Giles v. Kearney*, 571 F.3d 318, 326 (3d Cir. 2009) and *Halpin v. Camden*, 310 F. App'x 532 n.1 (3d Cir. 2009).

Absolute immunity protects officials who perform certain special functions, like judges, prosecutors, and witnesses, because it is though that these functions should be carried

out free from the threat of litigation; However, "the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." see Yarris, 465 F.3d at 135 and Burns, 500 U.S. at 486.

Collateral Estoppel & Res Judicata Standard

Res Judicata - claim preclusion, wherein a party who has asserted a right to relief arising out of a particular transaction or occurrence must join all claims she has arising from it, or the omitted claims will be barred by res judicata.

Collateral Estoppel - issue preclusion, is a common law estoppel doctrine that prevents a person from relitigation an issue.

The Full Faith and Credit Act 28 U.S.C. S 1738, requires that federal courts "give a state-court judgment the same preclusive effect as would be given that judgment under the law of the State which judgment was rendered." Migra vs. Warren City School Dist. Bd. of Educ., 465 U.S.75, 81 (1984).

Under collateral estoppel once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a deferent cause of action involving a party to the first case. As courts have often recognized, res judicata and collateral estoppel relieve parties of the costs and vexation of multiple lawsuits, conserve judicial resources and by preventing inconsistent decisions and encourage reliance on adjudication. "Allen vs. McCurry 449 U.S. at 94.

Application of collateral estoppel and whether an issue

is precluded based upon prior litigation is a question of law; *Szehinskyj vs. AG of the United States*, 432 F.3d 253, 255 (3d Cir. 2005); *Selective Ins. Co. vs. McAllister*, 327 N.J. Super, 168, 173 (App.Div.), cert. denied, 164 N.J. 188 (2000).

The Third Circuit has held that application of collateral estoppel to bar relitigation of an issue "required the presence of four factors specifically; (1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in prior action. The Third Circuit has also considered whether the party being preclude had a full and fair opportunity to litigate the issue in question in prior action, and whether the issue was determined by a final and valid judgment. "*Jean Alexander Cosmetics, Inc vs. L'Oreal USA, Inc.*, 458 F.3d 244, 249 (3d Cir. 2006) cert. denied, 549 U.S. 1305, 127 S.Ct. 1878, 167 L. Ed.2d 364 (2007)

Federal Rules of Evidence:

Rule 1007. Testimony Or Statement Of A Party To Prove Content. which states;

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered The proponent need not account for the original.