UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ANDRES ROBLES GONZALEZ,	*	**CIVIL ACTION**
	*	
Plaintiff,	*	**NO. 14-696**
	*	
VERSUS	*	**SECTION "J" (2)**
	*	
UNITED STATES OF AMERICA , U.S. DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT, THOMAS K. WINKOWSKI, in his Official Capacity as Acting Director of U.S. Immigration and Customs Enforcement, and JEH JOHNSON, in his Official Capacity as Secretary of Homeland Security	*	
	*	
Defendants.	*	
	*	
**********	*	

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S MALICIOUS PROSECUTION CLAIM, OR ALTERNATIVELY, FOR PARTIAL SUMMARY JUDGMENT ON DAMAGES

I. INTRODUCTION

Plaintiff Andres Robles-Gonzalez has asserted a malicious prosecution claim under the Federal Tort Claims Act ("FTCA") against the United States of America, as well as a claim under the Administrative Procedure Act ("APA") against other federal defendants. This motion deals exclusively with Plaintiff's malicious prosecution claim. Plaintiff alleges that Immigration and Customs Enforcement ("ICE") officers lacked probable cause and acted with malice and reckless disregard when initiating and proceeding with an immigration removal proceeding against Plaintiff. *See* Plaintiff's Complaint, Rec. Doc. 1 at ¶¶ 80-89.

Plaintiff's removal proceedings culminated in hearings before an Immigration Judge on December 1, 2008 and December 16, 2008. Plaintiff was represented by counsel at both hearings. During the second hearing, Plaintiff's attorney admitted to the allegations in the

charging document, conceded that Plaintiff was removable as charged, accepted the decision that Plaintiff was removable, designated Mexico as Plaintiff's country for removal, and waived any appeal rights. *See* Exhibit 1, transcript of the 12/16/08 hearing, at 3:15-4:18. "Absent egregious circumstances, a distinct and formal admission made … during … a proceeding by an attorney acting in his professional capacity binds his client as a judicial admission." *Matter of Velasquez*, 19 I&N Dec. 377, 382-3 (BIA 1986) (citations omitted); *see Cooper v. Lewis*, 644 F.2d 1077, 1082 (5th Cir. 1981) ("It is undisputed that for most purposes, each party is deemed bound by the acts of his lawyer-agent…." (internal quotation marks omitted)).

Under Louisiana law,[1] two essential elements Plaintiff must establish to sustain his malicious prosecution claim are a bona fide termination of the immigration removal proceeding in his favor and the absence of probable cause for ICE to commence the removal proceeding. *See JCM Construction Co. v. Orleans Parish School Bd.*, 871 So. 2d 1122, 1123 (La. 4/30/04); *Waste Management of Louisiana, L.L.C. v. Parish of Jefferson*, 947 F. Supp. 2d 648, 656 (E.D. La. 6/3/13) (Feldman, J.). Plaintiff's admissions, through his attorney, at the 12/16/08 removal hearing negate these essential elements of his malicious prosecution claim. Therefore, Plaintiff's malicious prosecution claim should be dismissed. Alternatively, as a result of his admissions, Plaintiff cannot accrue any damages for his malicious prosecution claim after the 12/16/08 hearing.

II. FACTS

Plaintiff was born in Mexico in July 1989. Rec. Doc. 1 at ¶20. He and his family entered the United States as Lawful Permanent Residents in January 1996. *Id.* at ¶21. He grew up in the

[1] In actions brought under the FTCA, courts are bound to apply the law of the state in which the alleged acts of negligence occurred. 28 U.S.C. § 1346 (b)(1); *United States v. Muniz*, 374 U.S. 150 (1963); *Brown v. Nationsbank Corp.*, 188 F.3d 579, 586 (5th Cir. 1999). Therefore, Louisiana substantive law applies to Plaintiff's malicious prosecution claim.

Houma area. As a teenager, Plaintiff ran afoul of the law, and on December 14, 2006, he plead guilty to the charges of Simple Burglary and Unauthorized Entry of an Inhabited Dwelling in Lafourche Parish. Exhibit 2, Felony Sentencing judgments. Plaintiff was sentenced to five years incarceration, suspended in favor of three years supervised probation. *Id.* Plaintiff was arrested again in 2007 on drug and theft charges and was incarcerated for violating the terms of his parole.

While Plaintiff was incarcerated, ICE officers issued an immigration detainer. Rec. Doc. 1 at ¶31. ICE officers took custody of Plaintiff on October 9, 2008 and processed him for possible removal from the United States. *Id.* at ¶33. That same day, ICE officers charged Plaintiff as being deportable under Section 237 of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii). *See* Exhibit 3, Notice to Appear; Rec. Doc. 1 at ¶46. That same day, Plaintiff requested a hearing before the Immigration Court to determine whether he could remain in the United States. *See* Exhibit 4, Notice of Rights and Request for Disposition.

On December 1, 2008 and December 16, 2008, Plaintiff appeared before Immigration Judge John A. Duck, Jr. ("Judge Duck"). Plaintiff was represented by counsel at both hearings[2] and Digital Audio Recordings, or DARs, exist for both hearings. *See* Exhibit 1, DAR transcript of 12/16/08 hearing, and Exhibit 5, DAR transcript of 12/1/08 hearing. During this time, Plaintiff's attorneys interacted with ICE and the Immigration Court on Plaintiff's behalf. At the 12/1/08 hearing, Plaintiff's attorney Riguer Silva requested a continuance. Exhibit 5 at 4:5-8. That same day, the Immigration Court mailed a notice to Cristian P. Silva setting Plaintiff's next hearing. Exhibit 6, Notice of Hearing in Removal Proceedings. On December 3, 2008, ICE's Office of Chief Counsel ("OCC") mailed a copy of the removal proceeding exhibits to Cristian

[2] Plaintiff's current legal representation in this lawsuit is different from his legal representation during his removal proceeding.

P. Silva. Exhibit 7, p. 2. In a letter dated December 11, 2008, another attorney from the firm representing Plaintiff, Maria Calvo, requested a copy of Plaintiff's Notice to Appear from ICE OCC. Exhibit 8, 12/11/08 letter. ICE OCC responded via fax on December 15, 2008. Exhibit 9, 12/15/08 fax.

During the 12/16/08 hearing, Plaintiff was represented by attorney Maria Calvo. Exhibit 1 at 2. During the hearing, Ms. Calvo admitted to the allegations in the charging document, the Notice to Appear, and conceded that Plaintiff was removable as charged.[3] *Id.* at 3:15-4:2. Ms. Calvo also accepted the decision that Plaintiff was removable, designated Mexico as his country for removal, and waived any appeal rights. *Id.* at 4:3-18. Based on these admissions, Judge Duck ordered that Plaintiff be removed from the United States to Mexico. *Id.* at 11-14; Exhibit 10, Removal Order. Plaintiff and his attorneys did not claim that Plaintiff was or might be a United States citizen while the 12/1/08 and 12/16/08 hearings were being recorded. *See* Exhibits 1 & 5. Plaintiff was deported to Mexico on December 31, 2008. Rec. Doc. 1 at ¶63.

On August 31, 2011, after being informed that Plaintiff had been granted United States citizenship earlier that year, ICE OCC moved to reopen and dismiss Plaintiff's removal proceedings. Exhibit 11, Motion to Reopen. On September 21, 2011, Judge Duck granted the motion to reopen and dismissed Plaintiff's removal proceedings without prejudice. Exhibit 12.[4]

III. BURDEN OF PROOF

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the initial burden of informing the

[3] While an interpreter was provided during Plaintiff's removal hearings, he speaks fluent English. Defendants deposed Plaintiff on January 29, 2015 without an interpreter.

[4] As will be explained *supra*, because Plaintiff admitted to his removability at the 12/16/08 hearing, this reopening and voluntary dismissal does not constitute a "bona fide termination" of the removal proceedings in Plaintiff's favor for purposes of his malicious prosecution claim.

court of the basis for their motion and identifying those portions of the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, which they believe demonstrate the absence of a genuine dispute of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Colson v. Grohman*, 174 F.3d 498, 506 (5th Cir. 1999). The moving parties, however, need not negate the elements of the nonmovant's case. *See Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996).

Once a proper motion has been made, the nonmoving party may not rest upon mere allegations or denials in the pleadings, but must present affirmative evidence, setting forth specific facts, to show the existence of a genuine dispute for trial. *Celotex*, 477 U.S. at 322-23; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986); *Colson*, 174 F.3d at 506. All the evidence must be construed "in the light most favorable to the non-moving party without weighing the evidence, assessing its probative value, or resolving any factual disputes." *Williams v. Time Warner Operation, Inc.*, 98 F.3d 179, 181 (5th Cir. 1996) (citation omitted).

"In a nonjury case, the Fifth Circuit has suggested, but not explicitly adopted, a 'more lenient standard for summary judgment. [] The Circuit Court has stated that 'where the judge is the trier of fact … he may be in a position to draw inferences without resort to the expense of trial, unless there is an issue of witness credibility.'" *Charles v. U.S.P.S.*, 2007 WL 925899 at *2 (E.D. La. 3/13/07) (Africk, J.) (citations omitted); *see Illinois Central R. Co. v. Mayeux*, 301 F.3d 359, 362 n.1 (5th Cir. 2002); *Moore v. AEP Memco LLC*, 2008 WL 3851574 (E.D. La. 8/13/08) (Vance, J.); *Miciotto v. Brown*, 2005 WL 1431703 at *5 (E.D. La. 5/25/05) (Zainey, J.); *U.S. v. Luwisch*, 1998 WL 830647 (E.D. La. 11/30/98) (Vance, J.).

"If the [nonmoving party's] theory is ... senseless, no reasonable jury could find in its favor, and summary judgment should be granted." *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 468-69 (1992). The nonmovant's burden is not satisfied by "some metaphysical doubt as to material facts," conclusory allegations, unsubstantiated assertions, speculation, the mere existence of some alleged factual dispute, or "only a scintilla of evidence." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). Summary judgment is mandated if the nonmovant fails to make a showing sufficient to establish the existence of an element essential to his case on which he bears the burden of proof at trial. *See Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993). "In such a situation, there can be 'no genuine issue as to any material fact' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 322-23.

IV. ARGUMENT

"Malicious prosecution is the wrongful institution or continuation of a criminal or civil proceeding." *JCM Construction Co.*, 871 So. 2d at 1123.

> An action for malicious prosecution requires proof of the following elements: (1) the commencement or continuance of an original criminal or civil proceeding; (2) its legal causation by the present defendant in the original proceeding; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage conforming to legal standards resulting to the plaintiff. [citations omitted].
>
> A plaintiff must prove not only malice but show there was no probable cause. Probable cause does not depend upon the actual state of the case in point of fact, but on the honest and reasonable belief of the party prosecuting. [citations omitted].

Id. (citations omitted); *see Lemoine v. Wolfe*, __ So. 3d __, 2015 WL 1212165 at *4 (La. 3/17/15); *Waste Management*, 947 F. Supp. 2d at 656.

"Malicious prosecution lawsuits are disfavored; indeed, 'in order to sustain them, a clear case must be established, where the forms of justice have been perverted to the gratification of private malice and the willful oppression of the innocent.'" *Waste Management*, 947 F. Supp. 2d at 656 (quoting in part *Johnson v. Pearce*, 313 So. 2d 812, 816 (La. 1975)). "[T]he action for malicious prosecution has always been applied only where there has been strict compliance with all essential elements." *McClanahan v. McClanahan*, 82 So. 3d 530, 535 (La. App. 5 Cir. 12/28/11) (citation omitted).

A. As a matter of law, Plaintiff's admission that he was removable as charged renders him unable to satisfy the essential elements of his malicious prosecution claim

The United States was not able to find any cases with identical facts in the immigration context. However, courts have analyzed the "bona fide termination" and "absence of probable cause" elements in analogous scenarios, where the malicious prosecution plaintiff plead guilty in the underlying criminal lawsuit, settled or compromised the underlying criminal lawsuit, or settled the underlying civil lawsuit. In all three situations, courts have dismissed the malicious prosecution claims, finding that the voluntary resolution of the underlying lawsuit meant there either was not a "bona fide termination" in plaintiff's favor or that probable cause existed as a matter of law.

Plaintiff's admissions, through his attorney, at the 12/16/08 hearing before Judge Duck are analogous to these situations because Plaintiff voluntarily resolved the underlying lawsuit. "Absent egregious circumstances, a distinct and formal admission made … during … a proceeding by an attorney acting in his professional capacity binds his client as a judicial admission." *Matter of Velasquez*, 19 I&N Dec. at 382-3; *State v. Carter*, 84 So. 3d 499, 520 (La. 1/24/12) ("Generally, a defendant represented by counsel is bound by the motions and strategic

decisions filed by counsel." (citations omitted)); *Hoodho v. Holder*, 558 F.3d 184, 192 (2nd Cir. 2009) ("in the normal course, aliens – like all other parties to litigation – are bound by the concessions of freely retained counsel … because a party who voluntarily chose [an] attorney as his representative in [an] action … cannot ... avoid the consequences of the acts or omissions of this freely selected agent." (citations omitted) (internal quotation marks omitted)); *Cooper*, 644 F.2d at 1082 ("It is undisputed that for most purposes, each party is deemed bound by the acts of his lawyer-agent…." (citation omitted) (internal quotation marks omitted)).

1. Pleading guilty in an underlying criminal lawsuit

Plaintiff admitting the allegations in the charging document in the immigration context is analogous to a defendant pleading guilty in the criminal context. Other jurisdictions have analyzed this scenario and routinely held that when a criminal defendant enters a guilty plea in the underlying lawsuit, he cannot satisfy the "bona fide termination" or "absence of probable cause" elements in a later malicious prosecution claim. *See Guinn v. Unknown Lakewood Police Officers*, 2010 WL 4740326 at *6 (D. Colo. 2010) (Plaintiff's "claims for false arrest and malicious prosecution fail because his guilty plea establishes probable cause."); *Roundtree v. City of New York*, 778 F. Supp. 614, 619 (E.D.N.Y. 1991) ("entry of a guilty plea … operates as a defense to a Section 1983 action for arrest without probable cause. []. That is, conviction … by a plea conclusively establishes the existence of probable cause, unless the conviction was obtained by fraud, perjury, or other corrupt means.") (internal quotation marks and citations omitted); *Holkesvig v. Welte*, 801 N.W.2d 712, 715 (N.D. 2011) ("A criminal proceeding has not terminated in the plaintiff's favor if the plaintiff has pleaded guilty to the underlying criminal charge."); *see also Danielson v. Lopez*, 2005 WL 3466557 at *3 (D. Conn. 2005) ("The court and other district courts in this circuit have held that a plea of guilty … bars a section 1983

action for false arrest and false imprisonment.") (citations omitted). Plaintiff essentially plead guilty to his deportability at the 12/16/08 hearing when his attorney admitted to the allegations in the charging document and conceded that Plaintiff was removable as charged. *See* Exhibit 1 at 3:15-4:2. There is no question that admitting allegations as charged and conceding removability together establish that the government has met its burden in the removal context. *Jimenez-Guzman v. Holder*, 642 F.3d 1294, 1298 (10th Cir. 2011) (citation omitted); *Roman v. Mukasey*, 553 F.3d 184, 187 (2nd Cir. 2009) (citation omitted); *see Estrada v. INS*, 775 F.2d 1018, 1020 (9th Cir. 1985). Therefore, regardless of whether Plaintiff's admission and concession to removability implicates the "bona fide termination" element or the "absence of probable cause" element, Plaintiff cannot sustain his malicious prosecution claim against the United States.

2. Settling or compromising an underlying criminal lawsuit

Within the last month, the Louisiana Supreme Court analyzed the "bona fide termination" element in the context of a prosecutor voluntarily dismissing criminal charges. *See Lemoine*, __ So. 3d __, 2015 WL 1212165 (La. 3/17/15). The Court reviewed prior Louisiana cases and noted that its prior decisions "reflect the rule followed in a majority of jurisdictions and set forth in the [] Restatement (Second) of Torts."[5] *Id.* at *6 (citations omitted). The Court acknowledged the general rule that a voluntary dismissal by a prosecutor satisfies the "bona fide termination" element, but noted several exceptions to the general rule, including the criminal charges being "dismissed pursuant to an agreement of compromise … [or] out of mercy requested or accepted by the accused…." *Id.* at *1; *see Pennington v. Dollar Tree Stores, Inc.*, 28 F. App'x 482, 488 (6th Cir. 2002) (under Kentucky law, a compromise dismissal of the underlying criminal charges

[5] "A termination of criminal proceedings in favor of the accused other than by acquittal is not a sufficient termination to meet the requirements of a cause of action for malicious prosecution if the charge is withdrawn or the prosecution abandoned pursuant to an agreement of compromise with the accused…." *See* Restatement (Second) of Torts §660.

is not a termination in favor the malicious prosecution plaintiff); *Land v. Hill*, 644 P.2d 43, 45 (Col. App. 1981) ("termination [of the underlying criminal action] resulting from negotiation, compromise, settlement, or agreement, is not considered a favorable termination."); 54 C.J.S. *Malicious Prosecution* § 67 (2015) ("Where the defendant in a criminal prosecution settles with the prosecutor the claim which is the subject matter in issue, the prosecution, although thereby terminated, is not terminated favorably to the defendant, for purposes of a malicious prosecution claim."); 52 Am. Jur. 2d *Malicious Prosecution* §38 (2015) ("Generally, the termination of a criminal prosecution as a result of the accused's settlement or compromise of civil liabilities arising out of the same acts precludes a subsequent malicious prosecution claim by the accused, the termination being viewed as unfavorable to the accused."). Such is the case here, where Plaintiff's admission to the allegations in the Notice to Appear at the 12/16/08 hearing were tantamount to a compromise or settlement of the removal charges brought against him.

3. Settling or compromising an underlying civil lawsuit

Similarly, Plaintiff's admitting to the allegations in the charging document is analogous to a defendant settling the underlying lawsuit in the civil context. "The resolution of civil proceedings by way of a settlement or compromise does not constitute a favorable termination." *Adrian v. Selbe*, 2007 WL 164642 at *9 (W.D. La. 1/17/07) (citations omitted); *see Strain v. Kaufman County Dist. Attorney's Office*, 23 F. Supp. 2d 685, 693 (N.D. Tex. 1998) ("resolution of the [underlying] civil proceedings through agreement or compromise defeats" the essential element that the underlying proceedings be terminated in plaintiff's favor); 54 C.J.S. *Malicious Prosecution* § 67 (2015) ("Where the parties to an underlying civil suit agree jointly to end the suit in a nonlitigious nature, the liability of the underlying defendant is never determined with finality."). Significantly:

> If a civil proceeding is the basis of an action for malicious prosecution, a judgment or decree entered in the prior proceeding adverse to the plaintiff of the malicious prosecution suit establishes or conclusively shows there was probable cause for the defendant to bring the prior action. **This rule applies even if the judgment or decree is subsequently reversed or set aside, or is erroneous**, unless the judgment or decree was obtained by fraud, perjury, or other improper means, or was void.

52 Am. Jur. 2d *Malicious Prosecution* §69 (2015) (emphasis added). This bolded statement is particularly important in this case.

Plaintiff may argue[6] that there was a "bona fide termination" in his favor because Judge Duck ultimately reopened Plaintiff's removal proceeding and terminated it without prejudice on September 21, 2011. Exhibit 12. However, as noted above, Plaintiff's admission that he was removable and Judge Duck's subsequent order of removal establish as a matter of law that probable cause existed at that time. 52 Am. Jur. 2d *Malicious Prosecution* §69 (2015). Judge Duck's reversal of his removal order almost three years later, after being presented with new evidence that Plaintiff was a United States citizen, which was not presented by Plaintiff's attorneys at either the 12/1/08 or 12/16/08 removal hearings, does not negate the probable cause that existed in December 2008. *Id.* Therefore, as a matter of law, probable cause existed at that time and there was not a bona fide termination of Plaintiff's removal proceeding in his favor. Because Plaintiff cannot establish these essential elements of his malicious prosecution claim, his malicious prosecution claim should be dismissed.

[6] Plaintiff is also expected to argue that he made claims to United States citizenship at the 12/1/08 and 12/16/08 removal hearings, but that these claims were made while the audio recording equipment was off. Rec. Doc. 1 at ¶61. However, this argument does not create a genuine dispute of material fact as to Plaintiff's attorneys' actual involvement in the removal proceeding prior to the 12/16/08 hearing. *See* Exhibits 5-9. Plaintiff's counsel was clearly engaged with both the Immigration Court and ICE OCC. *Id.* Similarly, this argument does not create a genuine dispute of material fact about whether Plaintiff's attorney, Maria Calvo, admitted to the allegations in the charging document, conceded that Plaintiff was removable as charged, accepted the decision that Plaintiff was removable, designated Mexico as his country for removal, and waived any appeal rights. Exhibit 1 at 3:15-4:18. It is clear that Plaintiff did not make any claims to citizenship while the recording equipment was on, though he certainly could have. Similarly, Plaintiff did not make any claims to citizenship between 12/16/08, when Judge Duck ordered Plaintiff's removal, and 12/31/08, when Plaintiff was actually removed to Mexico.

B. Alternatively, Plaintiff should not be able to recover any damages for his alleged malicious prosecution claim after 12/16/08

Alternatively, if this Court determines that a genuine dispute of material fact exists as to either the "bona fide termination" element or the "absence of probable cause" element and does not grant summary judgment as requested above, this Court should at least grant partial summary judgment on the issue of damages. Defendants will argue at trial that the ICE officers involved had probable cause to initiate and continue Plaintiff's removal and did not maliciously prosecute Plaintiff. However, even if this Court disagrees and finds the United States liable under the FTCA, the Court should not award Plaintiff any damages as a result of his malicious prosecution claim after the 12/16/08 hearing. This common-sense argument involves elements of intervening cause and comparative fault.

The United States is only liable for damages caused by its negligent act. It is not liable for damages caused by separate, independent or intervening causes of damage. *Laurent v. Jolly-Wright*, 950 So. 2d 47, 49 (La. App. 4 Cir. 2007) (citing *Keller v. City of Plaquemine*, 700 So. 2d 1285, 1294 (La. App. 1 Cir. 1997)). "Plaintiff has the burden of proving that [his] injuries were not the result of separate, independent and intervening causes." *Id.* (citing *Keller*, 700 So. 2d at 1294). Moreover, "[t]he plaintiff has the burden of proving, by a preponderance of the evidence, the causal connection between" the alleged malicious prosecution and Plaintiff's damages. *Id.*

Louisiana C.C. art. 2323 requires that the comparative fault of all parties be assessed in tort actions:

> In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or

> reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.

"In assessing the nature of the conduct of the parties for comparative-fault purposes, various factors may influence the degree of fault assigned, including: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger, (2) how great a risk was created by the conduct, (3) the significance of what was sought by the conduct, (4) the capacities of the actor, whether superior or inferior, and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought. And, of course, as evidenced by concepts such as last clear chance, the relationship between the fault/negligent conduct and the harm to the plaintiff are considerations in determining the relative fault of the parties." *Watson v. State Farm Fire and Cas. Ins. Co.*, 469 So. 2d 967, 974 (La. 1985) (quoting Uniform Comparative Fault Act §2(b) and comment (1979)).

In this case, regardless of whether the Court considers the 12/16/08 hearing as an intervening cause or comparative fault, it is clear that any alleged malicious prosecution on the part of ICE officers occurred prior to this hearing. Considering Plaintiff's successful application for citizenship in 2011, Plaintiff's attorney[7] apparently made false representations to Judge Duck when she admitted to the allegations in the charging document and conceded removability. *Compare* Exhibits 1 & 3 *with* Rec. Doc. 1 at ¶¶22-24, 61.

There are a number of possible explanations as to why neither Plaintiff nor his attorney made a claim to United States citizenship while the recording equipment was on at either the 12/1/08 hearing or the 12/16/08 hearing (or for that matter, why neither made a written claim to

[7] Plaintiff had different legal representation during his removal proceeding than he has for this lawsuit.

citizenship between the hearings). Perhaps this failure occurred because Plaintiff failed to communicate to his attorneys that he thought he might be a United States citizen. Perhaps this failure occurred because Plaintiff did not realize he might be a United States citizen, and so did not inform either the Court or his attorneys. Or perhaps Plaintiff's attorneys at the removal hearings knew or should have known that he had a claim to United States citizenship and committed legal malpractice by not only failing to articulate the claim, but to the contrary, admitting that Plaintiff was not a citizen.

For purposes of this motion, it does not matter *why* Plaintiff and his attorneys failed to articulate a claim to citizenship on the record during either of the removal hearings. What matters is that Plaintiff was afforded due process and had his "day in court." In fact, he had two days in court and was represented by attorneys both times. Regardless of anything ICE officers did or did not do and should or should not have done leading up to these hearings, Plaintiff and his attorneys' collective failure to make a claim to citizenship on the record at either hearing was a separate, independent or intervening cause of any damages incurred after 12/16/08. *See Laurent*, 950 So. 2d at 49 (citing *Keller*, 700 So. 2d at 1294.

Similarly, the comparative fault factors favor shifting all liability to Plaintiff and his attorneys after the 12/16/08 hearing. Plaintiff and his attorneys were clearly aware of the danger that he might be deported. *Watson*, 469 So. 2d at 974 (factor #1). Failing to articulate Plaintiff's citizenship created a great risk of him being deported, surpassed only by actually admitting to his deportability. *Id.* (factor #2). The opportunity to be heard and have arguments preserved on the record was extremely significant, as was the significance of admitting to removability. *Id.* (factor #3). Plaintiff speaks fluent English and was represented by counsel at both hearings, so the capacity of Plaintiff at these hearings to make a claim to citizenship was high. *Id.* (factor #4).

Also, this hearing provided Plaintiff and his attorney with the "last clear chance" to avoid being deported. *Id.* Meanwhile, the ICE officers who initiated Plaintiff's removal proceeding were no longer involved in the removal process at the time of the hearings.

Therefore, none of Plaintiff's alleged damages incurred after the 12/16/08 immigration hearing before Judge Duck were caused by ICE officers' alleged malicious prosecution of Plaintiff. This Court should grant partial summary judgment on the issue of damages and limit Plaintiff's damages for his malicious prosecution claim, if any, to those incurred before 12/16/08.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, the Defendants respectfully request that this Court grant summary judgment in their favor and dismiss Plaintiff's malicious prosecution claim. Alternatively, Defendants request that this Court grant partial summary judgment on the issue of damages and limit any damages awarded for Plaintiff's malicious prosecution claim to those incurred before December 16, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon counsel for all parties by ECF, facsimile, email, or mailing the same to each, properly addressed and postage prepaid this 31st day of March, 2015.

/s/ *Jason M. Bigelow*
JASON M. BIGELOW
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