COMMONWEALTH OF KENTUCKY
BARREN CIRCUIT COURT
CIVIL ACTION NO. 22-CI-00339

GREG TURNER, BRITTANY TURNER, d/b/a BG STABLES, an unincorporated entity — PLAINTIFFS

v.

ORDER

MICHAEL[1] HALE, individually and in his capacity as BARREN COUNTY JUDGE/EXECUTIVE
and
SHANI HALE, as spouse of Michael [*sic.*] Hale and individually
and
JEFF BOTTS, MAGISTRATE, in his official capacity as a member of Barren County Fiscal Court
and
TRENT RIDDLE, MAGISTRATE, in his official capacity
and
CARL DICKERSON, MAGISTRATE, in his official capacity
and
TIM COOMER, MAGISTRATE, in his official capacity
and
MARK BOWMAN, MAGISTRATE, in his official capacity
and
KENNETH SARTIN, MAGISTRATE, in his official capacity
and
BILLY HOUCHENS, MAGISTRATE, in his official capacity
and
HAROLD ARMSTRONG, individually and in his capacity as MAYOR OF GLASGOW, KY
and
SHELLY[2] FURLONG, BARREN COUNTY ANIMAL CONTROL OFFICER, individually and in her official capacity; and as an agent, servant, or employee of the Glasgow City Police Department in her official capacity
and
SUZANNA JOHNSON — DEFENDANTS

This matter is before the Court on multiple motions to dismiss. The Court entered an agreed scheduling order allowing the parties additional time to file arguments. The Court having

[1] The correct spelling is "Micheal." In this order, the Court will attempt to use the correct spelling of all names.
[2] The correct spelling, according to Furlong's motion, is "Shelley."

considered the motions, the arguments of the parties, and applicable law, and the Court being otherwise sufficiently advised,

IT IS HEREBY FOUND, ORDERED, AND ADJUDGED as follows:

At the outset, it is important to establish what this order is about and, perhaps equally importantly, what it is not designed to do. Each of the defending parties has filed a motion to dismiss, asserting various legal grounds in support. If a party believes it is entitled to have one or more claims dismissed, it generally can assert that right at the very beginning of the case. Sometimes a party asserts the right to a dismissal based on a legal doctrine or procedural rule, application of which is not a matter of discretion. The trial court is not permitted to decide *whether* to apply a statute of limitations, for example, or the doctrine of immunity. Instead, it is the role of the trial court to see *if* the undisputed facts support application of those defenses. If the facts support the assertion of such a defense, then the defense applies. When such a defense or protection is absolute, dismissal is mandatory, not discretionary.

The issue of whether a defense asserted in a motion to dismiss applies is value-neutral and based on the law pertinent to the factual assertions of the claimants. It does not concern whether the underlying claims themselves have merit. Accordingly, dismissal of a claim is not a ratification of any party's conduct. Similarly, an order denying a motion to dismiss a claim does not mean that the claim has merit.

CR 12 Motions to Dismiss: The standard to be applied by a trial court when considering motions to dismiss is well-established in Kentucky law.

> In lieu of filing an answer, CR 12.02 allows a defendant to file a motion to dismiss the complaint for failure to state a claim upon which relief can be granted. That motion admits as true the material facts of the complaint. [Citation omitted.] If granted, the motion serves to expediently terminate litigation, however, when ruling on a motion to dismiss, the court's "attention ... should be directed only to the sufficiency of the allegations in the complaint." [Citation omitted.] A "complaint should not be dismissed unless it appears to

> a certainty that [the] plaintiff would not be entitled to relief under any statement of facts which could be proved in support of the claim." [Citation omitted.][3]

When considering a motion to dismiss under CR 12.02, a trial court should liberally construe the pleadings in a light most favorable to the claimants; all allegations taken in the claimants' pleadings should be considered to be true.[4] This does not require, however, that the trial court accept the veracity of "any statements which are merely conclusory."[5]

A motion to dismiss for failure to state a claim should be denied unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of its claim.[6] "In making this decision, the circuit court is not required to make any factual determination; rather, the question is purely a matter of law."[7] This is an "exacting standard of review."[8] It requires the trial court to inquire, "if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?"[9]

Matters outside the pleadings may be considered by the trial court when presented by the movant, but when this is done the motion to dismiss must be treated as a motion for summary judgment and disposed of as provided by CR 56.[10] However, the trial court is not required to consider matters outside the pleadings when addressing CR 12.02 motion, based on the language

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[3] **Seiller Waterman, LLC v. RLB Properties, Ltd.**, 610 S.W.3d 188, 195 (Ky.2020).
[4] **Mims v. Western–Southern Agency, Inc.**, 226 S.W.3d 833, 835 (Ky.App.2007), citing **Gall v. Scroggy**, 725 S.W.2d 867, 869 (Ky.App.1987).
[5] **Moss v. Robertson**, 712 S.W.2d 351, 352 (Ky.App.1986).
[6] **Pari–Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL–CIO v. Kentucky Jockey Club**, 551 S.W.2d 801, 803 (Ky.1977).
[7] **James v. Wilson**, 95 S.W.3d 875, 883–84 (Ky.App.2002).
[8] **Fox v. Grayson**, 317 S.W.3d 1, 7 (Ky.2010).
[9] **James v. Wilson**, 95 S.W.3d at 884.
[10] **Ferguson v. Oates**, 314 S.W.2d 518, 521 (Ky.1958). "On a motion to dismiss on this ground the Rule recognizes that matters outside the pleadings may be presented by affidavit or otherwise. It is within the discretion of the court whether or not this extraneous matter shall be considered, but if the court does not exclude it, the motion shall be treated as one for summary judgment under Rule 56." 6 Philipps, Kentucky Practice, CR 12.02, cmt. 9 (5th ed.1995). The Court notes that Plaintiffs have presented substantial material outside their Complaint; consistent with CR 12, the Court has only considered the allegations in the Complaint itself. Similarly, Defendant Bulle submitted a verified memorandum in support of his motion. To the extent it contained factual assertions not apparent from the record or introduced any disputed facts, its contents have not been considered by the Court.

of the rule itself, so long as the allegations are taken to be true for the purposes of ruling on the motion and the ruling is based on issues of law. In consideration of the motions to dismiss, the Court has not treated these motions as summary judgment motions because it has not considered information outside the pleadings or otherwise beyond the scope of a CR 12 motion.

Proceedings in Barren District Court: Central to this controversy is that Greg Turner entered a guilty plea in Barren District Court, and that guilty plea was made with the benefit of counsel. The following facts are of record, or are acknowledged within the Complaint itself. Throughout the proceedings in Barren District Court, Greg Turner was represented by counsel. He entered a plea of guilty on February 9, 2021 to nine (9) counts of Second Degree Cruelty to Animals in violation of KRS 525.130.[11] As part of his agreement to plead guilty, Greg Turner agreed to forfeit the horses that were the subject of the criminal prosecution. The issue of ownership was not litigated in Barren District Court. Neither the guilty plea, nor the Barren District Court's judgment of guilt and forfeiture order, have been set aside. These are matters of public and judicial record.[12]

Plaintiffs' Responses: The motions to dismiss and their supporting arguments set out the legal bases upon which each movant asserts the right to a dismissal with respect to the various claims. Plaintiffs have, pursuant to orders of the Court, filed two responses. In their initial response, they set out a lengthy recitation of their version of the facts. This was in part a recapitulation of the allegations in the Complaint, but it also contained material not in the original pleading. The Complaint has not been amended. The assertions put forth in the Complaint are accepted as true

[11] KRS 525.130(1) creates a Class A misdemeanor for anyone who "[s]ubjects any animal to or causes cruel or injurious mistreatment through abandonment" or "[s]ubjects any animal in his custody to cruel neglect."
[12] The trial court may take judicial notice of court records without converting a CR 12 motion to dismiss into one for summary judgment. See **Rogers v. Commonwealth**, 366 S.W.3d 446, 451 (Ky.2012); **Polley v. Allen**, 132 S.W.3d 223, 226 (Ky.App.2004).

for the purpose of addressing the CR 12 motions. However, as discussed above, the Court cannot consider factual allegations outside the Complaint without converting the motions to summary judgment motions, and there is no reason to do so when the information is not submitted by the movant and when the issues are subject to resolution in their entirety as a matter of law.

The balance of Plaintiffs' first response addresses the sufficiency of the Complaint under CR 8.01(1) and the standards of notice pleading. This order will not address in depth the question of whether the allegations in the Complaint suffice to give the defending parties notice of the allegations against them, because none of them have raised that issue. Thus, the first response tendered by Plaintiffs essentially, with a couple of exceptions, leaves unchallenged the legal arguments that were presented by the movants.[13]

In the second response, Plaintiffs address more of the movants' contentions. For example, Plaintiffs assert that the defenses of statute of limitations, sovereign immunity, and qualified immunity are not appropriate to present by a motion to dismiss. As the Court will explain in detail below, this assertion is inconsistent with the law. They also state that it is inappropriate to raise "Probable Cause [*sic*.] as a bar" to suit. Again, as set out below, the presence of probable cause is an appropriate matter to raise in a motion to dismiss a claim for which existence of probable cause serves, as a matter of law, to prohibit successful pursuit of the claim.

Additionally, Plaintiffs note in their second response that the "Motions to Dismiss notably do not address the essence of the Plaintiffs' claims." This is, of course, correct, as the movants generally acknowledge that consideration of a CR 12 motion to dismiss requires the trial court to treat the factual allegations in the Complaint as true. The Court has, as noted, accepted the allegations in the Complaint as true for the purpose of addressing each motion to dismiss.

[13] The two exceptions concern a possible implied waiver of governmental immunity and the applicable statute of limitations for Plaintiffs' statutory injury claims. Each of these will be thoroughly discussed below.

Matters Relevant to all Defendants: Several of the arguments presented are germane to each defending party, as they concern the elements of the various claims asserted in the Complaint, as well as whether they are barred by the statute of limitation applicable to each claim. Below, the Court will address the elements of each claim and ascertain whether, as a matter of law, the Complaint is sufficient to survive a motion to dismiss. After discussing the elements of each identified claim, the Court will identify the statute of limitations applicable to each one and review each in the context of Plaintiffs' allegations.

Allegations of Constitutional Rights Violations: Plaintiffs allege in their Complaint that their constitutional rights were violated by the actions of Defendants. The existence and terms of the criminal judgment arising from the district court case are integral to evaluation of the pending motions to dismiss, because a guilty plea serves as a waiver of claims that any constitutional rights were violated prior to entry of the plea.[14] "In fact, the effect of a plea of guilty is to waive all defenses other than that the indictment charges no offense."[15]

Malicious Prosecution: In Paragraph 27 of the Complaint, Plaintiffs assert that the "charging and prosecution of Plaintiff, Greg Turner" was "not justified by the evidence of any offense." They go on to allege that they are entitled to recover for "abuse of process [which]

[14] See, *e.g.*, **Tollett v. Henderson**, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973): "We thus reaffirm the principle recognized in the **Brady** trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." (The "**Brady** trilogy" refers to **Brady v. United States**, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970); **McMann v. Richardson**, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); and **Parker v. North Carolina**, 397 U.S. 790, 90 S.Ct. 1458, 25 L.Ed.2d 785 (1970)). "A guilty plea constitutes a break in the chain of events, and the defendant therefore may not raise independent claims related to the deprivation of constitutional rights occurring before entry of the guilty plea." **White v. Sowders**, 644 F.2d 1177 (6th Cir.1980).

[15] **Commonwealth v. Watkins**, 398 S.W.2d 698 (Ky.1966). Of course, the underlying case had no felony charges, so no indictment was involved; in any event, there is no contention that the criminal complaint before the Barren District Court "charge[d] no offense."

constitutes the tort of malicious prosecution." Because these are two distinct torts, the Court will discuss them separately.[16]

Although the tort of malicious prosecution has long been recognized, it has historically not been favored in the law.[17] "The law generally disfavors the tort of malicious prosecution because 'all persons [should] be able to freely resort to the courts for redress of a wrong.'"[18] Thus, to be successful, one must strictly comply with the prerequisites of maintaining an action for malicious prosecution.[19]

To prevail on a claim that one was wrongfully subjected to a criminal prosecution,[20] a party must demonstrate that 1) the defendant initiated, continued, or procured the criminal proceeding against the plaintiff; 2) the defendant did so without probable cause; 3) the defendant acted with malice; 4) the proceeding terminated in favor of the plaintiff; and 5) the plaintiff suffered damages as a result.[21]

Clearly, for a successful malicious prosecution claim, one must show that there was "a favorable termination of the criminal proceedings."[22] A favorable termination requires dismissal that was "one-sided and not the result of any settlement or compromise."[23] Termination of the proceedings for "reasons that do not reflect on the merits of the case is not a favorable termination

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[16] "While the two torts of abuse of process and malicious prosecution often accompany one another, they are distinct causes of action." **Simpson v. Laytart**, 962 S.W.2d 392, 394 (Ky.1998).
[17] **Lexington Cab Co. v. Terrell**, 282 Ky. 70, 137 S.W.2d 721 (1940). See also **Davis v. Brady**, 218 Ky. 384, 291 S.W. 412 (1927): "[A]ctions for malicious prosecution are not favored, especially where the charge is of a crime which particularly affects the public. Public policy favors prosecutions for crimes …."
[18] **Garcia v. Whitaker**, 400 S.W.3d 270, 274 (Ky.2013) (quoting **Raine v. Drasin**, 621 S.W.2d 895, 899 (Ky.1981)). In other words, courts do not want to discourage people from seeking redress through the court system, and subjecting an unsuccessful complainant to a malicious prosecution action might do just that.
[19] **Davis v. Brady**, 291 S.W. at 413: "The action for malicious prosecution is not favored in law, and hence has been hedged about by limitations more stringent than those in the case of almost any other act causing damage to another, and the courts have allowed recovery only when the requirements limiting it have been fully complied with."
[20] Kentucky law recognizes that a malicious prosecution claim can be based on civil as well as criminal proceedings.
[21] **Martin v. O'Daniel**, 507 S.W.3d 1, 11 (Ky.2016) (citing Restatement (Second) of Torts § 653 (1977)). See also **Lee v. Stanley**, 2017 WL 465319, at *2 (Ky. Ct. App. Feb. 3, 2017).
[22] **Dunn v. Felty**, 226 S.W.3d 68, 73 (Ky.2007).
[23] See **Feinberg v. Townsend**, 107 S.W.3d 910, 912 (Ky.App.2003).

of the action."[24] Only where the charges are dismissed, after trial or otherwise, and the dismissal indicates that the accused may be innocent of the charges, have Kentucky courts found that the termination of the proceedings were favorable to the party bringing a malicious prosecution claim, and "the determination of whether a termination is sufficiently favorable ultimately rests with the trial court as a matter of law, absent a factual dispute relative to the circumstances of the dismissal."[25] In fact, "it is axiomatic that where there is a specific finding of probable cause in the underlying criminal action, or where such a finding is made unnecessary by the [criminal] defendant's agreement or acquiescence, a malicious prosecution action cannot be maintained."[26]

In the instant matter, it is apparent as a matter of law that the underlying criminal action was not resolved in favor of Plaintiffs. Greg Turner pled guilty to nine (9) counts of Cruelty to Animals, Second Degree. He agreed to forfeit his horses.[27] That outcome is the opposite of a resolution in his favor. No specific finding of probable cause need be made when such a finding is made unnecessary by a guilty plea. The judgment of guilt in district court is final, is no longer appealable, and has not been set aside. Those undisputed facts alone require dismissal of the malicious prosecution claim in its entirety against all Defendants.[28]

The Court has accepted the allegations in the Complaint to be true, as required when evaluating a CR 12 motion to dismiss. Those allegations may provoke outrage. However, this claim is borderline frivolous, as the requirement of a favorable termination of the underlying

[24] **Alcorn v. Gordon**, 762 S.W.2d 809, 812 (Ky.App.1988).
[25] **Davidson v. Castner–Knott Dry Goods Co., Inc.**, 202 S.W.3d 597, 605-606 (Ky.App.2006).
[26] **Broaddus v. Campbell**, 911 S.W.2d 281, 283 (Ky.App.1995).
[27] While Plaintiffs' Response appears to contend that only Brittany Turner owned the horses at issue, Paragraph 19 of the Complaint alleges that "On or about September 10, 2019, Plaintiffs owned nine (9) horses stabled per contract with the Commonwealth …." As previously noted, consideration of issues raised in a motion to dismiss is properly limited to the allegations in the Complaint, which are accepted as true.
[28] As noted below in the discussion of the abuse of process claim, a plea of guilt concedes probable cause. Lack of probable cause is an element of a claim for malicious prosecution. Accordingly, even had the case terminated in Turner's favor, the existence of probable cause would preclude success regarding this claim.

prosecution in the claimant's favor has been the law in the Commonwealth of Kentucky since at least 1841.[29] Moreover, since at least 1909 the law in this Commonwealth has been that "[a] person who comes into open court and admits on the record that he is guilty of the offense for which he is being prosecuted will not afterwards be heard to say that the prosecution against him was procured by fraudulent methods."[30] Clearly, no claim for malicious prosecution can succeed when the claimant has been found guilty, by plea or otherwise, of the offenses for which he was prosecuted, and the malicious prosecution claim must be dismissed as against all movants.

Abuse of Process: An abuse of process claim exists when an individual "uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which that process is not designed[.]"[31] A successful abuse of process claim requires that a plaintiff prove (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding."[32] It is essential that "[s]ome definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process is required and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion even though with bad intentions."[33]

Under Kentucky law, an abuse of process claim necessarily fails when there is probable cause for the criminal prosecution, regardless of the underlying motive on the part of authorities.[34] The equitable doctrine of "judicial estoppel" provides that, "[w]here a party assumes a certain

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[29] See **Yocum v. Polly**, 1 B.Mon. 358 40 Ky. 358, 1841 WL 2879, 36 Am.Dec. 583 (May 27, 1841).
[30] **Duerr v. Kentucky & Indiana Bridge & R. Co.**, 132 Ky. 228, 116 S.W. 325, 326 (1909). A "public admission of guilt in the criminal court [is] a complete and unanswerable refutation of the charge that the prosecution against [the claimant] was unfounded." A guilty plea is "conclusive evidence that there was probable cause for the prosecution."
[31] **Sprint Communications Co., L.P. v. Leggett**, 307 S.W.3d 109, 113 (Ky.2010).
[32] **Simpson v. Laytart**, 962 S.W.2d 392, 394 (Ky.1998).
[33] Id. at 394–95.
[34] See **Pennington v. Dollar Tree Stores, Inc.**, 28 Fed. Appx. 482 (6th Cir. 2002) and **Pennington v. Dollar Tree Stores, Inc.**, 104 F.Supp.2d 710, 714 (E.D. Ky. 2000). See also **Gorman v. Stites & Harbison, PLLC**, 2011 WL 1598746, at *4 (Ky. Ct. App. April 29, 2011) (when there is probable cause for the action, [i]t cannot therefore be said that the judicial process was wrongfully used.").

position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position."[35] Judicial estoppel, in the context of an abuse of process claim, mandates that "it is plainly inconsistent to stipulate to the existence of probable cause in one case and then allege its absence in a later case."[36] As noted above, a plea of guilty is an acknowledgment not only of probable cause, but also of factual guilt.[37] Because of Greg Turner's guilty plea, Plaintiffs are unable as a matter of law to establish a necessary element of the claim. It would therefore be impossible for them to prevail on the abuse of process claim at trial, and that claim must be dismissed in its entirety as to all Defendants.

Conversion: In Paragraph 28 of the Complaint, Plaintiffs allege that one or more Defendants committed "the Tort of Conversion [*sic.*]" when they deprived Plaintiffs "of the use and possession of their personal property, all without justification or excuse." Conversion is an intentional tort and is generally defined as "the wrongful exercise of dominion and control over the property of another."[38] To prove this tort, a plaintiff must show (1) the plaintiff had legal title to the property; (2) the plaintiff had possession of or the right to possess the property at the time of the conversion; (3) the defendant exercised dominion over the property in a manner which denied the plaintiff's rights to use and enjoy the property and which was to the defendant's own use and beneficial enjoyment; (4) the defendant intended to interfere with the plaintiff's possession; (5) the plaintiff made a demand for the property's return, which the defendant refused;

[35] **Watkins v. Bailey**, 484 Fed.Appx. 18, 20 (6th Cir.2012) (quoting **New Hampshire v. Maine**, 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)).
[36] **Grise v. Allen**, 714 Fed.Appx. 489, 495 (6th Cir.2017).
[37] It is well-recognized that "a guilty plea constitutes an admission of all facts alleged and a waiver of all nonjurisdictional and procedural defects and constitutional infirmities in any prior stage of the proceeding." 8 Leslie W. Abramson, 8 Ky. Prac. Crim. Prac. & Proc. § 22:14 (5th ed. 2019); see also **Jackson v. Commonwealth**, 363 S.W.3d 11, 15-17 (Ky.2012); **Centers v. Commonwealth**, 799 S.W.2d 51, 55 (Ky.App.1990).
[38] **Jones v. Marquis Terminal, Inc.**, 454 S.W.3d 849, 853 (Ky.App.2014).

(6) the defendant's act was the legal cause of the plaintiff's loss of the property; and (7) the plaintiff suffered damages.[39]

To start the analysis regarding this claim, the Court notes that Greg Turner's guilty plea was an acknowledgment that there was probable cause for the charges, and further that he was in fact guilty of the offenses charged. It is not wrongful or unjustified to remove from one's custody an animal that one is abusing, neglecting, or otherwise mistreating. Without belaboring the point, per the above discussion,[40] as a matter of law Greg Turner was guilty of that conduct.

Furthermore, if one voluntarily gives up his or her right to the purportedly converted property, "the doctrine of abandonment precludes any claim for conversion."[41] Property is considered abandoned when its owner "has voluntarily relinquished all right, title, claim[,] and possession with the intention of terminating his ownership, but without vesting it in any other person[.]"[42] Kentucky law recognizes abandonment in the voluntary relinquishment of possession coupled with the intent to repudiate ownership.[43] The question of intent is focused not on a party's internal objective, but on its external conduct.[44]

Greg Turner voluntarily relinquished his claim to the horses when he entered a guilty plea and agreed to forfeit them. While Plaintiffs argue that the disposition of the horses after they were voluntarily relinquished somehow injured them, this argument as advanced in the Complaint has no legal foundation. For example, whether there was compliance with the forfeiture provisions of

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[39] **Jones**, 454 S.W.3d at 853 (citing **Kentucky Association of Counties All Lines Fund Trust v. McClendon**, 157 S.W.3d 626, 632 n. 12 (Ky.2005)).

[40] This is another clear instance of judicial estoppel. To admit guilt, then come to a different court and claim that you are not guilty, is to assume a certain position in one legal proceeding and then, simply because your interests have changed, to assume a contrary position. See **Grise v. Allen**, 714 Fed.Appx. 489, 495 (6th Cir.2017).

[41] **C&H Manufacturing, LLC v. Harlan County Industrial Dev. Auth., Inc.**, 600 S.W.3d 740, 746 (Ky.App.2020) (citation omitted). See also **Mastin v. Hisle**, 343 S.W.2d 592 (Ky.1961); **Greer v. Arroz**, 330 S.W.3d 763, 765–66 (Ky.App.2011).

[42] **Goss v. Bisset**, 411 S.W.2d 50, 53 (Ky.1967) (citation omitted).

[43] **Ellis v. McCormack**, 309 Ky. 576, 218 S.W.2d 391, 392 (1949).

[44] **C&H Manufacturing**, 600 S.W.3d at 747.

KRS 218A.405 *et seq.* is completely irrelevant: those statutes address forfeiture of property that has been involved in illegal controlled substances activity, not the forfeiture of animals that one has, by his own admission, abused or neglected, and has agreed to surrender.[45] The provisions of KRS Chapter 218A have absolutely no application to the present action.[46]

Forfeiture of such animals is, however, addressed in KRS 525.130(5). That statute provides that, upon a finding of guilt, by plea or otherwise, arising from the treatment of an equine, the trial court (in this instance, the Barren District Court) may order that the guilty person pay restitution for costs incurred by others, including reasonable costs, as determined by agreement or by the trial court after a hearing, incurred in feeding, sheltering, veterinary treatment, and incidental care of any equine that was the subject of the offense; *or* it may terminate the person's right to possession, title, custody, or care of any equine that was the subject of the offense; *or* it may do both. In the context of KRS 525.130(5), Plaintiffs' arguments regarding forfeiture are without merit.

This provision was unequivocally triggered by the outcome of the underlying criminal action in Barren District Court. The boarding costs were not the responsibility of Greg Turner until he was found guilty. Further, the amount of the boarding fees were subject to the Barren District Court's authority to assure their reasonableness, in the event they were imposed upon him. It is, therefore, disingenuous to argue that the costs were wrongfully inflated, which somehow coerced any course of action by Turner. He was not forced to plead guilty. Until he did so, he was not

[45] See KRS 218A.410. Property subject to forfeiture under KRS Ch. 218A includes contraband controlled substances; plants from which controlled substances may be derived; items used to illegally make, store, or traffic in controlled substances; material used to illegally formulate controlled substances; vehicles used to illegally convey or transport controlled substances; records of illegal controlled substance transactions; anything of value furnished in exchange for a controlled substance contrary to law; and real estate used in the service of illegal controlled substance activity. Animals that have allegedly been abused or neglected are not in any way implicated in KRS Ch. 218A.

[46] Plaintiffs also refer to "the strict provisions of KRS Chapter 218. (Asset Seizure Law) [*sic.*]" in their first response. That law is also inapposite. KRS Ch. 218 was called "The Uniform Narcotic Drug Act" and was repealed in its entirety in 1972.

responsible for boarding costs. Had he not pled guilty, he could have gone to trial; had he been found not guilty at trial, he would not have had to pay any of those costs.

Again, Greg Turner pled guilty to nine (9) counts of Second Degree Cruelty to Animals in violation of KRS 525.130. Plaintiffs have acknowledged this fact in the Complaint. The trial court was authorized to dispossess him of the horses, by statute. This was done, with the consent of Turner, as part of a plea agreement. His agreement to forfeit the horses as part of his guilty plea was done with the benefit of counsel and was voluntary, as the Barren District Court found.[47] Under any standard, this constitutes an abandonment of any interest he had in the horses. Even if it were not, the trial court ordered forfeiture, which it was authorized to do by the clear language of KRS 525.130.[48]

Paragraph 19 of the Complaint alleges that Plaintiff Brittany Turner had an ownership interest in the horses. That may be the case and, as with the other allegations, has been accepted as true for the purposes of this order.[49] KRS 500.090(4) provides a procedure whereby an "innocent owner" of property involved in a criminal prosecution can petition the trial court (*i.e.*, the Barren District Court) for a return of the property. The record reveals that she has not done so. In the context of a conversion claim, this too constitutes abandonment.[50] For the above reasons, the conversion claim is untenable as a matter of law and must also be dismissed.

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[47] Rule of Criminal Procedure (RCr) 8.08 provides in pertinent part that the trial court shall not accept a guilty plea without first determining that the plea is made voluntarily.

[48] It is worth noting that the ultimate disposition of the horses is not relevant, as a matter of law, to whether removal or forfeiture was legally permissible. Beyond that, KRS 525.130(5) provides that "[i]f a person's ownership interest in an equine is terminated by a judicial order under paragraph (b) of this subsection, the [district] court may order the sale, conveyance, or other disposition of the equine that was the subject of the offense resulting in conviction." There is no requirement that they be disposed of in any particular fashion.

[49] In their second response, Plaintiffs assert that Greg Turner did not own the horses; Brittany Turner did. This is quintessentially a "matter outside the pleadings" and, furthermore, is in direct conflict with an allegation in the Complaint. As such, it cannot be considered in the determination of the pending motions.

[50] The Court is not implying that she would have been successful, as KRS 500.090(4)(c) would have required her to prove that the illegality was undertaken without her consent. The Complaint alleges that she operated the stable.

Statutory Injury Claims: KRS 446.070 provides that "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation." Plaintiffs claim injury due to the alleged violation of the criminal statutes of Complicity (KRS 502.020), Theft by Unlawful Taking (KRS 514.030), and Official Misconduct, First Degree (KRS 522.020).

It is important to note that the mere violation of a statute, by itself, does not create liability under KRS 446.070.[51] Further, the statute does not create a new theory of liability.[52] In passing KRS 446.070, Kentucky "codified the common law negligence *per se* doctrine and created an avenue by which an individual may seek relief even where a statute does not specifically provide a private remedy."[53] The doctrine "does not depend on a grant of a private right of action, express or implied, from the statute providing the standard of care."[54]

Thus, KRS 446.070 recognizes a private right of action through which a damaged party may sue for a violation of a statutory standard of care, provided that (1) the statute is penal in nature or provides no inclusive civil remedy; (2) the claimant is within the class of persons the statute is intended to protect; and (3) the injury is of the type that the statute was designed to prevent.[55] Assuming the veracity of Plaintiffs' allegations, which the trial court must do for the purpose of ruling on a CR 12.02 motion, the statutory injury claims fail as a matter of law for several reasons.

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[51] **Hargis v. Baize**, 168 S.W.3d 36, 46 (Ky.2005).
[52] See **Alderman v. Bradley**, 957 S.W.2d 264, 267 (Ky.App.1997).
[53] **Vanhook v. Somerset Health Facilities, LP**, 67 F.Supp.3d 810, 817 (E.D. Ky. 2014); **Davidson v. American Freightways, Inc.**, 25 S.W.3d 94, 99 (Ky.2000). Negligence *per se* "is merely a negligence claim with a statutory standard of care substituted for the common law standard of care." **Real Estate Marketing, Inc. v. Franz**, 885 S.W.2d 921, 926–27 (Ky.1994), quoting **Atherton Condominium Apartment–Owners Association Board of Directors v. Blume Development Company**, 115 Wash.2d 506, 799 P.2d 250 (1990).
[54] **Vanhook**, 67 F.Supp.3d at 819.
[55] **Hickey v. General Electric Co.**, 39 S.W.3d 19, 23-24 (Ky.2018). See also **Grzyb v. Evans**, 700 S.W.2d 399, 401 (Ky.1985).

First, Greg Turner admitted guilt for animal cruelty and agreed to forfeit the subject horses. He has been adjudicated guilty of the offense charged, through his own guilty plea. That determination is a final judgment of the Barren District Court. It has not been set aside. He agreed as part of his guilty plea to forfeit the animals. That element of his sentence speaks for itself; *post hoc* rationalizations and explanations are merely collateral attacks on the judgment, which are disallowed under the doctrine of collateral estoppel.

It is well-established that a party is generally precluded from relitigating an "issue actually litigated and finally decided in an earlier action."[56] One who enters a voluntary plea of guilty that is not set aside "is collaterally estopped from litigating the issue of his innocence."[57]

> The clearest case for such an estoppel is where a defendant pleads guilty to a substantial criminal charge and then seeks in civil litigation concerning the same transaction to assert that he did not commit the criminal act. Particularly galling is the situation where a criminal convicted on his own guilty plea seeks as plaintiff in a subsequent civil action to claim redress based on a repudiation of the confession. The effrontery or, as some might say it, *chutzpah*, is too much to take. There certainly should be an estoppel in such a case.[58]

In addition, Plaintiffs are not in the class of persons the criminal statutes referenced in the Complaint are entitled to protect. A person who is criminally prosecuted, admits guilt, and agrees to forfeit property is not a theft victim, or a victim of complicity or a conspiracy to commit theft, with respect to the property that was forfeited. The referenced statutes are not designed to protect those who voluntarily acknowledge guilt and are found guilty, then collaterally attack that judgment in another court.

Plaintiffs do not allege in their Complaint, or argue in either response, that they satisfy the elements required for a claim under KRS 446.070 to succeed. They merely cite the statute, then

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[56] **Yeoman v. Commonwealth Health Policy Board**, 983 S.W.2d 459, 465 (Ky.1998).
[57] **Ray v. Stone**, 952 S.W.2d 220, 224 (Ky.App.1997).
[58] **Gossage v. Roberts**, 904 S.W.2d 246, 249 (Ky.App.2005) (quoting Hazard, Revisiting the Second Restatement of Judgments; Issue Preclusion and Related Problems, 66 Cornell L.Rev. 564, 578 (1981)).

cite KRS 502.020, KRS 514.030, and KRS 522.020 as crimes committed by some of the defending parties. These claims under KRS 446.070 must be dismissed because they cannot, as a matter of law, be sustained.

Statute of Limitations: A statute of limitations is a law which limits the time in which one may bring suit after the cause of action accrues.[59] Application of such time limits is mandatory, not discretionary; a trial court is prohibited from extending such time, and any action not commenced within the appropriate statutory period must be dismissed.[60] "It is well established that the legislature has the power to limit the time in which a common law action can be brought."[61]

Contrary to Plaintiffs' argument, it is appropriate to raise a statute of limitations defense by a motion to dismiss.[62] "[W]here the pertinent facts are not in dispute, the validity of the defense of the statute of limitations can and should be determined by the court as a matter of law."[63] Often, the only issue concerns the date on which the statute of limitations began to run, but that too is generally subject to determination as a matter of law.[64]

"Statutes of limitations are based on the accrual of a right of action and, therefore, begin to run from the time the cause or the foundation of the right came into existence."[65] In other words, "[a] cause of action accrues when a party has the right and capacity to sue[.]"[66] It is immaterial why Plaintiffs may have waited to file the action. "An injured party has an affirmative duty to use

[59] **Tabler v. Wallace**, 704 S.W.2d 179, 185 (Ky.1985).
[60] See **Mitchell v. Money**, 602 S.W.2d 687 (Ky.App.1980). See also KRS 446.010(39), which provides that the word "shall" is mandatory when used in the statute laws of this state, unless the context requires otherwise.
[61] **Saylor v. Hall**, 497 S.W.2d 218, 223 (Ky.1973).
[62] **Tomlinson v. Siehl**, 459 S.W.2d 166 (Ky.1970). "[W]here the complaint shows upon its face that it is barred by limitation the question may be reached by motion to dismiss." Id. (citing **Rather v. Allen County War Memorial Hospital**, 429 S.W.2d 860 (Ky.1968).
[63] **Emberton v. GMRI, Inc.**, 299 S.W.3d 565, 572–73 (Ky.2009) (internal citations omitted).
[64] **Victory Community Bank v. Socol**, 524 S.W.3d 24, 29 (Ky.App.2017).
[65] **Jordan v. Howard**, 246 Ky. 142, 54 S.W.2d 613, 615 (1932).
[66] **Lexington–Fayette Urban County Government v. Abney**, 748 S.W.2d 376, 378 (Ky.App.1988).

diligence in discovering the cause of action within the limitations period. Any fact that should excite his suspicion is the same as actual knowledge of this entire claim."[67]

A civil action commences on the date of the first summons or process issued in good faith from the trial court having jurisdiction over the cause of action.[68] Accordingly, the record shows that this action commenced on June 13, 2022.

KRS 413.140 sets out a category of claims that "shall be commenced within one (1) year after the cause of action accrued." These include "[a]n action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice, or servant,"[69] "[a]n action for malicious prosecution, conspiracy, arrest, seduction, criminal conversation, or breach of promise of marriage,"[70] "[a]n action for the recovery of stolen property, by the owner thereof against any person having the same in his possession,"[71] and "[a]n action for the recovery of damages or the value of stolen property, against the thief or any accessory."[72] Further, KRS 413.125 provides that "[a]n action for the taking, detaining or injuring of personal property, including an action for specific recovery shall be commenced within two (2) years from the time the cause of action accrued."

Per KRS 413.140(1)(c), a claim for malicious prosecution is subject to a one-year statute of limitations. Such claim accrues upon "a favorable termination of the criminal proceedings."[73] Aside from the acknowledged facts that the underlying criminal proceedings were not terminated in Greg Turner's favor, and that he conceded the existence of probable cause by pleading guilty,

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[67] **Fluke Corp. v. LeMaster**, 306 S.W.3d 55, 60 (Ky.2010) (quoting **Hazel v. General Motors Corp.**, 863 F.Supp. 435, 440 (W.D. Ky. 1994)).
[68] KRS 413.250.
[69] KRS 413.140(1)(a).
[70] KRS 413.140(1)(c).
[71] KRS 413.140(1)(i).
[72] KRS 413.140(1)(j).
[73] **Dunn v. Felty**, 226 S.W.3d 68, 73 (Ky.2007).

both of which clearly preclude any recovery on the malicious prosecution claim, the proceedings were terminated more than one year prior to the Complaint. Clearly, this action was not commenced within one year of February 9, 2021, the date on which the district court case terminated. Had that been a termination in Turner's favor, the malicious prosecution claim would still be barred by the statute of limitations.

The abuse of process claim must also be dismissed based on the statute of limitations. In *DeMoisey v. Ostermiller*,[74] the Kentucky Supreme Court recognized that a one-year statute of limitations applies to abuse of process claims and held that such a claim "accrues at the time the conduct complained of by the plaintiff occurred, not at the termination of the underlying litigation."[75] Here, the conduct allegedly constituting abuse of process occurred in September 2019. It could not have occurred any later than February 9, 2021, which was the date on which the criminal proceedings ended. The abuse of process claim filed June 13, 2022 is therefore time-barred.

The claim for conversion was not timely filed either. This claim is governed by KRS 413.215, which states that an action for the taking of personal property "shall be commenced within two (2) years from the time the cause of action accrued."[76] For over 100 years, Kentucky courts have consistently held that the cause of action for conversion accrues upon the taking of the property. In *Joseph Goldberger Iron Co. v. Cincinnati Iron & Steel Co.*,[77] Kentucky's highest court

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[74] No. 2014-CA-001827 and 2014-CA-001864, 2016 WL 2609321 (Ky. Ct. App. May 6, 2016) (unpublished).
[75] Id. at *14. "[A]n action for abuse of process will not lie unless there has been an injury to the person or his property." **Raine v. Drasin**, 621 S.W.2d 895, 902 (Ky.1981) (abrogated on other grounds by **Martin v. O'Daniel**, 507 S.W.3d 1 (Ky.2016). In Kentucky, a personal injury claim must be brought within one year after the cause of action accrues pursuant to KRS 413.140(1)(a). Federal courts interpreting Kentucky law also apply a one-year statute of limitations to these claims. See **Maqablh v. Heinz**, 2016 WL 7192124, at *8 (W.D. Ky. Dec. 12, 2016); **Vidal v. Lexington Fayette Urban Cty. Gov.**, 2014 WL 4418113, at *7 (E.D. Ky. Sep. 8, 2014); **Dickerson v. City of Hickman**, 2010 WL 816684, at *5 (W.D. Ky. Mar. 4, 2010).
[76] See also **Stanley v. Knuckles**, 2016-CA-001290, 2017 WL 6398296 (Ky. Ct. App. Dec. 15, 2017): "Claims for conversion … are governed by the two-year statute of limitations under KRS 413.125."
[77] 153 Ky. 20, 154 S.W. 374, 375 (1913).

recognized "that where an actual conversion is alleged, as here, an averment of demand and refusal is not required" because "any wrongful exercise or dominion over chattels to the exclusion of the rights of the owner, or a withholding of them from his possession under a claim inconsistent with his rights, constitutes a conversion." If the claimant asserts that the taking was wrongful at its inception, then a cause of action for conversion arises at the time the property is taken.[78]

This rule appears to be universal.[79] Plaintiffs' claim for conversion therefore accrued when they were dispossessed of the horses in 2019. Paragraph 19 of the Complaint alleges that "at approximately 0130 PM CDT on September 10, 2019 and thereafter the nine (9) horses' ownership was usurped, converted, disrupted, or terminated by one or all of the defendants named herein...." The Complaint therefore alleges that the taking was wrongful *ab initio*. The statute of limitations began to run on September 10, 2019. Because the claim was not asserted until June 13, 2022, it is untimely and barred.

It should be noted that Plaintiffs did not offer any arguments in opposition to the various contentions regarding statutes of limitation as presented in the motions to dismiss, except as discussed below. Based on the allegations in the Complaint, the aforementioned claims for malicious prosecution, abuse of process, and conversion were all filed after the statute of limitations expired and must be dismissed.

Regarding the statute of limitations for Plaintiffs' statutory injury claims, the result is the same. Contrary to Plaintiffs' intimation that there is no statute of limitations for statutory injury claims,[80] Kentucky law is clear that the statute of limitations for a statutory injury claim is the one

[78] **Madison Capital Co., LLC v. S & S Salvage, LLC**, 507 Fed.Appx. 528 (6th Cir. 2012).
[79] See 90 C.J.S, Trover and Conversion §55 (2012): "The right of action [for conversion] accrues in favor of the owner of goods as soon as they are wrongfully taken from the owner's possession or otherwise wrongfully converted...."
[80] In their response to the arguments that these claims are barred by the statute of limitations, Plaintiffs simply note that, "As to Defendants' claims regarding Statute of Limitations issues, the claims presented by Plaintiffs are

applicable to the most analogous common law action.[81] It is immaterial that some of the claims are premised on an alleged violation of felony criminal statutes, and that felonies have no statute of limitations. When, as here, the statute does not create an entirely new cause of action, under Kentucky law the closest civil common law cause of action, not a criminal statute, provides the applicable statute of limitations for any claim advanced under KRS 446.070.[82]

As previously noted, the statute of limitations for conversion has expired. It may be argued that Plaintiffs' claim based on the Theft by Unlawful Taking statute (KRS 514.030) is analogous not to the tort of conversion but to "[a]n action for the recovery of stolen property, by the owner thereof against any person having the same in his possession," or to "[a]n action for the recovery of damages or the value of stolen property, against the thief or any accessory," each of which is addressed in KRS 413.140. This argument provides Plaintiffs no safe harbor, however, as the statute of limitations for each of these claims is one year.[83] Under either theory (conversion or recovery of stolen property or its value), the claim for violating KRS 514.030 is time-barred because it accrued more than one year prior to the filing of the Complaint.[84]

Complicity would have no inherent statute of limitations because it requires an underlying offense for one to be complicit in; thus, the statute of limitations would be the same as the

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actionable as negligence under KRS § 446.070." KRS 446.070 does not, as previously discussed, create a substantive cause of action. Instead, it merely substitutes a statutory standard of care in common law causes of action, each of which has an applicable statute of limitations. Plaintiffs did not address the contentions pertaining to the applicable statutes of limitation and do not offer any real argument that the claims are not time barred.

[81] See **Toche v. American Watercraft**, 176 S.W.3d 694, 698 (Ky.App.2005).

[82] "Unless the statute codifying a common law liability expressly provides otherwise, the applicable statute of limitation is the one that applies to the common law cause of action." **Overstreet v. Kindred Nursing Centers Limited Partnership**, 479 S.W.3d 69, 73-74 (Ky.2015). See also **Stivers v. Ellington**, 140 S.W.3d 599 (Ky.App.2004).

[83] KRS 413.140(1)(i) and (j).

[84] Claims arising under KRS 413.140(1)(i) "accrue at the time the property is found by its owner." KRS 413.140(5). Claims arising under KRS 413.140(1)(j) "accrue at the time of discovery of the liability." KRS 413.140(6). As previously noted, Plaintiffs argue that the taking was wrong *ab initio*, or at its inception, which would therefore be the time they discovered the alleged wrong. Further, the Complaint establishes that they have known where the horses were being kept all along.

limitations period for the alleged conduct to which any person was complicit. To the extent that complicity may be tantamount to conspiracy,[85] the statute of limitations would be one year.[86] If the allegation is that some or all the parties were complicit in official misconduct, the closest civil law cause of action under the alleged facts would be abuse of process or malicious prosecution.[87] In any event, as discussed, the statute of limitations has expired with respect to all such claims.

Regarding the allegation of official misconduct, a one-year statute of limitations has been held to apply.[88] Therefore, whether the statutory action for damages is fundamentally a claim for malicious prosecution, abuse of process, conversion, theft, official misconduct, or complicity/conspiracy, the claim is time-barred as discussed above.

Punitive damages: A claim for punitive damages "does not constitute a stand-alone cause of action."[89] In other words, there must be liability under some other theory before punitive damages can be awarded.[90] If the underlying claims fail, a punitive damages claim necessarily fails.[91] As noted, the statute of limitations precludes Plaintiffs' claims in their entirety. Further, as the Court will discuss below, the doctrine of governmental immunity precludes the claims against Jeff Botts, Trent Riddle, Carl Dickerson, Tim Coomer, Mark Bowman, Kenneth Sartin, and Billy

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[85] Kentucky's highest court has stated that, strictly speaking, "there is no such thing as a civil action for conspiracy, noting that the action is for damages caused by acts committed pursuant to a formed conspiracy." **Davenport's Adm'x v. Crummies Creek Coal Co.**, 299 Ky. 79, 184 S.W.2d 887 (1945), as cited in **James v. Wilson**, 95 S.W.3d 875, 897 (Ky.App.2002).

[86] KRS 413.140(1)(c). See also **Seiller Waterman**, LLC v. RLB Properties, Ltd., 610 S.W.3d 188 (Ky.2020).

[87] Id.

[88] See **Goins v. Lafoe**, 2016 WL 3050234 (Ky. Ct. App. May 27, 2016).

[89] **McDonald v. DNA Diagnostics Center, Inc., United States District Court**, W.D. Kentucky, August 20, 2021, 2021 WL 3710734 at *6 (citing **Ky. Dep't of Corr. v. McCullough**, 123 S.W.3d 130, 139 (Ky.2003)).

[90] See **Nissan Motor Co., Ltd. v. Maddox**, 486 S.W.3d 838, 840 (Ky.2015) (quoting **Gibson v. Fuel Transport, Inc.**, 410 S.W.3d 56, 59 (Ky.2013)): "In order to justify punitive damages there must be first a finding of failure to exercise reasonable care, and then an additional finding that this negligence was accompanied by wanton or reckless disregard for the lives, safety, or property of others."

[91] See **Fowler v. Mantooth**, 683 S.W.2d 250, 252 (Ky.1984), which stated that for punitive damages to be considered, "[f]acts must be established that, apart from punitive damages, are sufficient to maintain a cause of action…."

Houchens (collectively, "the Magistrates") and the County Judge-Executive in their official capacities,[92] even if the claims were not barred in full by the applicable statutes of limitation.

Moreover, the Claims Against Local Governments Act (CALGA) precludes punitive damages against a municipality or a county. The provisions of CALGA are found in KRS Chapter 65. They apply to any "local government," which is defined to include "any city incorporated under the law of this Commonwealth, the offices and agencies thereof, [and] any county government or fiscal court."[93] Apropos of punitive damages, CALGA provides that "[t]he amount of damages recoverable against a local government for death, personal injury or property damages arising out of a single accident or occurrence, or sequence of accidents or occurrences, shall not exceed the total damages suffered by plaintiff, reduced by the percentage of fault including contributory fault, attributed by the trier of fact to other parties, if any."[94] CALGA's limitation of recoverable damages to those actually suffered effectively precludes a claimant from recovering punitive damages against a municipality or a county.[95]

The Kentucky Court of Appeals has specifically found that CALGA prohibits punitive damages and that such prohibition is not unconstitutional.[96] Even if any of the claims were viable, punitive damages would not be available against the Magistrates; against Micheal Hale *qua* Barren County Judge-Executive; against Harold Armstrong; or against Shelley Furlong.

Accordingly, for the reasons set out above, the claim for punitive damages must be dismissed in its entirety.

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[92] This will be discussed in more detail below.
[93] KRS 65.200(3).
[94] KRS 65.2002.
[95] This is because punitive damages are not compensation for damages suffered by the claimant. Instead, they "are given to the plaintiff over and above the full compensation for his injuries, for the purpose of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example." **Hensley v. Paul Miller Ford, Inc.**, 508 S.W.2d 759, 762 (Ky.1974).
[96] **Williams v. City of Glasgow**, No. 2017-CA-001246-MR (Ky. Ct. App. Aug. 10, 2018). See also **Louisville Metro Housing Authority v. Burns**, 198 S.W.3d 147, 150-51 (Ky.App.2005).

Immunity Claims by Public Servant Defendants: The public servants (the Magistrates, Hale, Armstrong, and Furlong) have asserted claims of immunity. These defenses do not apply to the non-governmental parties; only the elected officials and Furlong have claimed immunity.

Sometimes, the immunity enjoyed by a public servant is absolute. At other times, it is qualified. Official immunity is absolute when an officer or employee of the state is sued in his representative capacity, "in which case his actions are encompassed by sovereign immunity." Likewise, when an officer or employee of a governmental agency is sued in his representative capacity, his "actions are afforded immunity coextensive with that of the agency." However, when public officers and employees are sued in their individual capacities, "the officers and employees enjoy only qualified official immunity, 'which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment.'"[97] The various types of immunity involved in this action, and whether immunity of any type applies in the instant case, will be discussed below.

Sovereign Immunity: Sovereign immunity is absolute. As a concept, it arose from the common law of England, and it was embraced by American jurisprudence early in our history.[98] Kentucky courts have recognized and applied the principle of sovereign immunity since at least 1828.[99]

The doctrine of sovereign immunity is "deeply implanted in the law of the Commonwealth through Section 231 of the Kentucky Constitution."[100] A court cannot refuse "to accord an immune entity its protection under the law. Once it has been determined that an entity is entitled to

[97] **James v. Wilson**, 95 S.W.3d 875, 904 (Ky.App.2002) (internal citations omitted).
[98] See **Reyes v. Hardin Memorial Hospital**, 55 S.W.3d 337, 338 (Ky.2001) (citing the United States Supreme Court case **Chisholm v. Georgia**, 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793)).
[99] **Divine v. Harvie**, 23 Ky. (7 T.B. Mon.) 439, 441 (1828).
[100] **Kestler v. Transit Authority of Northern Kentucky**, 758 S.W.2d 38 (Ky.1988).

sovereign immunity, [a court] has no right to merely refuse to apply it or abrogate the legal doctrine."[101] Far from being a technicality, sovereign immunity is a time-honored jurisprudential doctrine that must be recognized and applied when the circumstances warrant.

The Magistrates have all been sued in their official capacities. Micheal Hale has been sued in his official capacity as Barren County Judge-Executive.[102] An "official-capacity suit is, in all respects other than name, to be treated as a suit against the entity" of which the official is an agent.[103] Thus, the claims against the Magistrates and the County Judge-Executive in their official capacities are in practical effect claims against Barren County itself.

Counties are incorporated political subdivisions of the state. Their existence is of constitutional origin.[104] As units of the state, they are entitled to the same sovereign immunity as the state.[105] "This immunity flows from the Commonwealth's inherent immunity by virtue of a Kentucky county's status as an arm or political subdivision of the Commonwealth."[106] Essentially, the immunity that a subdivision of the state enjoys is extended to the official acts of its officers and employees.[107] In the context of civil litigation, it is well-settled and beyond dispute that "[a]ny action against fiscal court members in their official capacities is essentially an action against the county which is barred by sovereign immunity."[108]

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[101] **Withers v. University of Kentucky**, 939 S.W.2d 340, 342–43 (Ky.1997) (citing **Fryman v. Harrison**, 896 S.W.2d 908 (Ky.1995); **Calvert Investments, Inc. v. Louisville & Jefferson Metropolitan Sewer District**, 805 S.W.2d 133 (Ky.1991)).

[102] He has also been sued individually. This will be discussed below.

[103] **Kentucky v. Graham**, 473 U.S. 159, 166 (1985).

[104] See Kentucky Constitution §§ 63, 64, and 65.

[105] See **Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.**, 295 S.W.3d 91, 94 (Ky.2009). See also **Edmonson County v. French**, 394 S.W.3d 410, 414 (Ky.App.2013).

[106] **Monroe County v. Rouse**, 274 S.W.2d 477, 478 (Ky.1955). "The absolute immunity from suit afforded to the state also extends to public officials sued in their representative (official) capacities, when the state is the real party against which relief in such cases is sought." **Yanero**, 65 S.W.3d at 518. In its thorough discussion of immunity jurisprudence, **Yanero** stated unequivocally that official immunity is "absolute … when an officer or employee of the state is sued in his/her representative capacity, in which event his/her actions are included under the umbrella of sovereign immunity[.]" **Yanero**, at p. 521.

[107] **Autry v. Western Kentucky University**, 219 S.W.3d 713, 717 (Ky.2007).

[108] **Estate of Clark ex rel. Mitchell v. Daviess County**, 105 S.W.3d 841, 844 (Ky.App.2003).

The law is, therefore, clear that a county government, as well as its agents and employees, are immune from suit unless immunity has been waived.[109] In other words, governmental agents who are specifically sued "in their official capacities," including elected officials such as a magistrate or a county judge-executive, have the same immunity protections as the government or agency they represent.[110]

As stated by the United States Supreme Court, the "essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action."[111] Moreover, when immunity exists, it "entitles its possessor to be free 'from the burdens of defending the action, not merely ... from liability.'"[112] In other words, immunity includes not only protection against liability, but also freedom from having to defend oneself. "Immunity from suit includes protection against the 'cost of trial' and the burdens of broad-reaching discovery' that 'are peculiarly disruptive of effective government.'"[113]

As a defense, "sovereign immunity may be asserted at any time."[114] Contrary to Plaintiffs' arguments that the defense of immunity cannot be presented in a motion to dismiss but must instead be affirmatively pled in a responsive pleading, immunity can be asserted at any time, including at the earliest possible time.[115]

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[109] **Schwindel v. Meade County**, 113 S.W.3d 159 (Ky.2003).
[110] **Yanero v. Davis**, 65 S.W.3d 510, 522 (Ky.2001) (citing **Alden v. Maine**, 527 U.S. 706, 756, 119 S.Ct. 2240, 2267, 144 L.Ed.2d 636 (1999); 72 Am.Jur.2d, States, Territories and Dependencies, §104 (1974); **Tate v. Salmon**, 79 Ky. 540, 543 (1881); **Divine v. Harvie**, *supra*, at 441.)
[111] **Mitchell v. Forsyth**, 472 U.S. 511, 525, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411, 424 (1985).
[112] **Breathitt County Board of Education v. Prater**, 292 S.W.3d 883, 886 (Ky.2009) (quoting **Rowan County v. Sloas**, 201 S.W.3d 469, 474 (Ky.2006)).
[113] **Lexington-Fayette Urban County Gov't v. Smolcic**, 142 S.W.3d 128, 135 (Ky.2004), quoting **Harlow v. Fitzgerald**, 457 U.S. 800, 817–18, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 409–10 (1982).
[114] **Louisville Metro/Jefferson County Government v. Abma**, 326 S.W.3d 1, 14 (Ky.App.2009).
[115] In **Wells v. Com., Dept. of Highways**, 384 S.W.2d 308 (Ky.1964), Kentucky's highest court held that although "[t]he defense of sovereign immunity was not specially pleaded or relied upon ..., it is a constitutional protection that can be waived only by the General Assembly and applies regardless of any formal plea." In that case, Kentucky's highest court entertained an immunity claim that was not presented to the trial court at all, confirming that a claim of absolute immunity can be asserted at any time.

This doctrine is not designed as a perk for an individual who holds office. "Immunity from suit exists not for the benefit of the possessor 'but for the benefit of the public.'"[116] The rationale for absolute immunity in the performance of official functions "is not to protect those individuals from liability for their own unjustifiable conduct, but to protect their offices against the deterrent effect of a threat of suit alleging improper motives …."[117]

It does not matter, under the law, that the Complaint alleges intentional misconduct. The rule that "the state is not liable for the torts of its agents is not a matter of choice, but of constitutional mandate for public agencies that qualify for state sovereign immunity under the Kentucky Constitution, §§ 230 and 231. In establishing the sovereign immunity principle, these two sections of the Kentucky Constitution make no distinction between intentional and unintentional torts. Therefore we are not free to make any such distinction. A wrong is a wrong, whether intentionally or negligently committed, but unless our Constitution is changed the sovereign state cannot be held liable in a court of law for either intentional or unintentional torts committed by its agents."[118] This is true even though, as the Kentucky Supreme Court has acknowledged, to recognize absolute immunity will "have the effect, on occasion, of protecting 'officials in their misconduct.'"[119]

Plaintiffs, in their first response, raised the possibility that discovery might uncover an implied waiver of immunity. This position is not consistent with or supported by the law. Kentucky law provides that, regarding immunity, "the granting of waiver is a matter exclusively legislative."[120] In other words, "[s]overeign immunity can only be waived by the General

[116] **Smolcic**, 142 S.W.3d at 135, quoting **Pierson v. Ray**, 386 U.S. 547, 554 (1967).
[117] Restatement (Second) Torts, supra, § 895D cmt. c. (A.L.I.1979).
[118] **Calvert Investments, Inc. v. Louisville & Jefferson Metropolitan Sewer District**, 805 S.W.2d 133, 139 (Ky.1991).
[119] **McCollum v. Garrett**, 880 S.W.2d 530, 535 (Ky.1994) (quoting **Compton v. Romans**, 869 S.W.2d 24, 27 (Ky.1993)).
[120] **Withers**, 939 S.W.2d at 346.

Assembly."[121] This is a matter of constitutional law, as Section 231 of the Kentucky Constitution empowers only the General Assembly to "direct in what manner and in what courts suits may be brought against the Commonwealth."[122]

Thus, the only way sovereign immunity may be waived is by statute. "It is often stated that the state is immune from suit unless there has been an express waiver allowing suit. This is generally true, at least in tort cases."[123] A trial court should find that a statute waives immunity "only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction."[124] In the present case, Plaintiffs have not suggested, in the Complaint or in either response, that a statutory waiver of immunity exists, nor have they identified any statute that purportedly waives immunity. Vague allusions to the possibility of an immunity waiver are not sufficient to survive a motion to dismiss. "Certainly the constitutional mandate [of immunity] would be of small stature if its precepts could be waived by any state officer or agent other than the general assembly."[125] A waiver of sovereign immunity cannot be inferred or assumed by the courts.[126]

Sovereign immunity, then, can only be waived through a clearly expressed determination by the General Assembly in the form of a statutory waiver. Moreover, whether to apply the protections afforded by governmental immunity is not discretionary or optional. Based on the unequivocal applicability of the doctrine of governmental immunity, the Magistrates and the

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[121] **Department of Corrections v. Furr**, 23 S.W.3d 615, 616 (Ky.2000). See also **Jewish Hospital Healthcare Services, Inc. v. Louisville/Jefferson County Metro Government**, 270 S.W.3d 904, 907 (Ky.App.2008): "[A]bsent an explicit statutory waiver, [a county] is entitled to sovereign immunity."

[122] See **Yanero**, 65 S.W.3d at 524: §231 is a provision "that permit[s] the General Assembly to waive the Commonwealth's inherent immunity ...."

[123] **Commonwealth v. Kentucky Retirement Systems**, 396 S.W.3d 833, 836 (Ky.App.2013).

[124] **Withers**, 939 S.W.2d at 346 (quoting **Edelman v. Jordan**, 415 U.S. 651, 673, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974)).

[125] **Commonwealth, Dept. of Highways v. Davidson**, 383 S.W.2d 346, 348 (Ky.1964).

[126] **Board of Trustees of Kentucky Retirement Systems v. Com., Board of Claims**, 251 S.W.3d 334, 340 (Ky.App.2008).

County Judge-Executive are entitled to immunity regarding the claims against them in their official capacities. Accordingly, even if they could otherwise proceed, those claims must be dismissed.

Qualified immunity: Qualified official immunity is "immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions."[127] As the name suggests, it is not absolute. When a public official is sued in his or her individual capacity, he or she generally enjoys qualified official immunity, "which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment."[128] The salient factor is not the title of the official, but the act or function performed.[129] Qualified official immunity applies when the act performed by the official is discretionary in nature; that is, one that involves the exercise of discretion and judgment, or personal deliberation, decision, and judgment.[130]

On the other hand, ministerial acts or functions require "only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts."[131] In contrast to discretionary acts, there is no qualified official immunity for acts that are ministerial.

Furthermore, if an act is discretionary but it violates constitutional, statutory, or other clearly established rights, or if it is done willfully or maliciously with intent to harm, or if it is committed with a corrupt motive or in bad faith, there is no immunity.[132] Plaintiffs would have the burden of showing that the public official was not acting in good faith.[133]

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[127] **Yanero**, 65 S.W.3d at 521.
[128] **Yanero**, 65 S.W.3d at 522 (citing 63C Am. Jur. 2d Public Officers and Employees § 309 (1997)).
[129] Id. at 521 (citing **Salyer v. Patrick**, 874 F.2d 374 (6th Cir.1989)).
[130] **Haney v. Monsky**, 311 S.W.3d 235, 240 (Ky.2010).
[131] **Yanero**, 65 S.W.3d at 522.
[132] **Autry**, 219 S.W.3d at 717 (citing **Yanero**, 65 S.W.3d at 522–23 and **Harlow v. Fitzgerald**, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).
[133] **Yanero**, 65 S.W.3d at 522–23.

If the motions to dismiss were based solely on qualified immunity, they would likely not be granted at this time because there remain genuine issues of material fact regarding some of the allegations. The Court therefore cannot say that qualified official immunity applies as a matter of law, as it is conceivable that the facts may not support a claim of qualified official immunity for one or more of the movants. However, for the reasons discussed above, it is unnecessary to address that question, as none of the claims presented by Plaintiffs can survive a motion to dismiss as a matter of law for other reasons.

Vicarious Liability/*Respondeat Superior*: In Paragraph 30 of the Complaint, Plaintiffs state that "Defendants are liable for the torts ... of its [*sic.*] agents ... when those torts are committed during the scope of and in furtherance of the employment." This is not an accurate statement of the law as to governmental defendants. A public official generally does not have vicarious liability for the actions of a subordinate. Thus, assuming for the purposes of these motions that the allegations against Defendant Furlong are true, it does not follow that the elected officials are responsible for her conduct.

"A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties."[134] In other words, "there can be no vicarious liability which pierces immunity, if immunity is found to be applicable."[135] This blanket prohibition would not apply to allegations of wrongdoing on the part of any elected official, only to allegations that any of them is responsible for the actions of another. Any claim based on a vicarious liability theory must be dismissed.

[134] **Ashcroft v. Iqbal**, 556 U.S. 662, 676, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting **Robertson v. Sichel**, 127 U.S. 507, 515–516, 8 S.Ct. 1286, 3 L.Ed. 203 (1888)).
[135] **Rowan County v. Sloas**, 201 S.W.3d 469, 477 (Ky.2006).

The Non-Government Defendants

Suzanna Johnson: The first motion to dismiss in this matter was filed by Defendant Suzanna Johnson ("Johnson"). She contends that the Complaint sets out no viable claims against her. This sort of argument is permissible pursuant to CR 12.02(f), which provides that one may assert the defense of failure to state a claim upon which relief can be granted through a motion to dismiss.

In support of her motion, Johnson notes that the Complaint is devoid of any assertion that she published any statement concerning Greg Turner; that the Complaint fails to assert a claim for defamation; that the allegations of theft, complicity, official misconduct, abuse of process, malicious prosecution, and conversion do not pertain to any alleged conduct on her part; and that the Complaint does not contend that any photographs Johnson posted online were false.

Johnson is correct. While Plaintiffs' first response refers to a "slanderous and defamatory narrative," the allegations in the Complaint do not suffice; the Complaint does not allege defamation either by naming that tort or by alleging any conduct by Johnson that would satisfy the elements of a defamation action.[136] Further, as previously noted, there is no independent tort of complicity; at most, under a generous reading of KRS 446.070, one may initiate an action against a person allegedly complicit in a tort committed by another.[137] Johnson is not alleged in the Complaint to have been complicit in any actionable tort committed by another.

Further, the Complaint does not allege that Johnson stole the horses, possessed them, initiated the criminal action, or pursued the criminal action for an improper purpose. Finally, the

[136] The elements are enumerated in **Smith v. Martin**, 331 S.W.3d 637 (Ky.App.2011). The Complaint does not set forth allegations supporting those elements, nor does it claim that they are present.

[137] Because complicity is not a substantive offense (it is not a crime by itself), the provisions of KRS 446.070 are inapposite. One cannot be injured by another's complicity, only by wrongdoing that the other person was complicit in. Moreover, a suit for "violation of the statute against complicity" ignores fundamental concepts such as the requirement of a duty and a breach of that duty, or the requirement of an agency relationship or related principles when seeking to hold one person responsible for the conduct of another.

Complaint contains no allegation that Johnson is a public servant; only individuals meeting the statutory definition of public servant can commit official misconduct.[138] In short, without even considering the statute of limitations issues discussed above,[139] which would act as a complete bar to the claims against Johnson, the Complaint fails to state any claim against Johnson upon which relief may be granted and must be dismissed as to her.

Shani Hale: Defendant Shani Hale has also filed a motion to dismiss. She makes arguments akin to those presented in Johnson's motion. She also asserts the statute of limitations as a defense.

The Court has already addressed the latter issue. Each claim filed by Plaintiffs is barred by the statute of limitations. The statute of limitations applies to all claims, whether or not they are filed against the parties that are public servants or government officials.

Furthermore, Shani Hale was sued both individually and "as spouse of Michael [*sic.*] Hale." This should go without saying, but assuming *arguendo* that a tort has been committed, wives are not responsible for wrongs committed by their husbands. For that matter, neither is a husband responsible for the consequences of his wife's alleged wrongdoing. "The mere fact that the one is the husband or the wife of the other should not render him or her answerable for the negligence of the other."[140] This has been the law in Kentucky for well over 100 years. Shani Hale *qua* wife of Micheal Hale has no responsibility for the alleged wrongs of her spouse. Therefore, to

[138] KRS 522.010(1) defines public servants to include any public officer or employee of the state, any political subdivision thereof, or any governmental instrumentality within the state; any person exercising the functions of such public officer or employee; any person advising or consulting in the performance of a governmental function (excluding witnesses); and any person who will be a public servant although not yet occupying that position. Both KRS 522.020 (Official Misconduct, First Degree) and KRS 522.030 (Official Misconduct, Second Degree) apply only to "public servants."

[139] Johnson did not raise the statute of limitations defenses in her motion. However, the Court notes that KRS 413.140(1)(d) requires an action for libel or slander, like the other claims presented, to be commenced within one (1) year after the cause of action accrued.

[140] **Louisville Ry. Co. v. McCarthy**, 129 Ky. 814, 112 S. W. 925, 927, 19 L. R. A. (N. S.) 230, 130 Am. St. Rep. 494 (1908).

the extent any allegation was made against Shani Hale in her capacity as the spouse of Micheal Hale, it fails as a matter of law.

Based on the foregoing, the Complaint as against Shani Hale must be dismissed, as no viable claims have been asserted against her.

Steve Bulle: In the motion to dismiss filed by Defendant Steve Bulle, he also raises the statute of limitations defense. For the same reasons as previously discussed, the statute of limitations bars any claim against Bulle.

Further, the Complaint fails to set out a prima facie claim against Bulle under any recognized theory. The substantive allegations against Bulle consist of a statement that the horses were "boarded at the farm of the Defendant, Steve Bulle until around May, 2020" and the assertion that "the Defendant, Steve Bulle's charges, for the nine (9) horses [exceeded] $35,000.000." He is not alleged to have engaged in any of the causes of action identified by Plaintiffs, including theft, conversion, complicity, conspiracy, malicious prosecution, or abuse of process.

There is no contention in the Complaint that Bulle did anything other than board the horses after they had been confiscated pursuant to an investigation and criminal prosecution, and that he did not board the horses for free. It fails to set forth a prima facie case of civil conspiracy, as it fails to allege the necessary agreement or concerted action. "As a legal term the word 'conspiracy' means a corrupt or unlawful combination or agreement between two or more persons to do by concert of action an unlawful act, or to do a lawful act by unlawful means."[141] The Complaint does not assert that Bulle in any way instigated the investigation, pressed charges, pursued that prosecution, sought out the horses, or entered into any agreement to deprive anyone of property.

[141] **Smith v. Board of Education of Ludlow**, 264 Ky. 150, 94 S.W.2d 321 (1936). Kentucky's highest court has stated that, strictly speaking, "there is no such thing as a civil action for conspiracy, noting that the action is for damages caused by acts committed pursuant to a formed conspiracy." **Davenport's Adm'x v. Crummies Creek Coal Co.**, 299 Ky. 79, 184 S.W.2d 887 (1945), as cited in **James v. Wilson**, 95 S.W.3d 875, 897 (Ky.App.2002).

Moreover, as previously noted, Plaintiffs cannot establish the elements of a claim against Bulle as a matter of law. Turner pled guilty to the charges in Barren District Court; because he failed to seek relief from the court that found him guilty, his guilt has been established as a matter of law. To reiterate, a guilty plea waives claims of constitutional violations. The allegations against Bulle, when accepted as true, merely establish that he held or stored the evidence of a crime, at the request of law enforcement, until such time as the issue of guilt was determined.

The Complaint fails to state a claim against Bulle upon which relief can be granted. Accordingly, it must be dismissed in its entirety as to Defendant Steve Bulle.

As required by law, the Court has reviewed the Complaint and taken all its allegations to be true. Even if the allegations could be proven at trial, each of the claims is barred by the statute of limitations applicable to that claim. That alone requires that the Complaint be dismissed in its entirety. Further, Plaintiffs cannot succeed for the other reasons thoroughly discussed above, and cannot in any event succeed against those entitled to governmental immunity. As a result, each motion to dismiss is granted, and the Complaint is dismissed with prejudice.

This is a final and appealable order, and there is no cause for delay in its entry.

IT IS SO ORDERED this 30th day of September 2022.

/s/ HON. JOHN T. ALEXANDER
electronically signed
9/30/2022 2:57:07 PM CT

HON. JOHN T. ALEXANDER
JUDGE, BARREN CIRCUIT COURT

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