

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Civil Action No. 05-CV-02064-REB-OES

JOHN AND BRENDA NICHOLAS, Individually
and as Successors in Interest to THE ESTATE OF
DEMETRIOS JOHN NICHOLAS, Deceased,

Plaintiffs

v.

RICHARD M. BOYD, ROBERT ALLEN,
HAROLD CHEUVRONT, and
ROBERT FRANCISCO,

Defendants

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs John and Brenda Nicholas, by and through their counsel, file this Memorandum of Authorities in Opposition to Defendants' Motion For Summary Judgment. In support of their opposition, Plaintiffs rely on the arguments and authorities set forth herein, and on the following summary judgment evidence that is properly before this Court: (i) the deposition testimony of Plaintiffs John and Brenda Nicholas (selected excerpts); (ii) the deposition testimony of Plaintiffs' experts, Linda Norton, M.D. (forensic pathology); and John W. Belk, J.D. (death scene investigation); (iii) reports of Dr. Joe Batuello, Dr. Linda Norton, and NMS Laboratory; and the deposition testimony of Defendants Boyd, Francisco, Chevront and Jefferson County Deputy Coroner Triena Harper (selected excerpts).

I. Plaintiffs' Cause of Action

Plaintiffs sued Defendants, all of whom are officials of the Colorado School of Mines (CSM) and employees of the State of Colorado,¹ under 42 U.S.C. §1983 for violating their First Amendment right of access to the courts by intentionally suppressing and concealing evidence of the wrongful death of their 19-year old son, Demetrios ("Rio") Nicholas, who died unexpectedly in a dormitory at CSM on December 6, 2001.

Plaintiffs have alleged two claims for relief. The first is a conspiracy claim against all of the defendants for conspiring to intentionally suppress and conceal evidence of the wrongful death with the intent to deny Plaintiffs the evidence necessary to bring a cause of action for wrongful death damages against the persons responsible for the death.² The second claim is against each of the defendants, individually, for committing the substantive conduct of suppression and concealment of evidence of the wrongful death.³ Both claims allege that the Defendants' concealment and suppression of evidence commenced on the date of the death, December 6, 2001, and *continued to the date of the filing of the complaint, November 19, 2005*. Plaintiffs have also sued for damages, exemplary damages, and attorneys fees under 42 U.S.C. §1988.

II. Basis of Defendant's Motion

All Defendants have moved for summary judgment on both of Plaintiffs' claims on the grounds that (1) such claims are barred by the applicable Colorado statute of limitation, (2) the conspiracy claim is inadequate because it fails to allege that the object of the conspiracy was an illegal act; and (3) that Defendants are entitled to judgment as

¹ So admitted by Defendants. Answer, Pars. 2–4 [Doc. No. 7]

² Amended Complaint, p. 12

³ Id., p.13

a matter of law under the doctrine of qualified immunity. Plaintiffs' response will demonstrate that Defendants' motion lacks merit; that Defendants misunderstand Plaintiffs' cause of action; and that Defendants have misapplied applicable law in their Brief in Support of their Motion for Summary Judgment.

III. Response to Limitations Defense

The focal issue of the Defendants' limitations defense is, "At what time subsequent to December 6, 2001, did Plaintiffs know, or should they have known, that they had suffered an injury—in this case, the loss of a cause of action (i.e., access to the courts) against those responsible for their son's death—and the Defendants caused the injury." Plaintiffs suggest that based on the summary judgment evidence before the Court, this Court should find that material questions of fact exist as to when Plaintiffs knew or should have known they had been injured.

A. Standard of Review

In *U.S. v. Telluride Co.* No. 97-1236 (10th Cir. 1998) the court reviewed the district court's decision on motions for summary judgment based on statutes of limitation and stated as follows:

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, we draw all justifiable inferences in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The case of *Stump v. Gates*, 777 S.Supp. 808 (D. Colo. 1991), affirmed, 986 F.2d 1429 (10th Cir. 1993) arose out of claims similar to the case at bar. There, the plaintiff heirs of the decedent alleged that the City of Greenwood Village, Colorado, covered-up a murder by ruling the death occurred by suicide, and thereby denied them their rights of access to the courts. In that case, the district court addressed the two

primary issues Defendants have raised in their motion for summary judgment in this case—statute of limitations and qualified immunity.

In reviewing the statute of limitation defense, the court in *Stump v. Gates* applied the Tenth Circuit rule: where concealment of facts giving rise to the claim is alleged, the limitations period is tolled until the injury and its cause are discovered, or by due diligence should have been discovered. 777 F.Supp. at 822.

B. The factual dispute as to when Plaintiffs claim accrued.

In this case, as in *Stump*, the gravamen of the action is the denial of the plaintiffs' access to courts to seek redress for the wrongful death of their son. In order to pursue a wrongful death action, the Plaintiffs must have evidence that their son had been killed by the wrongful conduct of others and did not die of an accidental drug overdose as Defendants have contended and continue to contend. Here, Plaintiffs did not learn until the spring or summer of 2005 that their son had likely died as a result of the wrongful conduct of other students, individuals who could have been the defendants in wrongful death causes of action, but for the intentional conduct of Defendants to obstruct and cover up their conduct.

1. First concluded possible murder- Batuello Report.

Reliable evidence supporting a conclusion that Rio Nicholas died from something other than a self-induced drug overdose first became available to Plaintiffs in April 2005. That was when they received an expert report that disputed some of the Defendants medical explanations regarding the forensic evidence of Rio Nicholas's death. This report, prepared by Dr. Joe Batuello, indicates that the prior explanations of a self-induced accidental death given to Plaintiffs by the Defendants were not plausible.

For example, to explain the finding of three syringes at the crime scene and only one puncture spot on Rio Nicholas, Defendants Boyd and Chevront told Plaintiffs that

Rio had used all three syringes and placed the needles in the same hole. In particular, Chevront told Plaintiffs that he had consulted with a doctor and learned that Rio had hit an artery during the third injection and died instantly, which explained the blood on the shower wall. See Johnny Nicholas deposition, Exhibit D to Defendants Motion for Summary Judgment, pp 56-57, 100-101; Brenda Nicholas deposition, Exhibit 1, pp 387-39.

Dr. Batuello's report, Summary Judgment Exhibit 2, indicates that more than one injection would likely have left more than one puncture wound. Dr. Batuello's report also indicates that the explanations previously given by Defendants Boyd and Allen (Boyd deposition pp 81-82) — that the blood found on the shower wall came from the puncture wound in Rio's left arm — was untenable because the possibility that the blood on the shower wall came from the hypodermic puncture spot is so remote as to not even warrant consideration. Similarly, Dr. Batuello indicated that medically, it is unlikely the shower wall blood came from Rios's mouth, hands or toes; he concluded that the source of blood found on the shower wall is undeterminable.

Indeed, John Nicholas testified that it was not until April of 2005 he believed that his son had been murdered, after he had received the report from Doctor Batuello who had reviewed the investigation materials. This report provided something other than speculation and conjecture to dispute the Defendants' lies and false explanations.

Pertinent parts of John Nichlolas' testimony include the following:

10 Q When did you first contact[Attorney] Mr. Hinton?

11 A This would have been -- I don't recall.

12 I don't recall exactly when it was. It was after,
13 you know, 2002.

14 Q In the summer of 2002?

15 A I believe that's correct. Possibly
16 earlier than that.

17 Q What was the purpose for engaging
18 Mr. Hinton?

19 A Asking questions about -- because the

20 questions that had arisen surrounding Rio's death,
21 and trying to find out, you know, what happened to him
22 and get his advice.
23 Q Had you come to the conclusion by then
24 that your son had been the victim of murder?
25 A No.

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1 Q Had you come to the conclusion by then
2 that Brandon Reese had something to do with your son's
3 death?
4 A No.
5 Q You did come to these conclusions at some
6 point, didn't you?
7 A Yes.
8 Q When would that have been?
9 A In around -- it was about spring or
10 around April of 2005. What are we in now?
11 MR. MAHONEY: 2006.
12 A It was in 2005, in the spring. It was
13 the first communication from a -- of a physician, of
14 review by a physician. That gave us a pretty
15 good. . .
16 Q (By Mr. Haines) Who was that physician?
17 A It's Dr. Batuello.
18 MR. MAHONEY: B-a-t-u-e-l-l-o. I believe
19 that's how you spell it.

John Nicholas deposition pages 80-81, Exhibit D to Defendants Motion and brief.

2. Report from Pathologist Linda Norton

In June 2005 John and Brenda Nicolas received a draft report from Dr. Linda Norton, a forensic pathologist. After reviewing the Colorado School of Mines investigation and information obtained by the Plaintiffs' hired investigators, Dr. Norton determined (i) that Rio's body had been moved into the shower so as to stage the death scene, and (ii) that Rio did not act alone in causing his death. See Exhibit 3, Dr. Norton's June 2005 draft report.

Plaintiff Brenda Nicholas was questioned during her deposition as to when she had any hard evidence that her son had been murdered. The deposition dialogue went as follows:

11 Q [By Ms. McCann] Is there any hard evidence that you
12 have
13 that he was murdered?
14 A Hard evidence?
15 Q Uh-huh. Specific evidence you can say,
16 you know, this is what makes me think he was murdered.
17 A Well, the body was moved.
18 Q And what makes you say "the body was
19 moved?"
20 A That's just what we've been told.
21 Q By who?
22 A Doctors.

The determination that Rio Nicholas' body had been moved to a shower from some other location after he died was instrumental in Plaintiffs concluding that their son had been killed by someone else; dead men don't walk.

3. NMS Report- No cocaine in Rios' blood.

Sometime after August 24, 2005, Plaintiffs received a scientific report from the NMS laboratory in Redding, Pennsylvania, setting forth the results of a retest of a post-mortum sample of Rio's blood. The NMS report, Summary Judgment Exhibit 4 states that there is zero cocaine in the blood. The NMS report contrasts starkly to what the Plaintiffs had been told by Defendants, that Rio Nicholas' blood contained a large quantity of cocaine in his blood. For example, see Exhibit E to Defendant's motion for summary judgment, the district attorney's "review that indicates Rio had a large quantity of cocaine and its metabolite in his blood". John Nicholas discussed the NMS Laboratory finding in his deposition:

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8 Q [Question by Ms. McCann] Now, I'm sorry. I think
9 that was
10 ambiguous. What do you believe about the manner of
11 Rio's death?
12 A Initially, we believed that he had died
13 from a very large dose of cocaine, is what we were
14 told by the coroner. And we trusted their expertise
15 or what we thought was their expertise.
16 Q Okay. Initially?
17 A Yes. And April of 2005, as I've told
18 you, we had the letter from Dr. Batuello. And shortly

18 after that, in August -- I believe it was August of
19 2004, I received a phone call. We had been awaiting
20 the results of the analysis of the blood and urine,
21 which we were able to get from the coroner's office,
22 through the district attorney's office, with them
23 agreeing to preserve chain of custody and transfer
24 that evidence to the National Medical Services
25 Laboratory at Redding, Pennsylvania.

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1 Again, we picked the very best laboratory
2 that we could find for forensic toxicology. And they
3 supervised the testing of all of the evidence. It
4 wasn't just the blood and urine.

5 And in August, our expert, a gentleman
6 named Earnest Street contacted me by telephone; and he
7 told me that the results were in. And he said, Mr.
8 Nicholas, Rio did not die of a cocaine overdose.

...

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24 Q Mr. Mahoney's given me Dr. Batuello's
25 report. I don't want to examine you about what his

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1 opinion is. Let me just ask you: Do you understand
2 his opinion to be that death was not by cocaine
3 toxicity?

4 A No, that's not my -- the timing of that
5 letter is previous to when the analysis of the blood
6 and urine was done. He would have had -- he would
7 only have had the original toxicology report.

8 Q I see. Is he doing a follow-up report?

9 A Not that I know of.

10 Q And what was Mr. Street's conclusion?

11 A That he did not die of a cocaine
12 overdose.

John Nicholas deposition, pages 140 -141, 144 -145, Exhibit D to Defendants Motion for Summary Judgment.

4. Plaintiffs trust of the authorities.

Defendants contend that no later than October 18, 2003, Plaintiffs knew or should have known that their civil rights of access to the courts had been intentionally and knowingly violated by Defendants destruction and suppression of evidence.

Defendants point to Plaintiffs' dissatisfaction with Defendants' efforts to explore the many unanswered questions about Rio's death, and they have attached exhibits to their brief that demonstrate Plaintiffs' concerns regarding the manner and thoroughness of

Defendants' efforts or lack of efforts in conducting the investigation of their son's death. But Defendants have not pointed to any evidence that could give rise to a finding that, as matter of law, Plaintiffs knew or should have know that they had been injured prior to October 19, 2003.

For sure, there remain factual disputes as to how Rio Nicholas actually died. Defendants contend to this day that Rio's death was an accidental, self-induced drug overdose, whereas experts retained by Plaintiffs conclude that the evidence supports several possible wrongful death theories that cannot be determined with any certainty because of the Defendants' intentional decision to turn their backs on ample probable cause to suspect wrongdoing in Rio's death. The conduct of the Defendants subverted any meaningful investigation of the death and aborted the process of the collection of evidence that could have led to the discovery of the manner and means of Rio's death.

When the statute of limitations begins to run is a question of fact for the finder of fact to determine. Plaintiffs believed they could rely on what the Colorado School of Mines officials and Jefferson County Coroner told them as to the death of their son. Plaintiff John Nicholas discussed his reliance on authorities to do their job in the following excerpt of his deposition:

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13 Q [By Ms. McCann] In January of 2002, you still
14 trusted
15 Chief Boyd and the CSM police department to do a
16 thorough investigation?
17 A I don't know if I would say that
18 specifically at that point. We knew something was
19 wrong. I would say, more accurately, that I was
20 raised to respect law enforcement and to have that --
21 I mean that was drilled into me by my family. I have
22 that respect. And once I'm told something by an
23 authority, that that's the deal, that's the truth.
24 Q In January of 2002, you respected their
25 authority, correct?
A Whose authority?

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1 Q The police and Chief Boyd and the CSM

2 police?

3 A I would say at that point I had some
4 serious questions regarding their authority. I think
5 I can accurately answer your question by saying that
6 throughout the questions that we asked, that we
7 proceeded with a respectful demeanor and that we tried
8 to respectfully go through all the proper channels
9 that we could, to try to find out what happened to
10 Rio.

11 Q You were having serious doubts about
12 Chief Boyd and the CSM police by February of 2002?

13 A After the -- certainly after the phone
14 conversation, and being told about the needles being
15 stuck in the same hole three times.

16 Q Did that destroy whatever trust you had?

17 A No, I wouldn't say that. It just stunned
18 me. **I actually believed what they were telling me,**
19 **but it was a very shocking image, and that led to**
20 **other questions.**

[Emphasis added.] John Nicholas deposition, pages 73-74, Exhibit D.

This case is similar to *Stump v. Ocrant*, supra, where the court found that those plaintiffs also reasonably relied on the authorities' determination as to the cause of death until the plaintiffs received information suggesting otherwise. There, at 777 F.Supp. at 822, the court said:

The police investigation and coroner's report both had concluded that suicide was the cause of death. Thereafter, nearly all relevant evidence of the cause of death was destroyed by one or more of the alleged co-conspirators. To accept the defendants proposed accrual date, in the instant circumstances, would be to impose upon the plaintiffs an affirmative duty privately to investigate the cause of death and to second guess the official investigation into that death, as well as an obligation to commence an action based on that private investigation shortly thereafter. In short, it would transfer to private individuals the obligation to perform governmental police functions. Neither law nor logic favors that result.

C. Genuine issues of material facts prevent
summary judgment based on the statute of limitation defense.

During the spring and summer of 2005, after spending considerable personal resources to investigate and have the evidence evaluated by their own experts, Plaintiffs John and Brenda Nicholas finally were able to determine they had evidence to confirm that their son did not die of a self-induced drug overdose, but from some other means and/or cause. There is no question that Plaintiffs objected to the manner of

Defendants' (lack of) investigation activities in the year following Rio's death. Plaintiffs' suspicions that Defendants were acting to protect the Colorado School of Mines' reputation and sweep this wrongful death under the rug as a drug overdose were not confirmed until the spring and summer of 2005.

At a bare minimum, it remains a question of material fact as to when Plaintiffs knew or should have known their son did not die from a self-inflicted cocaine overdose and that his death was either brought about or preventable by the acts of others. This court should deny the Defendants' motion for summary judgment based on statutes of limitation and find that there are questions of fact as to when Plaintiffs reasonably discovered their injury and its cause.

D. As a matter of law, Plaintiffs filed their cause of action within the applicable state of limitations period

Defendants have failed to account for the fact that in this case we are dealing with two, distinct limitations periods—the limitations period for bringing a wrongful death cause of action, **and** the limitations period for bringing a §1983 cause of action.

Under Colorado law, Plaintiffs had two years from the date of Rio's death to bring a cause of action for wrongful death against those responsible for the death. CRS §§ 13-80-102 and 108. This limitations period expired on December 5, 2003, two years after the date of Rio's death. Accordingly, Plaintiffs could not have suffered the "injury" of the loss of the right to sue until *the expiration of the wrongful death limitations period*. Therefore, the date of injury, as a matter of law, is December 5, 2003.

The second limitations period, for bringing a §1983 cause of action, did not commence running until the date of the injury—December 5, 2003. That period, also established by the Colorado wrongful death statute, did not expire until December 4, 2005—46 days AFTER Plaintiffs filed this cause of action. Notwithstanding the discussion in the preceding sections regarding the factual questions of when Plaintiffs

could have reasonably discovered the existence of their claims and whether the running of the statute of limitations is tolled by Defendants conduct, the Plaintiffs timely filed their action. Therefore, as a matter of law, Plaintiffs cause of action was filed within the applicable limitations period.

IV. Qualified Immunity Defense

Defendants also claim that this Court should dismiss Plaintiffs' claims based on claims of qualified immunity. Review of a motion for summary judgment based qualified immunity is decided differently than traditional summary judgments. In *Floyd v. Colorado Dept. of Health*, No. 04-1241 (10th cir. 2006), the court addressed the legal standards of qualified immunity:

Because of the underlying purposes of qualified immunity, we require a plaintiff to satisfy a "heavy two-part burden" to avoid summary judgment: (1) "that the defendant's actions violated a constitutional or statutory right" and (2) that the right "was clearly established at the time of the defendant's unlawful conduct." *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001). At the summary judgment stage, merely pointing to an unsworn complaint is not enough. A plaintiff has an obligation to "present some evidence to support the allegations; mere allegations, without more, are insufficient to avoid summary judgment." *Lawmaster v. Ward*, 125 F.3d 1341, 1349 (10th Cir. 1997). The plaintiff must go beyond the pleadings and "designate specific facts so as to make a showing sufficient to establish the existence of an element essential to that party's case in order to survive summary judgment." *Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000).

Plaintiff must first establish that "the facts alleged [taken in the light most favorable to the nonmoving party] show the officer's conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Medina*, 252 F.3d at 1128. Second, plaintiff must demonstrate that the right was clearly established. *Id.*

If the plaintiff fails to satisfy either part of the two-part inquiry, the court must grant the defendant qualified immunity. *Albright*, supra, 51 F.3d at 1535. But if the plaintiff successfully establishes the violation of a clearly established right, the burden shifts to the defendant, who must prove that there are "no genuine issues of material

fact and that he or she is entitled to judgment as a matter of law.” *Albright*, supra, 51 F.3d at 1535; *Hinton v. City of Elwood*, 997 F.2d 774, 779 (10th Cir. 1993).

In applying this law, Defendants claim that for Plaintiffs to defeat their defense of qualified immunity, they must prove both:

- (a) that the Defendants violated Plaintiffs’ First Amendment rights—that is, that Plaintiffs’ son’s death was a homicide (and should have been investigated as such); and
- (b) that all reasonable officers would agree that the Defendants should have known that Plaintiffs’ son’s death was a homicide. ⁴

A. Violation of Right of Access to the Court

Defendants have misconstrued Plaintiffs’ cause of action and thus how the law applies. What the Defendants appear to be arguing in their brief is that Plaintiffs are claiming they were deprived of the right to have their son’s death investigated as a homicide. Plaintiffs have made no such contention. What Plaintiffs have alleged is that the Defendants deprived them of the First Amendment right of *access to the courts*, a right that has been judicially recognized and “clearly established” for years, *and* held applicable to the states under the Fourteenth Amendment. *See, Stump v. Gates*, 777 F. Supp 808 (D. Colo. 1991), affirmed 986 F.2d 1429 (10th Cir. 1993) (Unpublished opinion attached hereto as Exhibit 5.) There is no room for disagreement on the recognition of this constitutional right as having been established by the Courts, when it was recognized by the Tenth Circuit in 1993.

B. Facts supporting violation of the constitutional right.

As noted above, after confirming that the right was clearly established, Plaintiff must also establish that the facts alleged, taken in the light most favorable to the nonmoving party, show the Defendants’ conduct violated this constitutional right. In support of their claims, Plaintiffs have alleged that Defendants deliberately failed to

follow appropriate procedures during the investigation into Rio Nicholas's death, that Defendants lied to Plaintiffs and the media regarding Defendants investigation and that Defendants have destroyed important evidence that possibly could have identified Rio Nicholas' killer. For example, Plaintiff John Nicholas was questioned during his deposition about what Colorado School of Mines Chief of Department of Public Safety Defendant Boyd told him as to the status of the evidence and whether Boyd later directly contradicted his prior representations. Specifically, John Nicholas testified that Defendants Boyd and Director of Student Life Francisco told him the following:

1. Rio's fingerprints were found on all three used syringes;
2. That the blood in the three syringes were all from Rio.
3. That the 92 syringes found later in Rio's back pack had been fingerprinted and Rios' fingerprints were on them;
4. They determined that Rio bought the drugs and syringes in Texas and brought them to school.

See John Nicholas deposition, pp.201-205, attached to Defendants brief Exhibit D.

When questioned by Plaintiffs' investigator, Defendant Boyd contradicted these prior assertions and acknowledged that none of the syringes had ever been tested for finger prints. Moreover, Defendant Boyd acknowledged that the 92 syringes found in Rio's backpack had been destroyed. See Exhibit K to Defendants motion for summary judgment. Boyd never gave an explanation as to why he lied or did not have the evidence properly examined for fingerprints before it was destroyed.

The extensive nature of Colorado School of Mines' Detective Defendant Allen's and Defendant Boyd's intentional conduct to obfuscate what had happened to Rio Nicholas by their failure to perform an appropriate investigation are detailed in the report and deposition testimony of Plaintiffs' expert homicide investigator, Detective Sergeant John William Belk, attached hereto as Exhibits 6 and 7. Examples of inappropriate conduct by Defendants Allen and Boyd include the following:

⁴ Defendant s' Brief, p. 6

1.) Failure to photograph any of Rio Nicholas's injuries; 2.) Failure to test any evidence for fingerprints; 3.) Failure to examine any of Rio's suitemates for recent intravenous drug use even though three used syringes were found at the scene and only one injection site was found on Rio; 4.) Failure to test or mention in any report the blood depicted in the shower where Rio was found; 5.) Failure to search and secure Rio's room even though two other used syringes were found there; 6.) Failure to search for any drug paraphernalia that would be used for the intravenous injections or other drug use;

In his expert report Detective Sergeant Belk notes that rather than Defendants Boyd and Allen performing an appropriate investigation, they enlisted the aid of their confederate Defendant Robert Francisco to clean up the room and "keep your eyes open, if you see anything out of line, let us know." After receiving these directions from Boyd and Allen, Defendant Francisco conducts a search of the dorm room two days after Rio's death. Francisco then "discovers" Rio's backpack filled with 92 syringes on the shelf in Rio's closet. This is the same backpack depicted in the common area of the suite in the few crime scene photographs that were taken. Defendants failed to explain how a backpack was able to move on its own, but decided to destroy the syringes before examining them.

These deficiencies of Defendants, set forth in detail in the Amended Complaint, are similar to those that the court found sufficient in the *Stump v. Gates* case to state §1983 claims. There, the Tenth Circuit recognized a denial of access to the courts civil rights claim is proper when a police department covers up a murder. In *Stump v. Gates*, the court stated that the specificity of plaintiffs' factual allegations are important to its determination on the issue of qualified immunity. Both the Tenth Circuit and the district court noted that the plaintiffs had stated with particularity the conduct they alleged which violated their right of access to the court; that it is the alleged acts of destroying evidence and precluding an adequate investigation into the death. In its order affirming

the district court's ruling that a denial of access of courts claim was proper, the Tenth circuit quoted from the district court's order as follows:

I emphasize that it is Gates' and Sexton's alleged acts of destroying and precluding an adequate investigation into Lawrence Ocrannt's death that form the basis of [the court's ruling denying Gates and Sexton qualified immunity]."

See Exhibit 5 page 2, Stump v. Gates unpublished opinion of the 10th Circuit.

Plaintiffs have alleged, and the evidence produced during pre-trial discovery, when viewed in a light most favorable to the Plaintiffs, establishes that other students at the Colorado School of Mines caused the murder or wrongful death of Rio Nicholas and the Defendants intentionally failed and refused to conduct even the most rudimentary of investigations into the cause of death. Instead, in order to protect the School of Mines' reputation, Defendants made an almost immediate determination that the cause of death was accidental drug overdose. It is this intentional conduct of the Defendants that Plaintiffs claim was *the means by which they deprived Plaintiffs of their access to the courts*—by depriving them of evidence they could have used to prosecute a wrongful death action against those responsible for the death of their son.

The clearly established constitutional right of access to the courts, taken with Plaintiffs' well-plead allegations of deliberate suppression and concealment, satisfy the rule in this circuit that the §1983 complaint must include "all the factual allegations necessary to sustain a conclusion that defendant violated clearly established law." *Sawyer v. County of Creek*, 908 F.2d 663 (10th Cir. 1990). Thus, the burden has shifted to the Defendants to show that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law.

The Defendants have offered the following admissions in their brief *that genuine issues of fact exist as to the interpretation of their conduct* that Plaintiffs allege

constitutes evidence of a deliberate intent to avoid conducting a competent death scene investigation to sweep the matter under the rug:

. . . [E]ach allegation set forth by Plaintiffs is capable of an equally innocuous explanation.⁵ . . . There is no doubt that reasonable officials could disagree with respect to the circumstances surrounding the death of Plaintiffs' son.⁶

These admissions settle the matter of disputed facts on the issue of qualified immunity—Defendants' motion for summary judgment must be denied because here the evidence must be viewed in a light most favorable to Plaintiffs. *Nelson v. McMullen*, supra, at 1205.

Defendants argue further that, “even when assuming *arguendo* that the Defendants deprived Plaintiffs of some constitutionally protected right, Plaintiffs have presented no evidence, [sic] which would support a conclusion that any of these Defendants knew or should have known that their activities would violate Plaintiffs' constitutional rights.” It is exactly this kind of reasoning that underlies the requirement that the constitutional right that is the subject of the alleged deprivation under color of state law be “clearly established.” Once that right is shown to be clearly established, it makes no difference that the defendant officers did not know it was. Any intentional or deliberate conduct that cause a deprivation of that right will constitute a violation of 42 U.S.C. §1983.

V. Conspiracy

In their motion for summary judgment, the Defendants argue that Plaintiffs' conspiracy claim is deficient, arguing that in addition to agreement and concerted action, the plaintiffs have failed to show that the conspiracy's goal was to deprive the plaintiff of a constitutionally protected right. Further, Defendants argue that the claim of

⁵ Defendants' Brief in Support of Motion for Summary Judgment, p. 4

⁶ Ibid, p. 8

civil conspiracy requires proof of an unlawful intent. The issue of whether denial of access to the courts is constitutionally protected is discussed above while the Defendants establishment of an agreement to undertake an unlawful objective are set forth below.

A. The Agreement

Immediately after Rio Nicholas's dead body was discovered on the morning of December 6, 2001, the four Defendants in this action gathered outside Rio Nicholas' dorm suite. See Robert Francisco deposition, Exhibit 8 pages 40-41. That is when the agreement was reached that this would be investigated solely as a self-inflicted drug overdose and not as a homicide. During his deposition, Defendant Francisco acknowledged that agreement was reached at that meeting;

8 Q Let's look at the bottom of page 10,
9 if you would. The last paragraph says, "Francisco
10 confirmed the standing theory that Nicholas died of
11 a self-inflicted cocaine overdose. The hypothesis
12 was that he injected the drug directly into an
13 artery while in the shower."

14 Is that your understanding of the
15 theory?

16 A It's my understanding, correct.

17 Q "When he collapsed, he blocked the
18 shower drain, which resulted in the flooding."

19 Is that your understanding?

20 A Yes.

21 Q "He first heard the scenario from
22 the investigators at the dorm that morning."

23 What investigators did you hear that
24 from?

25 A Whoever was there, whether it was

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1 the Golden officer -- I don't know exactly who.

2 Q The last page, it says, "When the
3 death hypothesis was articulated, there was no
4 disagreement."

5 Is that your recollection?

6 A Which paragraph?

7 Q "When the death hypothesis was
8 articulated, there was no disagreement."

9 Is that your recollection?

10 A It's my recollection, yes.

11 Q "Those present nodded their heads in
12 agreement."

13 That's your recollection?

14 A Correct.
 15 Q "Thereafter, around 9 a.m., the
 16 rooms were released back to the students so they
 17 could get ready for classes."
 18 That's your recollection?
 19 A Correct.

Francisco Deposition, Exhibit 8, pages 145-146.

B. Motive for the Agreement

Defendants have always been intent on proving that this was a self-inflicted drug overdose and not a suicide or homicide in order to protect the reputation of the Colorado School of Mines. Indeed, Defendant Boyd indicated in an email to the parents of Rio's roommate that he was intent on trying to prove that this was an accidental drug overdose, not that he was searching for what really happened. During his deposition Defendant Boyd testified as follows:

4 Q (By Mr. Novak) This is Deposition
 5 Exhibit No. 41, and I'm going to quote a portion of
 6 it so it goes in the transcript, and then I'm going
 7 to offer it up to you.
 8 **Quote, I'm trying to provide enough**
 9 **evidence to the Nicholas family to prove that the**
 10 **death of their son was an accidental event and not**
 11 **something caused by a prank or criminal intent.**
 ...
 20 Exhibit No. 41, can you identify
 21 that?
 22 A Yes.
 23 Q Who wrote it?
 24 A I did.

[Emphasis added.] Exhibit 9 Boyd deposition, page 153,.

Colorado School of Mines Dean of Students Defendant Chevront testified that the School of Mines was concerned about prior suicides and its reputation as a stressful place when he sent a memo out the morning of Rio's death that "drugs were the suspected" even before any toxicology tests or autopsy had been performed:

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 23 Q What kind of misunderstandings,

24 rumors, or gossip were you attempting to minimize
25 by sending out the e-mail that you eventually sent
page84

1 out that morning?

2 A What had been the cause of death,
3 that it wasn't a suicide, that type of thing...

age 86

Q Did you and/or Trefny have concerns
11 about the school's reputation in the community at
12 that time?

13 A No. I think the major concern was
14 getting back to those suicides. Because some of
15 the concerns that came up when we had the student

16 suicides were that the School of Mines is a
17 difficult, stressful place, is that what's causing
18 -- is that stress what's causing students to commit
19 suicide.

20 And stress certainly does have a lot
21 -- and a lot of those situations were different.
22 And I think that was the primary concern we had, as
23 well as making sure the campus knew what had
24 happened and that it wouldn't be perceived as a
25 suicide and that type of thing.

Exhibit 10, Chevront deposition, pp. 83-86

Whether they were worried about the implications to the School of Mines' reputation of another student committing suicide or being killed by a fellow student, it is clear that Defendants' motive was to protect the School, not to conduct a proper investigation into what had happened to Rio Nicholas. Defendants' conduct, in intentionally failing to search for or obtain evidence and then destroying what evidence existed, was improper and unlawful.

C. Unlawful Acts

In *Strachan v. City of Federal Heights*, 837 F.Supp. 1086, 1091 (D. Colo.1993), also a §1983 case, the court noted that there, as in most conspiracy cases, the plaintiff must rely on circumstantial evidence to prove conspiracy, citing. *Stump v. Gates*, *supra*. That court concluded that the conspiracy claim should go forward as, when viewing the record in the light most favorable to the plaintiff, a genuine issue of a fact

remained as to whether the defendants created or concealed evidence. [Emphasis added.]

We have discussed above Defendants' actions in failing to obtain and destruction of evidence. However, even more shocking is Defendants' creation of evidence through misrepresentations to the media that it was the Plaintiffs who requested that no autopsy be performed on their son. Defendant Chevront testified as follows about the School of Mines press release that the Plaintiffs did not want an autopsy:

19 Q The statement I want to ask you
20 about here in particular is, quote, It is our
21 understanding that Mr. and Mrs. Nicholas requested
22 that no autopsy be performed, and the body was
23 released to the parents on December 7th, closed
24 quote.

25 Do you know anything about that
p122

1 statement, any personal knowledge about it?

2 A No, other than I believe that was
3 made by Rich Boyd, because he's the person that
4 talked with the coroner's office.

5 And any conversation afterwards
6 would have been what he told me. So I believe
7 that's Rich's statement.

8 Q He's the source of that statement,
9 then, is what you're saying?

10 A I believe so.

Exhibit 10, Chevront Deposition, pp. 121-122.

When asked about the school's press release that was released to the media, Defendant Boyd claimed that the Deputy Chief Coroner Triena Harper was the source of the information that the family did not want an autopsy. Boyd claimed that Harper told him the body was to be sent back without an autopsy, although he admitted he did not prepare a memo or note of this alleged conversation.

Exhibit 9, See Boyd Deposition, pp. 184-185, 191-192,.

Chief Deputy Coroner Triena Harper was asked about Defendant Boyd's assertion that she told Boyd the Nicholas family did not want an autopsy and testified as follows:

- 8 Q Did the family ever make -- Johnny and
9 Brenda Nicholas make a request to you that no
10 autopsy be performed in this case?
11 A No.
12 Q Okay. I asked a bad question. Was a
13 request for no autopsy ever made by my clients?
14 A Was a request?
15 Q Yes.
16 A Not to my knowledge.
17 Q Did you -- Was one made to Kimberly
18 Route?
19 A Not to my knowledge.
20 Q Okay. Now, Chief Boyd said that that
21 came from you. Is that not true?
22 A That what came from me?
23 Q That he heard from you that the family
24 requested no autopsy be performed.
25 MS. McCANN: I'll just object to the

66

- 1 form of the question.
2 You can go ahead and answer it.
3 A Say it again.
4 Q (BY MR. MAHONEY) Chief Boyd represented
5 that the source of the information that the family
6 had requested no autopsy was to be performed came
7 from the Jefferson County Coroner's Office.
8 A I don't remember that. I don't remember
9 them not -- or requesting not to have an autopsy.
10 Q And if such a request was made, wouldn't
11 you probably note that in the file?
12 A Probably.
13 Q And there's no such notation in the
14 file, is there?
15 A No.
16 Q I'm sorry. Is there a notation in your
17 file of a request by the family that no autopsy be
18 performed?
19 A No.
20 Q And if a family requested that no
21 autopsy be performed but you thought it was
22 appropriate, what would you do?
23 A Go ahead and do it.

Exhibit 11, Triena Harper Deposition pp 65-66.

In this case, we have the Defendants' acknowledgements that they destroyed the 92 syringes found in Rio's room without ever examining them, they did not preserve and or test the blood found in the shower, they failed to undertake any action to assure that an autopsy was performed and failed to perform even a rudimentary investigation into Rio's unattended death. Moreover, Defendants made false representations that Plaintiffs were the reason no autopsy was performed on Rio Nicholas' body. These unlawful actions are substantially similar to the acts the court in the *Stump v. Gates* case found sufficient to support a conspiracy claim. This court should find that, at minimum, sufficient questions of fact exist as to whether Defendants concealed or created evidence to permit the conspiracy claim to go forward.

E. Conclusion

This Court should deny Defendants' motions for summary judgment. The court should find that there are questions of fact as to when Plaintiffs should have discovered sufficient information to establish their denial of access of court constitutional claims, as the evidence confirming that Rio did not die as Defendants alleged did not come to light until the spring and summer of 2005. Moreover, the Court should conclude that as a matter of law Plaintiffs timely filed their denial of access to the courts claim as they were filed within two years of the extinguishment of Plaintiffs ability to file a wrongful death claim.

In denying the Defendants' motion for summary judgment based on qualified immunity, the court should find that Plaintiffs have satisfied their two-part burden of establishing that Defendants, through their conduct of destroying evidence, failing to obtain evidence and creating false evidence, violated Plaintiffs' established right of access to the courts to pursue a wrongful death action against their son's assailant(s).

Finally, the court should deny Defendants' motion for summary judgment to strike Plaintiffs' conspiracy claim. The court should find that Plaintiffs have set forth sufficient supported factual allegations that Defendants conspired to protect the School of Mines reputation by agreeing to label Rio Nicholas' death a drug overdose and thereafter unlawfully destroyed evidence and made false assertions to support that agreement.

Respectfully submitted this 8th day of January, 2007.

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CERTIFICATE OF SERVICE

I hereby certify the foregoing was served upon all parties herein by E-Filing and service through the ECF system maintained by United States District Court for the District of Colorado, this 8th day of January, 2007 to the following:

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Office of the Attorney General
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*Printed Copy w/ original signature on file
at The Law Offices of W. Dan Mahoney, P.C.*

s/ Pesia Lenczner

**LIST OF EXHIBITS FILED WITH PLAINTIFFS' MEMORANDUM OF
AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT**

1. Plaintiff Brenda Nicholas deposition pp.27, 38-39
2. Dr. Joe Batuello April 2005 report
3. Dr. Linda Norton June 2005 draft report
4. NMS Laboratory August 2005 report
5. *Stump v. Gates*, Tenth Circuit unpublished opinion
6. Detective Sergeant John Belk report
7. Detective Sergeant John Belk deposition (entire transcript)
8. Defendant Robert Francisco deposition pp. 40-41, 145-146
9. Defendant Richard Boyd deposition pp.153, 184-185, 191-192
10. Defendant Harold Chevront deposition pp. 83-86, 121-122
11. Jefferson County Deputy Coroner Triena Harper deposition pp. 65-66.
12. Dr. Linda Norton Deposition (entire transcript)
13. Affidavit of John Nicholas