No. 76010-6-I

COURT OF APPEALS DIVISION I

STATE OF WASHINGTON

MICHAEL SEGALINE,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES and ALAN CROFT

Appellants

RESPONDENT'S PETITION FOR REVIEW

AND CERTIFICATE OF SERIVCE

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PETITIONER: Plaintiff/Respondent, Michael Segaline.

CITATION: The Court of Appeals published its opinion on July 17, 2017. ("Opinion", Appendix I, pp 1—22); it requested a response to a timely Motion for Reconsideration (Appendix II) and entered an Order denying the Motion for Reconsideration. (Appendix III). This case was the subject of 2 past appeals,[1] but the instant issues were never reached on the merits.

A STATEMENT OF ISSUES.

Accept Review of the decision granting Qualified Immunity, and reversing a jury verdict per RAP 13.4 (b), (1) through (4)

1. The Opinion conflicts with controlling federal and state authority by accepting the State's arguments as fact, thus foreclosing plaintiff from the benefit of facts proved to the jury.
2. The Opinion conflicts with U.S. Supreme Court cases that deny Qualified Immunity when there is a factual dispute, erroneously relying upon 4th Amendment exigency cases.
3. The Opinion is in conflict with Washington and 9th Circuit cases which require a detailed factual analysis on plaintiff's facts, RAP 13.4 (2), and (3).

[1] *Segaline v. State Dept. L & I* 169 Wn. 2d. 467, 238 P.3d 1107 (2010) and *Segaline v. State Dept. L & I*, 176 Wn. App 1012 2013 WL 6843617 (2013)

4. The Opinion is in conflict with the venerable Due Process values established since the 1970's, failing to apply them.
5. The Opinion conflicts with established authorities by omitting any analysis of the mandatory *Matthews* factors, and substituting a new and erroneous burden on Plaintiff to find an identical case that prohibited the state's decisions.

Review the decision reversing a jury verdict on the basis that due process is a decision of law, without addressing the conflicts with case authorities, CR 51(f), and important public policy issues regarding the meaning of juries in a due process case. RAP 13.4 (b) (2)—(4).

6. The opinion fails to defer to the jury findings inherent in the Jury Instructions, and instead reverses a jury verdict, a significant issue of public policy.
7. The Opinion bases its reversal of a jury verdict on a 1973 case that involves no salient relevant issues.
8. The Opinion conflicts with CR 51 (f) and interpreting authorities, reversing a jury verdict when an exception was not preserved.
9. The Opinion omitted analysis regarding the facts that were properly submitted to the jury, such as reasonableness, that inhere in the jury verdict.
10. The Opinion conflicts with established State authorities by failing to require the State to demonstrate a likelihood of a different result to achieve reversal.

A "REASONABLE OFFICIAL" COULD NOT HAVE BELIEVED HE ALLOWED MINIMAL DUE PROCESS, WHEN VIOLATING CLEARLY ESTABLISHED LIBERTY RIGHTS

The Opinion reversed a jury verdict of almost $1,000,000.00. Croft—a safety and Health Manager for the East Wenatchee Region—violated Electrician Segaline's liberty interest to enter the Dept. of L & I (L & I) for electrical permits for his business, during a continuous several-month period.[2]

The case proceeded to trial after the judge below denied qualified immunity and found genuine issues of fact regarding what Croft reasonably knew at the time and whether he provided, or believed that he provided, due process. The Opinion acknowledged (at p. 15) a liberty interest was violated, triggering the right to due process. But it granted Qualified Immunity to Croft who did not provide minimal process. Any reasonable official would have known about minimal process, per benchmark U. S. Supreme Court cases since the 1970's. Yet at trial, Croft admitted there was no notice, right to appeal, or impartial review; Croft intended to exclude Segaline as long as he arbitrarily *personally*

[2] For a period of time from June 19, 2003 to October 2003, Segaline's liberty interest was continuously abridged by exclusion from L & I, RP 355-356 This ongoing action was a fact found as a matter of law by the Trial Judge in his determination Segaline established a continuing violation for statute of limitations purposes. RP 883-884, and was jury finding per Instruction #12, Appendix V hereto. This finding was not appealed and cannot be contested by the State.

determined.[3] The unjustified and particularly flagrant denial of process crippled Mr. Segaline personally and professionally. (See Jury Verdict, Appendix IV)

Although Croft's knowledge of the facts and circumstances, and whether any process was offered, were disputed facts tried to the jury, The Opinion reversed this verdict, by requiring plaintiff to cite a case specifically determining, "whether a government official violates an individual's right to due process by issuing a trespass notice in response to 'arguably threatening and harassing behavior'."

The analysis is driven by facts, and the Opinion mischaracterized the facts at trial. Controlling authority rejects a standard of "arguable" facts. Plaintiff proved at trial that Croft knew *at the time* he was no threat, and that Croft spent 11 days considering how to violate his liberty rights before arbitrarily "trespassing" him. The Opinion focuses upon a make-shift "trespass notice" that Croft admittedly just "wrote up." RP 433. It ignores the months of exclusion, and applies none of the controlling *Matthews* factors. It fails to views facts and circumstances reasonably known or knowable by Croft, in deference to plaintiff's evidence and the

[3] Repeatedly admitted by Croft when testifying about his intent about the effect of the "notice" to exclude Segaline, also called "trespass notice" herein. RP 457, 344, 355.

jury verdict. It ignores that any reasonable official is aware of minimal process per controlling law. It errs by granting qualified immunity when there was a factual issue about the official's reasonableness, extensively tried and argued to the jury.

By requiring plaintiff to produce a case that "in 2003 to issue the Trespass Notice violated the right to due process," the Opinion reframes decades of due process and of qualified immunity decisions that map the fair, balancing process when a citizen is deprived of liberty to enter a public place to practice his occupation. The effect of the Opinion is that although this Electrician was deprived of his liberty, there is no remedy

The Opinion confuses Fourth Amendment cases on exigent public safety decisions with the established right to minimal due process. It adopts reasoning, usually applied in emergencies, which *if applied to non-exigent due process issues, such as here,* will allow any public official to deny minimal due process by claiming there is no specific case prohibiting his exact conduct. Values such as fairness are not factors in this Opinion. Review is essential, to preserve due process rights of citizens in this State.

The Opinion also, without analysis, reversed the jury verdict based upon objections to the Due Process jury Instructions, (# 12 and 13, Appendix V), although the State did not preserve the issue, or offer a

viable alternative; the jury considered correct due process principles, and the State demonstrated no likelihood of a different result if reversed. There are no Washington cases supporting this rash act.

The Opinion departed from controlling authorities by failing to analyze minimal process due; it delivers a flawed qualified immunity decision and no guidance on whether a jury verdict can or should be reversed. Review to prevent Washington from becoming a Maverick Due Process State, and to address jury and Instruction issues likely to recur, should be accepted.

STATEMENT OF THE CASE: THE OPINION USED STATE'S "ARGUABLE" FACTS, NOT PLAINTIFF'S FACTS OR TRIAL FACTS PROVED TO JURY

The Opinion states that it must apply disputed facts in favor of plaintiff; this is critical. Facts drive the legal analysis. However, contrarily, the opinion uses the State's "arguments," and not the contested, and dispositive, facts in evidence at trial and found by the jury.

Trial evidence contested and proved there was no reasonable safety issue. The Opinion adopted the State's version, at pp 2-3:

1. Guthrie filed an incident report on June 9, in a telephone conversation, Segaline "threatened to bring a tape recorder and start legal proceedings", said "a lot of people would be behind bars". . .

2. Sanchez filed an incident report about Segaline's bahavior on June 13, that he was "very mean and demeaning" "very frustrated, " and she was "afraid to help him at the counter as to what he might do or say to me", and she checked the pre-printed "harrassment" box on the form.. . .

3. Guthrie filed another report for the June 13 incident because he accused her of "not following the RCW's " and he would "file a tort claim.". . .

4. Hawkins' testimony about two incidents, a phone call and one in-office incident, were that he was "quite threatening in his verbal language , very aggressive, and threatening and intimidating, red faced.", yelled, and said, "One of us is going to jail."

Yet at trial, evidence showed no true "threats" and Croft had already investigated these incidents before his critical June 19 meeting, RP 319, and did not view them as harassment or as safety issues, RP 319-321:

--Sanchez testified that usually Segaline was "very, very nice." RP 566. Her term "afraid" meant, "afraid" that he would yell, RP 573, but *never* afraid he was violent. RP 573, 579.

-- Croft *admitted* that the telephone conversation on June 9 was not disruptive or harassing RP 329, 334. RP 334.

-- Croft *admitted* that "threatening" to sue and that L & I was wasting his time, was not a threat or harassment. RP 345. Per written policy and Croft's testimony, "I'm going to get you," "better watch out", "I'll get you fired," "I'll sue you"--"These comments happen but are not threats under our rules." RP 345, 348, 455-457.

-- Croft did not believe there was harassing behavior at the time.[4] His letter for the June 19 meeting referred to "any misunderstandings," RP 318. He excluded Segaline only for saying that "someone" was going to jail, that he would hire a lawyer and sue L & I, and his "tone of voice," and "nothing else." RP 344-345. He conceded that Segaline was *never* an immediate danger. RP 348.

--Croft had read all the staff reports prior to the June 19 meeting; RP 319. He could have, but did not, investigate Sanchez' statement that Segaline was 'demeaning and mean." RP 331, 337. He met with Ms. Guthrie and Ms. Hawkins, RP 307, 315. After his investigation, he *had not concluded* that staff was being harassed. RP 318.

-- Ms. Guthrie testified that she did not consider Segaline a violent threat, and she did not feel threatened by him. RP 796-7.

--Ms. Hawkins' testified that Mr. Segaline "yelled" for a minute, but she did not write a report. RP 474. She had no other problems when serving him, either from 1991—2002 or since 2003. RP 483, CP 470. Croft knew or had access to all this information.

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[4] He only classed them as "harassment" because there was more than 1 event. RP 415.

The Opinion has no factual basis to find there was "arguably threatening behavior."

-- Croft described Segaline at the June 19 meeting as a "balloon about to pop", but Segaline did not yell, use profanity, RP 339, or threaten RP 323. Croft called the police at the end of the meeting solely from "surprise" that Segaline left the meeting. RP 404-405. His objective reasonableness was a contested fact at trial.

Evidence at trial revealed no threat, no immanency, and no cause to violate a liberty interest, all known by Croft at the time he "wrote up" the notice, several days later, and given to Segaline June 30, after 11 days..

The Opinion's erroneous analysis based on "arguably threatening behavior," converts the State's losing arguments into the facts of the case.

No Incidents of concern to Croft after June19, but Segaline was arrested and charged with a crime when he entered L & I to obtain an electrical permit.

It is uncontested that there were no incidents from June 19 to June 30, 2003. RP 192. Yet on June 30, while peacefully trying to buy a permit, Segaline was refused service, and given the "trespass notice."

On August 23, Segaline entered the L & I office to buy a permit. He was arrested, jailed, and charged with trespass. RP 105—110. The

criminal charge was dismissed. RP 194. Croft *admitted* that Segaline was not harassing or disruptive on June 30, or in August. RP 350-352.

Uncontested testimony by Croft admitting lack of due process

The Opinion ignores the evidence at trial that proved Croft never provided minimal due process to Segaline either pre or post exclusion.

Croft *admitted* to no notice or hearing before he decided to exclude Segaline—he just "wrote it [trespass notice] up," RP 433, and he never informed Segaline of any concerns before a June 19 meeting. RP 318.

On June 19, Croft first mentioned to Segaline that he received complaints about harassment. RP 181-2. When Segaline denied it and asked Croft to explain, Croft *admitted* saying, "I don't know off the top of my head," never detailing any alleged conduct. RP 323, 182.

Croft alone directed the exclusion by trespass without prior notice, RP 353, and confirmed he could have easily written a letter regarding concerns or the proposal to exclude Segaline but he never considered it. RP 341. The "notice" said Segaline was no longer "licensed or permitted" to enter the office, because of "disruptive behavior, harassment of staff, and failing to follow instructions to contact the department." RP 87. It cited no incident, no facts, and set forth no L & I standards. RP 341-2. It did not tell how or when L & I might decide to allow Segaline into L & I,

or provide a review process. RP 341-344. A juror asked if Croft provided any appeal or review by a neutral party; he answered "No." RP 466.[5]

Croft's investigation regarding trespass notices, but disputed at trial, demonstrated willful ignorance

The Opinion endorses the State's argument that Croft prudently investigated the use of a trespass notice by talk with police and a mall security guard, and requesting an attorney general opinion. The testimony at trial shows otherwise. [6]

The police cautioned Croft that a trespass notice might not be possible because L & I was a public office. RP 324-5, 436. He knew about the public office issue. RP 417. More concerning, he had "gotten into trouble" previously for attempting a court protection order—the Attorney General told him it was not his job. RP 434. He knew correct protocol was through the State Patrol, Sgt. Patty Reed, to the Attorney General; he circumvented the process by acting before Reed or the AG advised him.

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[5] The notice told Segaline to call Mr. Whittle, an L & I supervisor who was at the June 19 meeting with Croft. He was Croft's subordinate, and he initially requested that Croft become involved. RP 311. This was evident in Croft's testimony about his intent that the effect of the "notice" to exclude Segaline, was to last until he personally decided to allow re-entry to the L & I office. RP 457, 344, 355

[6] The trial court excluded the content of opinions given to Mr. Croft and ruled they were irrelevant to the legal standard of due process. This ruling was not appealed by the State. In fact, Trooper Jarmin had advised Croft that Segaline was not likely dangerous given his lack of criminal history. Thus if the state had been able to present this data, it would not have been in its favor. RP 385.

RP 466-7; 435. He knew that excluding Segaline affected the business as a licensed and permitted electrician RP 437-8.

Four days *after* the June 19 meeting, He told his supervisor that he was exploring the "right of trespass." And "if valid" it should be pursued. RP 443. Sometime between June 23 and June 30, he unreasonably and arbitrarily decided to exclude Segaline. RP 444. It was properly the jury, not the Appeals Court, determining after days of testimony what Croft reasonably knew. The Jury acknowledged Segaline's substantial interest, and that Croft did not reasonably believe there was a danger, nor provide minimal process, all findings inherent in Instructions #12 and 13.

THE OPINION ERRONEOUSLY RELIES UPON POLICE/EXIGENCY CASES AND CONFLICTS WITH THE RULE TO DENY QUALIFIED IMMUNITY IF THERE IS AN ISSUE OF FACT.
The Opinion is in conflict with the U.S. Supreme Court cases it cites.

RAP 13.4 (b) (1), (3).

The Opinion cites *Harlow v. Fitzgerald*, 457 U.S. 800, 812, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), holding that qualified immunity, protects officials unless their conduct violates clearly established rights; but it ignored that the case *denied* qualified immunity and remanded for the trial court to evaluate *plaintiff's evidence* regarding the circumstance of deprivation, because a reasonably competent government worker should

know the law regarding his conduct. This controlling principle favors Plaintiff.

The Opinion cites *Pearson v. Callahan* 555 U.S. 223, 129 S. Ct. 808, 172 L. ed. 2d 565k 77 U. S. L. W. 4068 (2009), which *increased* trial court discretion to adapt its method in deciding whether a right is clearly established, and whether it was violated, using facts most favorable to Plaintiff. This case supports Plaintiff.[7] The Opinion also cites *Hernandez v. Mesa* 582 U. S. ____ (June 26, 2017), *reversing* a lower court's finding of qualified immunity and remending for consideratinn of what the officer reasonably knew or could have known. Plaintiff proved to the jury that Croft reasonably knew that he was no safety threat, but nevertheless arbitrarily excluded him indefinitely; *Hernandez* supports Segaline.

Other cases cited in the Opinion support Segaline and primarily analyze exigent situations.[8] *Anderson v. Creighton*, 483 U.S. 635, 640,

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[7] However, the *Pearson* facts, a warrantless search with 3d party consent, and exigency, are unlike Segaline. There, qualified immunity was granted because of significant conflict in legal precedent, not an issue here.

[8] *Mitchell v. Forsyth*, 472 U.S. 511, 524, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); (qualified immunity for a 1970 wiretap not determined illegal until a year later); *White v. Pauly* 137 S. Ct. 548, 196 L. Ed. 2d 463, 85 U. S. L. W. 4027 (2017) (qualified immunity in exigent circumstance for one officer, but respect trial court denial of qualified immunity for 2 officers when facts and circumstances of their knowledge was disputed); *Ashcroft v. al-Kidd*, 563 U.S. , 131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149 (2011) and *Reichle v. Howerd* ____ U. S. ____ (2012) 132 S. Ct. 2088, 182 L. Ed. 2n 985, 80 U. S. L. W. 4405, (both cases, no factual dispute of probable cause so qualified immunity); *Groh v. Ramirez* 540 U. S. 551, 124 S. Ct. 1284, 157 L. .Ed. 2nd 1068 (2004) (qualified immunity *denied* when the warrant did not specify items, and a magistrate's signature did not cure the officer's omissions. *Wilson v. Layne* 526 U. S. 603, 119 S. Ct.

107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), guides the fact finding process, holding courts must evaluate clearly established law and "in light of the law" whether a reasonable official would believe his actions lawful given the facts and circumstances with which he was presented. The Opinion avoids this mandate by only considering the State's version of facts.

The cited U. S. Supreme Court cases require higher clarity of the contours of a right in exigent circumstances, not a factor in this case. They unanimously *deny* qualified immunity when there is a genuine issue of fact regarding what the officer knew or could have reasonably known, and whether the officers acted reasonably. They support qualified immunity if the officers followed protocol, but not when they violate it, as Croft did. They all require the court to analyze plaintiff's facts, and they respect the trial court findings of issues of fact. Here, the trial court correctly found issues of fact, which were sent to the jury, and in light of those findings, properly denied a post-trial Motion for Qualified Immunity. Croft had no exigency. He had no reasonable cause to exclude Segaline indefinitely without notice, and provided no appeal or review by

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1692 143. L. Ed. 2d 818 , 67 U.S.L.W. 4322 (1999), (qualified immunity for an arrest when the officer *followed policy*)[8]; *Mullenix v. Luna* ___ U. S. ___ (2015); 136 S. Ct. 305, 193 L. Ed. 2d 255, 84 U. S. L. W. 4003, (Fourth Amendment excessive force case, right not sufficiently clear in a split-second exigency.); *Brouseau v. Haugen* 543 U S. 194, 125 S. Ct. 596, 160 L. ed. 2d 583 (2004) and *Plumhoff v. Rickard* _____ U. S. ____ (2014), 134 S. ct. 2012, 188 L. ed. 2nd 1056, 82 U. S. L. W. 4394, (both cases, qualified immunity based on exigency and danger to lives.)

an impartial person. These contested facts were the explicit subject for days, of testimony, hundreds of pages, and extensive argument by the State to the jury, which rejected the State's arguments.

The Opinion is in conflict with Washington and 9th Circuit Law which require a detailed factual analysis on *plaintiff's* facts, RAP 13.4 (2), and (3).

Federal and State cases, cited in the Opinion, require detailed factual analyses; reasonableness is a jury question.

Cunningham v. Gates 229 Fed.3d 1271 (9th Cir. 2000), an excessive force, 4th amendment case, *denied* qualified immunity, because of contested fact whether there was a warning or a reasonable belief there was a weapon. Here, without exigency, there is even a stronger basis for denial of qualified immunity. Similarly, *Davis v. Conley* 854 F.3d 594 (9th Cir 2017) *denied* qualified immunity when "reasonableness" was disputed, an agent had many days pre-detention to investigate, like Croft.

The Opinion cites 9th Circuit cases that support Plaintiff, but fails to discuss or follow their controlling methodology. *Shinault v. Hawks* 782 F.3d 1053 (9th Cir 2015), ruled that a pre-termination hearing was required; it balanced the *Matthews* factors, and because of a full administrative trial by judge before final deprivation, granted qualified immunity Here, Segaline received no *pre* or *post* process.

Baker v. Racansky 887 F.2d 18 (9th Cir 1989) similarly was a case in which a full hearing was provided within 72 hours, and preliminary taking was justified by exigency. (Cited in the opinion, without analysis.)

In *Brewster v. Lynnwood Unified School District* 148 F.2d 971 (9th Cir. 1998) a teacher, admitted receiving factual written notices, response periods, and a meeting. *Brewster* ruled, "it was not unreasonable under the facts for a government official to conclude that process was given," as it mapped the analysis for a minimal due process case, which must balance the *Matthews* factors on plaintiff's facts, and if the result clearly favors plaintiff, lack of "adequate, clearly established procedural protections" will defeat qualified immunity. The Opinion deprives Segaline of this methodology, and of his victory, incorrectly applying *Brewster.*

When the disputed fact is reasonableness of an official's decision, the case must go to trial. *Staats v. Brown*, 991 P.2d 615, 139 Wn.2d 757 (Wash. 2000) (the jury question if force applied was reasonable) *Mission Springs, Inc. v. City of Spokane*, 954 P.2d 250, 134 Wn.2d 947 (Wash. 1998) (qualified immunity, denied when official interfered with the issuance of a lawful permit, and remanded for trial).

Washington State cases also require that to evaluate qualified immunity, the court engages in a fact-specific inquiry, using *plaintiff's* facts. *Gallegos v. Freeman* 172 Wn. App 616, 291 P.3d 265 (2013). (Excessive

force case, with exigent circumstances irrelevant to plaintiff's factual disputes) The Opinion conflicts with *Gallegos* because it failed to consider plaintiff's version, to analyze those facts, or to apply the Matthews factors.

CLEARLY ESTABLISHED DUE PROCESS BALANCING TEST: NO QUALIFIED IMMUNITY, IF THERE IS NO MINIMAL PROCESS.

The Opinion conflicts with authorities; a reasonable official would know that minimal due process is clearly established, per leading decisions over the past 30+ years. RAP 13.4 (1), (2), and (3).

Goldberg v. Kelly 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed 2nd 287 (1970) required pre-termination "process" if deprivation of property (welfare benefits) caused exigency, defined as notice, reasons and facts relied on, and confrontation of witnesses. *Goss v. Lopez* 419 U.S. 565, 581, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), required pre-deprivation process if excluded from a State Created forum, public school. Due process is "fundamentally fair," and not "arbitrary" and *minimally* notice, including evidentiary facts. To cure deprivation, post process *must* afford the right to explain and respond within a reasonable time. *Bell v. Burson* 402 U.S. 535, (1971), defined minimal process "notice and opportunity appropriate to the nature of the case" *before* the termination. *(CP at 542),* for state-granted driving and occupational licenses. Segaline's liberty right to *minimal* process was clearly established in the 1970's, something a reasonable official knew in 2003. It was violated and not cured.

Matthews v. Eldridge 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976), articulated the balancing test if minimal process is required prior to constitutional deprivation.

Zinermon v. Burch 494 U.S. 113, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990 (pre-deprivation process, before "voluntary" mental illness treatment) ruled that where a violation of a clear constitutional right is foreseeable, pre-termination process must be provided. Segaine's deprivation of liberty was foreseeable, Croft had 11 days to ponder it.

Washington adopted these controlling rules before 2003: i.e., whether existing procedures are adequate to protect the interest at stake, and for an "opportunity to be heard at a meaningful time and in a meaningful manner." *Post v. City of Tacoma,* 167 Wn.2d 300 at 313, 340 P.3d 969 (2009), (citing *Mathews v. Eldridge*, (cit.omitted)). *Tellevik v. W. Rutherford St.*, 120 Wn.2d 68, 78, 838 P.2d 111 (1992) (adopting and applying the *Mathews* test).

Segaline's evidence to the jury, and the jury decision, established there was no process—no notice, facts, opportunity to respond, or review by an impartial person. There was no minimal due process.

The Opinion did not apply the Matthews factors.

(1) Private interest affected by the official action; Segaline's liberty interest in his occupation and entering L&I was substantial.

(2) Risk of erroneous deprivation through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. The risk when Croft unilaterally and arbitrarily deprived Segaline of his liberty interest, was high. Minimal procedures--fair notice of specific complaints or behavior and a reasonable chance to respond--would reduce the probability of arbitrary deprivation, especially with a neutral appeal.

(3) The Government's interest, the function involved and the fiscal and administrative burdens that additional procedures would entail. There was no Government safety or exigency concern.[9] Minimal due process is inexpensive. Notification by letter of specific facts, a procedure allowing a response, and a neutral third party to resolve the matter was reasonable and inexpensive. All this was considered by the jury.

This case requires review by Supreme Court, to preserve the proper application of those venerable standards.

In light of the law, a reasonable official would not have believed that he provided any minimal process

[9] While Segaline proved there was no safety concern, even if there had been, he was entitled to post-deprivation process; Croft's testimony for the State conceded there was no such process. Thus, even if the State survived the Matthews factors, it failed to provide any process and violated minimal process as a matter of law. The State argues on appeal, in conflict with its own witness, that it provided process. See RP 466.

The violatons by Croft are so eggregious that any reasonable official would know that some *minimal* form of due process must be afforded before or after deprivation of a clearly established liberty right. Pre-deprivation process was required because there was no exigency, the right is substantial, and a process could have avoided the deprivation. But unlike the *Shinault* and *Racansky* cases cited in the Opinion, Segaline received no minimal process *after* deprivation. Croft, who is required to be "a reasonable official," knew he did not provide process at any time.

The Opinion conflicts with caselaw before and after 2003 consistently finding a violation when there is no minimal process.

Case authorities nationwide consistently find Constitutional violations when no minimum process is provided. *Flatford v. City of Monroe*, 17 F.3d 162, 167-8. (6th Cir. 1994). (A notice to leave and a phone number not minimum process.) *Wayfield v. Town of Tisbury* 925 F.Supp 880 (1996) (a lack of minimal process in trespass notice of expulsion) *McGee v. Bauer*, 956 F.2d 730 (7th Cir. 1992) (no process provided but the case was reversed on other grounds.)

Pre-2003 law demonstrates the right was clearly established, and that Croft reasonably knew process was due and what it is minimally.

Post-2003 cases demonstrate that when process is due, lack of *minimal* process establishes a violation of rights, even if there is no case that

defines the exact process that would have been due. i.e., *Anthony v. State*, 209 S.W.3d 296, 307-8, (Tex.App.—Texarkana 2006) arbitrary trespass notice; [10] *Kennedy v. City of Cincinnati*, 595 F.3d 327, 337-338 (6th Cir. 2010);(denial of access to public grounds) *State v. Green* 157 Wn. App 833, 239 P.3d 1130 (2010)(trespass conviction reversed based on trespass notice issued without minimal process.).

The historical due process cases are consistent. The Opinion's methodology and conclusion are not sanctioned by established authority. The Supreme Court should assist litigants with the correct presumptions and methodology governing qualified immunity issues at trial court level.

THE OPINION REVERSES A JURY VERDICT BASED ON AN OBJECTION TO JURY INSTRUCTION NOT PRESERVED AT TRIAL. FALING TO DEFER TO JURY FINDINGS, AND FINDING NO PREJUDICE TO THE STATE.

The Opinion pronounces a secondary holding, reversing a jury verdict, without addressing the arguments by plaintiff below and providing no guidance to trial courts regarding the issues raised. There is little authority how to analyze a jury verdict that considers due process factors. Defendants never properly preserved this issue or proved a likely different

[10] The official relied upon an Ordinance allowing him to issue a Trespass Notice; here, Croft made up the notice without any authority, and Segaline's case is more egregious.

result. This is a reckless and unreasoned ruling that only confuses the law and how it applies to due process trials.

The jury verdict compels the Court to rule as a matter of law in the favor of plaintiff.

As a matter of law this court, deferring to the jury process, must not reverse the jury's verdict. See Appendix IV, Verdict, and V, Instructions)

The due process jury instructions (Appendix V, # 12 and 13) direct the jury to consider all of the *Matthews* factors, and *post* deprivation factors, and reasonableness. This is the same inquiry the court must make. Thus the jury verdict on these contested facts, merges with the issues of law. In deference to jury findings, contained in Instruction 12 and 13, the verdict must be upheld.

The Opinion relies upon one 1973 case that does not apply.

The Opinion cites *State v. Chambers* 81 Wn. 2d 929 (1973), upholding a trial court decision to reject jury instructions that would have informed a jury how to interpret tribal law terminology, "open unclaimed land." The case does not reverse a jury verdict; nor relate to issues before this court.

The Opinion conflicts with established authorities that interpret CR 51 (f), that unpreserved error is waived.

CR 51(f) provides:

> [t]he objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.

The State did not preserve an objection in the Trial Court, that the Due Process analysis is a matter of law.[11] An objection at the trial court level without adequate specificity cannot be the basis for reversal of a trial. *Haugen v. Minnesota Mining & Mfg. Co* 15 Wn. App 379, 550 P.2d 71 (1976); *Truex v, Ernst Home Center* 124 Wn. 2d 334, 878 P.2d 1208 (1994). *McGee v. Bauer*, 956 F.2d 730 (7th Cir. 1992), cited in the Opinion, also ruled that an objection not preserved is waived.

Cases above have provided that "reasonableness" of officials' actions can be submitted to the jury.

The Trial court listed the *Matthews* factors in jury instruction #13, correctly submitted the reasonableness issue, and instructed on post-deprivation process. The jury found a lack of process, and reasonableness, as matters of fact.

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[11] The objection was not preserved; the court inserted the State's requested language into instructions #12 and 13, and the state indicated it did not further object. RP 1015; 1019 (State won't except to # 13); State asks that its language, "notice and opportunity to be heard " as proposed in its Instructions 2 and 3 be added, RP 1033, and the court revised #13 by adding the language, with no further objections. RP 1038-1039. The State's general objection to Instructions 9—13 were only as they relate to "Qualified Immunity." RP 1042

The Opinion cites *McGee v. Bauer*, 956 F.2d 730 (7th Cir. 1992) where the jury instruction asked if there was "due process." Unlike in Segaline, the *McGee* court did not define "due process." Yet, *McGee* did not reverse, and instead *deferred to* the jury verdict for "McGee's version of the facts that relate to Bauer when supported by the evidence." Id at 735. It found due process violated. (Case reversed on issue of the authority of a defendant, an issue conceded by Croft and not germaine in this case.)

Even if a jury instruction is erroneous, it is not grounds for reversal unless the party demonstrates that the outcome of the trial would likely be different. *Torno V. Hayek* 133 Wn. App 244, 135 P.3D 536 (2006).

The trial record contains evidence substantially supporting the jury verdict. The Due Process Instruction (Appendix V) is a correct statement of the law. This was not contested at trial. Like *McGee* the court must defer to the jury. Defendant cannot demonstrate a likely difference in trial outcome and the Opinion, failing to apply this standard, conflicts with established law and the province of the jury.

Expanding the reasons to reverse a jury verdict because of a jury instruction, is a significant issue of public policy. That the Supreme Court should review.

Reversal of a jury verdict without a specific preserved objection, proof of prejudice, and authoritative analysis cuts to the heart of the validity of

the jury system. It conflicts with established authorities. It is a substantial issue of public policy affecting litigants, particularly Civil Rights litigants, regarding which there is scant analysis in Washington caselaw. This court should review these issues. See *State v. Watson*, 155 Wn.2d 574, 122 P.3d 903, (2005) (When determining the degree of public interest involved, courts consider (1) the public nature of the question (2) the desirability of an authoritative determination for the future, and (3) the likelihood of future recurrence of the question. Id.; *In re Mines*, 146 Wn.2d 279, 285, 45 P.3d 535 (2002); *In re Post-Sentence Petition of Combs*, 353 P.3d 631, (2015)

CONCLUSION

The Opinion should be reviewed, and reversed. A correct analysis respecting juror decisions should be provided, using the *Mathhews* Analysis and upholding the right to minimal process for licensees excluded from public offices. Croft is not entitled to qualified immunity because no reasonable official would have believed, in light of the law, that he provided process. The jury instruction should not be the basis for reversal of the verdict.

The jury verdict and all costs should be re-instated. Per 42 USC 1983 attorney's fees and costs should be awarded to Segaline for this appeal.

CERTIFICATE OF SERVICE: I hereby certify that I caused a true copy of the following documents: Petition for Review, Respondent's Motion And declaration

to Grant Enlargement of Pages for Petition for Review, and this certificate of service to be delivered to the attorney general at his address of record, to wit:

Attn: Patricia D. Todd, Torts Division

71741 Cleanwater Dr. S.W., Third floor, TORTS

Olympia, WA

By legal messenger, for delivery on October 27 2017, and e-mailed on October 26, 2017.

DATED this 26th day of October 2017.

Law Offices of Jean Schiedler- Brown, P. S. WSBA # 7753

Jean Schiedler-Brown, Attorney for

Segaline

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL SEGALINE, a single person, Respondent, v. THE STATE OF WASHINGTON, DEPARTMENT OF LABOR AND INDUSTRIES and ALAN CROFT, Appellants.	)	No. 76010-6-I DIVISION ONE PUBLISHED OPINION FILED: July 17, 2017

SCHINDLER, J. — The doctrine of qualified immunity shields a government official from civil liability and money damages unless the plaintiff shows violation of a constitutional right that is clearly established at the time of the challenged conduct. The Washington State Department of Labor and Industries and Regional Safety and Health Coordinator William Alan Croft appeal the jury verdict in favor of Michael Segaline on his 42 U.S.C. § 1983 claim against Croft.[1] The Department of Labor and Industries and Croft contend the court erred by denying the motion for judgment as a matter of law on qualified immunity and instructing the jury to decide the legal question of due process. Because Segaline did not show that Croft violated a clearly established right when he

[1] This is the third appeal in this case. See Segaline v. Dep't of Labor & Indus., 144 Wn. App. 312, 182 P.3d 480 (2008); Segaline v. Dep't of Labor & Indus., 169 Wn.2d 467, 238 P.3d 1107 (2010); Segaline v. Dep't of Labor & Indus., 176 Wn. App. 1012, 2013 WL 6843617, at *1 (2013).

issued a trespass notice in 2003, the court erred in denying judgment as a matter of law on qualified immunity and dismissal of the 42 U.S.C. § 1983 claim. We reverse the jury verdict on the 42 U.S.C. § 1983 claim and remand to vacate the judgment and award of attorney fees.

FACTS

The Washington State Department of Labor and Industries (L&I) is responsible for issuing permits for electrical work. In 2003, William Alan Croft worked as the L&I Regional Safety and Health Coordinator for the East Wenatchee office. The L&I Regional Safety and Health Coordinator is responsible for "safety, health, security, ergonomics, [and] emergency management."

Michael Segaline is a licensed electrician and the owner of an electrical contracting company located in East Wenatchee, Horizon Electric Inc. Segaline routinely obtained electrical permits at the L&I East Wenatchee office.

In June 2003, L&I Field Service Coordinator Jeanne Guthrie and L&I Customer Service Representative Jacqueline Sanchez filed "Safety & Health Security Incident Reports" about Segaline's threatening and harassing behavior.

Guthrie filed an incident report about Segaline's behavior on June 9. Guthrie said Segaline called her on June 9 about a "bogus" contractor deposit account. According to Guthrie, Segaline threatened to "bring a tape recorder in and start legal proceedings" and said a "lot of people would be behind bars." Guthrie describes the statements Segaline made as a "[t]hreat."

Sanchez filed an incident report about Segaline's behavior on June 13. Sanchez said Segaline wanted to pay for an electrical permit. When she told Segaline the permit

"had already been paid," Segaline told her that was "not 'his problem, it was L&I's problem,' " and L&I "could not refuse to take his money because it was in the RCW's." Sanchez states Segaline was "very mean and demeaning" and appeared "very frustrated and very red in the face and just very, very upset with me." Sanchez states she is "afraid to help him at the counter as to what he might do or say to me." Sanchez describes Segaline's behavior as "[h]arassment."

Guthrie also filed an incident report about Segaline's behavior on June 13. When Segaline attempted to pay for an electrical permit, Guthrie said she "could not take more money" because he had already paid. Segaline told Guthrie she "could not refuse to take the money." According to Guthrie, Segaline accused her of "not following the RCWs" and said he "would file a tort claim." Guthrie describes Segaline's behavior as "[h]arassment."

According to L&I employee Alice Hawkins, on June 9 and June 13, Segaline was "quite threatening in his verbal language, very aggressive and threatening and intimidating, red faced." Hawkins said Segaline "yell[ed]" and told her "one of us is going to go to jail, that I better get an attorney."

On June 19, L&I Electrical Program Supervisor David Whittle and Croft met with Segaline about the reported incidents. Segaline abruptly left the meeting and demanded to speak to Guthrie. Croft called the police and told Segaline to leave the office. Croft said Segaline appeared "like a balloon that was waiting to pop" with "a real rage going on underneath." Segaline left when the police arrived. One of the police officers suggested Croft draft a trespass notice for the police to "enforce in the future."

Croft had never issued a trespass notice before and was uncertain whether he could do so for a state agency office. The "primary" reason Croft wanted to issue a trespass notice was to protect "the safety of our staff." Croft contacted the Wenatchee Police Department Crime Prevention Unit and the Washington State Patrol trooper assigned to assist L&I with workplace violence about the procedure for issuing a trespass notice. Croft also asked the trooper to obtain an opinion from the Washington State Attorney General's Office. In addition, Croft reviewed the Revised Code of Washington provisions on trespass and the "workplace violence policy."

Croft drafted a "Trespass Notice." The Notice states Segaline engaged in "disruptive behavior" and "harassment of staff" and he is not "permitted, invited, licensed or otherwise privileged to enter or remain at the [East Wenatchee office]." The Notice states Segaline can "have this notice terminated" by obtaining the written approval of Whittle. The Trespass Notice provides, in pertinent part:

> TRESPASS NOTICE
>
> Date and Time Issued: 6/30/03 9:30 AM
>
> Trespassed Subject: Michael J. Segaline Date of Birth: 10/20/1956
>
> . . . .
>
> Trespassed for: disruptive behavior, harassment of staff and failure to follow instructions for contacting the department.
>
> The above individual has been trespassed from the Department of Labor and Industries, 519 Grant Road, East Wenatchee, WA 98802.
>
> Failure to comply with this notice may result in prosecution for trespass.
>
> The trespass notice was read by or to, and/or a copy of the notice provided to the above individual. The above individual is no longer permitted, invited, licensed or otherwise privileged to enter or remain at the Department of Labor and Industries above location.

. . . .

> To have this notice terminated, the subject must secure the written approval of David Whittle, Electrical Supervisor, prior to re-entry of the East Wenatchee Department of Labor and Industries service location. This trespass notice remains in effect until this approval is obtained.

Hawkins handed Segaline the Trespass Notice on June 30. When Segaline refused to accept the Notice, an L&I employee called the police. After a police officer handed Segaline a copy of the Trespass Notice, Segaline left the L&I office.

On August 20, Segaline called Guthrie and "yelled" at her about an "emergency permit." The next day, Segaline went to the office and an L&I employee handed him the permit. When Segaline went to the office again on August 22, an L&I employee called the police. The police arrested Segaline. The city of Wenatchee (City) charged Segaline with criminal trespass. The City later dismissed the criminal trespass charge.

On August 8, 2005, Segaline filed a lawsuit against the Washington State Department of Labor and Industries (Department). The lawsuit alleged (1) negligent infliction of emotional distress, (2) intentional infliction of emotional distress, (3) malicious prosecution, (4) negligent supervision, and (5) violation of his civil rights.

A year later on August 3, 2006, Segaline filed a motion to amend the complaint to name Croft as a defendant and assert a 42 U.S.C. § 1983 claim against Croft alleging violation of his liberty interest to be present in a public place without due process. The court granted the motion to amend.

The Department filed a motion for summary judgment dismissal of the 42 U.S.C. § 1983 claim against Croft. The court ruled the 42 U.S.C. § 1983 claim was barred by the three-year statute of limitations. The court also ruled, "Croft is entitled to summary

judgment in that he did not violate plaintiff's constitutional rights, and Croft is entitled to qualified immunity from suit."

The Department filed a motion for summary judgment dismissal of the claims alleging intentional and negligent infliction of emotional distress, negligent supervision, and malicious prosecution. The trial court ruled the Department was immune from suit under a statute that protects a person from liability for communicating a complaint to a government agency, RCW 4.24.510. We affirmed dismissal of the 42 U.S.C. § 1983 claim against Croft and the claims against the Department. Segaline v. Dep't of Labor & Indus., 144 Wn. App. 312, 317, 182 P.3d 480 (2008). The Washington Supreme Court granted review. Segaline v. Dep't of Labor & Indus., 165 Wn.2d 1044, 205 P.3d 132 (2009).

The Supreme Court held that because RCW 4.24.510 did not apply to a government agency, the Department was not immune from suit. The court reversed summary judgment dismissal of the claims against the Department alleging intentional infliction of emotional distress, negligent supervision, and malicious prosecution. Segaline v. Dep't of Labor & Indus., 169 Wn.2d 467, 479, 238 P.3d 1107 (2010).[2] The court affirmed dismissal of the 42 U.S.C. § 1983 claim against Croft as barred by the statute of limitations. Segaline, 169 Wn.2d at 479. In a footnote, the court declined to address for the first time on appeal Segaline's argument that the 42 U.S.C. § 1983 claim was "timely under the continuing violation doctrine." Segaline, 169 Wn.2d at 476 n.8.

On remand, Segaline argued the 42 U.S.C. § 1983 claim against Croft was not barred by the statute of limitations on a continuing violation theory. In a letter ruling, the

[2] Segaline did not seek review of dismissal of his negligent infliction of emotional distress claim. Segaline, 169 Wn.2d at 472 n.2.

trial court states the Supreme Court decision affirming dismissal of the 42 U.S.C. § 1983 claim against Croft as untimely is "the law of this case." The court states it is "too late to now raise the continuing violation theory." The court entered an order denying the statute of limitations motion on the 42 U.S.C. § 1983 claim against Croft.

The Department filed a motion for summary judgment dismissal of the claims for intentional infliction of emotional distress, negligent supervision, and malicious prosecution. In response, Segaline conceded there was no evidence to support the claim for intentional infliction of emotional distress. The court granted the motion. The court entered an order dismissing the lawsuit against the Department and Croft. Segaline appealed. We affirmed dismissal of the negligent supervision claim but concluded material issues of fact precluded summary judgment on the malicious prosecution claim. Segaline v. Dep't of Labor & Indus., 176 Wn. App. 1012, 2013 WL 6843617, at *7 (2013). We held the law of the case doctrine did not preclude the trial court from considering the continuing violation theory. Segaline, 2013 WL 6843617, at *9. We remanded to the trial court to exercise its discretion and decide whether to allow Segaline to raise the continuing violation theory. Segaline, 2013 WL 6843617, at *9.

On remand, the case was assigned to a different judge. Segaline filed a motion arguing the evidence showed the claim against Croft under 42 U.S.C. § 1983 was a continuing violation that was not barred by the statute of limitations. Segaline also argued there were material issue of fact about whether Croft was entitled to qualified immunity. Specifically, whether Croft "knew that the 'no trespass' notice might violate Mr. Segaline's rights." The Department argued there was no evidence of a continuing violation and the 42 U.S.C. § 1983 claim against Croft was barred by the statute of

limitations. The Department also argued that as a matter of law Croft was entitled to qualified immunity.

The court ruled there were material issues of fact as to whether the continuing violation theory applied and whether Croft was entitled to qualified immunity. The order states, in pertinent part:

> The court rules that there is a genuine issue of material fact that the continuing violation theory applies and the 42 USC 1983 action against Alan Croft will be allowed to be presented at trial and argued to have been timely filed. The court finds that there is a genuine issue of material fact whether Alan Croft is entitled to qualified immunity.

The Department filed a motion for reconsideration. The Department asserted that because Segaline did not carry his burden of presenting "case law that existed at the time when the no trespass notice was issued that would have informed Mr. Croft that his issuance of the no trespass order was a clear violation of due process," Croft was entitled to qualified immunity as a matter of law. The court denied the motion. The case proceeded to trial on the malicious prosecution claim against the Department and the 42 U.S.C. § 1983 claim against Croft.

At the conclusion of the evidence, the Department filed a CR 50 motion to dismiss the malicious prosecution claim and the 42 U.S.C. § 1983 claim against Croft. The Department argued the evidence established probable cause to arrest Segaline for violating the Trespass Notice.

> [T]here was an abundance of probable cause in [the arresting officer]'s testimony as he indicated the dangerousness, L & I employees appearing afraid, L & I employees hiding behind walls as if Mr. Segaline would shoot them, the irrational demands of talking to the Attorney General of the State of Washington or he would return.
>
> . . . .
>
> . . . There has been no evidence of malice as legally required to show ill will, hostility, improper motives, or to gain private advantage.

The Department asserted that because Segaline did not present evidence or case law to show the decision Croft made in 2003 to issue the Trespass Notice violated a clearly established constitutional right, Croft was entitled to qualified immunity and dismissal of the 42 U.S.C. § 1983 claim as a matter of law.

> In addition, plaintiff has not fulfilled the burden to establish what rights Mr. Croft knew he was clearly violating in regards to issuing that trespass notice. There's also been no case law that this Court has that establishes the issuing of a trespass notice was a clear violation of any rights. We know that Mr. Croft consulted law enforcement on at least two different times, retail security, the Assistant Attorney General. He reviewed the law, he reviewed Labor & Industries' policies, he acted as a reasonable official in his position as a safety and health coordinator. He is entitled to qualified immunity, and if the Court found that, there would be no civil rights claims remaining.

The court denied the CR 50 motion to dismiss but reserved ruling on the 42 U.S.C. § 1983 claim. The court ruled, in pertinent part:

> Now, as to the motion to dismiss the [42 U.S.C. § 1983] action, I am denying that motion as well. I am not today telling you, at least at this time, what matters are going to be allowed to be submitted [to] the jury as far as claims of how the plaintiff's constitutional rights were violated; however, in terms of deciding whether there is a sufficient basis to allow this matter to go forward, construing the evidence in the light most favorable to the plaintiff, I'm determining that there is, and so I'm denying the motions at this time. Although as I said, we've got lots of decisions to make and lots of argument that's going to go forward. I'll be ruling on those at some later time.

The court later ruled Segaline did not meet his burden of showing Croft violated a clearly established right in 2003 when he issued the Trespass Notice. The court ruled the jury would not consider whether the Trespass Notice violated clearly established law. But instead of dismissing the 42 U.S.C. § 1983 claim against Croft as barred by qualified immunity, the court ruled the jury would decide whether the Trespass Notice

violated due process. The court ruled, in pertinent part:

> I am going to rule and find that the trespass notice was not in 2003 an established legal procedure. There was not an established legal procedure. There was — there has already been testimony that there was discussion about what can or can't be done, what should or should not be done, and there's been argument by the plaintiff that it's clear now, based on the Green case, 2010,[3] that there were mistakes made.
>
> In ruling that I believe that was an ongoing issue that was not resolved in 2003. I intend to instruct the jury in some way, shape or form that the legal requirements of the trespass notice is not an issue for the jury to consider. There may be some argument about the procedure of giving the notice or telling Mr. Segaline that he could not come to the office of Labor & Industries in East Wenatchee. I'll address that more in a moment. But I am not going to instruct as to an alleged violation of [42 U.S.C. § 1983] that the trespass notice was legally ineffective.
>
> . . . .
>
> Having said that, however, I believe that there still is a [42 U.S.C. § 1983] claim that I'm going to allow to go forward, and that is, and I hesitate to say that I've got all this absolutely worked out in my own mind, but I'll just tell you in general terms how I see that. It's a due process claim under the Fourteenth Amendment[4] . . . that the decision to tell him that he could not come there did not allow him appropriate remedial — I don't want to use the term appeal, but an appropriate redress to address that.

The court instructed the jury that Segaline claimed that "by directing him not to come to the L&I office, Alan Croft deprived Michael Segaline of rights without due process of law as guaranteed by the Fourteenth Amendment to the Constitution."

The court instructed the jury that it could consider the timing of the Trespass Notice but could not "consider issues as to the legalities or form of the notice." The court instructed the jury that to prevail on the 42 U.S.C. § 1983 claim, Segaline must show that from June 2003 through October 2003, Croft deprived him of his liberty

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[3] State v. Green, 157 Wn. App. 833, 239 P.3d 1130 (2010).

[4] U.S. CONST., amend. XIV.

interest without due process.[5] Over the objection of the Department, the court instructed the jury on the legal factors to consider in deciding whether Croft violated due process.

The court instructed the jury that to prevail on the malicious prosecution claim, Segaline must prove there was no probable cause to charge him with criminal trespass and malice.[6]

By special verdict, the jury found in favor of the Department on the malicious prosecution claim. The jury found in favor of Segaline on the 42 U.S.C. § 1983 claim. The jury found Croft "violate[d] Michael Segaline's Fourteenth Amendment Right to enter a public office." The jury awarded Segaline $203,000 in economic damages and $750,000 in noneconomic damages.

The Department filed a motion for judgment as a matter of law. The Department argued that because the court ruled Segaline did not meet his burden to show Croft violated a clearly established right, as a matter of law Croft was entitled to qualified

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[5] Jury instruction 12 states, in pertinent part:

> To prevail on his [42 U.S.C. § 1983] claim Michael Segaline must prove each of the following by a preponderance of the evidence:
>
> That Alan Croft subjected, or caused Michael Segaline to be subjected, to deprivation, of his liberty interest to enter the East Wenatchee Department of Labor and Industries by keeping him out of the East Wenatchee Department of Labor and Industries from approximately June through October, 2003;
>
> That Alan Croft was acting under color of law; You are instructed that the parties agree that Alan Croft was acting under color of law;
>
> That Alan Croft acted intentionally; and
>
> That Alan Croft did not provide Michael Segaline with due process prior to depriving him of his interest.

[6] Jury instruction 15 states, in pertinent part:

> There was no probable cause for the institution or continuation of the prosecution;
>
> The proceedings were brought or continued through malice; and
>
> Mr. Segaline suffered injury or damage as a result of the prosecution.

The court instructed the jury that "probable cause" means "facts and circumstances known to an employee or officer that are sufficient to warrant a reasonably cautious person to believe that an offense has been or is being committed."

immunity and dismissal of the 42 U.S.C. § 1983 claim.

> Here, the Court ruled before the conclusion of the trial that Alan Croft was entitled to qualified immunity as to the contents of the trespass notice. However, there is no case that supports the application of qualified immunity in this fashion. The government official either has qualified immunity as to a stated act or not. The contents of the trespass notice cannot be separated from its issuance or timing. If Alan Croft has qualified immunity as to the trespass notice he is entitled to qualified immunity for the actions that flowed from it. . . . Absent a clearly established right, Mr. Croft is entitled to qualified immunity as a matter of law. . . .
>
> . . . Mr. Segaline has not and cannot come forward with any facts or case law that satisfies the shifting burden to establish the law was clearly established in June of 2003 determining what process was due. There simply was no law that Alan Croft knew or should have known that would prohibit his attempt to protect his employees. Alan Croft is entitled to qualified immunity and the jury's verdict should be vacated.

The court denied the motion for judgment as a matter of law.

ANALYSIS

The Department and Croft (collectively, the Department) appeal the verdict in favor of Segaline on the 42 U.S.C. § 1983 claim. The Department contends the court erred by denying the motion for judgment as a matter of law and dismissal of the 42 U.S.C. § 1983 claim and by instructing the jury on due process. The Department asserts Croft was entitled to qualified immunity as a matter of law because Segaline did not meet his burden to show that Croft violated a clearly established right when he issued the Trespass Notice in 2003 in response to arguably threatening and harassing behavior. We agree.

We review a trial court decision on a motion for judgment as a matter of law de novo. Paetsch v. Spokane Dermatology Clinic, PS, 182 Wn.2d 842, 848, 348 P.3d 389 (2015); Alejandre v. Bull, 159 Wn.2d 674, 681, 153 P.3d 864 (2007). To grant judgment as a matter of law, the court must construe all facts and reasonable inferences in favor

of the nonmoving party and conclude as a matter of law that " 'there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party.' " Paetsch, 182 Wn.2d at 848 (quoting Indus. Indem. Co. of the Nw. v. Kallevig, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990)).

42 U.S.C. § 1983 provides a cause of action against an individual who, acting under color of state law, deprives a person of a federally protected constitutional or statutory right.[7] Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 508, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990); Gonzaga Univ. v. Doe, 536 U.S. 273, 284, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002); Durland v. San Juan County, 182 Wn.2d 55, 70, 340 P.3d 191 (2014).

The doctrine of qualified immunity shields government officials from civil liability and money damages so long as " 'their conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known.' " Pearson v. Callahan, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)); Hernandez v. Mesa, No. 15-118, 2017 WL 272240917, at *4 (U.S. S. Ct. June 26, 2017) (per curiam). Qualified immunity balances the need to hold a government official accountable and the need to shield an official from liability when performing duties reasonably. Pearson, 555 U.S. at 231.

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[7] 42 U.S.C. § 1983 states, in pertinent part:

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

Qualified immunity is " 'immunity from suit rather than a mere defense to liability.' " Pearson, 555 U.S. at 231 (quoting Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)); White v. Pauly, ___ U.S. ___, 137 S. Ct. 548, 551-52, 196 L. Ed. 2d 463 (2017) (per curiam). Therefore, the United States Supreme Court has " 'repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation.' " Pearson, 555 U.S. at 232 (quoting Hunter v. Bryant, 502 U.S. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam)).

Qualified immunity shields a government official from liability unless the plaintiff shows (1) the official violated a constitutional right, and (2) the right was " 'clearly established' " at the time of the challenged conduct. Ashcroft v. al-Kidd, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (quoting Harlow, 457 U.S. at 818); Gallegos v. Freeman, 172 Wn. App. 616, 631, 291 P.3d 265 (2013). The doctrine of qualified immunity applies regardless of whether a government official's error is " 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.' " Pearson, 555 U.S. at 231 (quoting Groh v. Ramirez, 540 U.S. 551, 567, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004)).

Segaline alleged that by issuing the Trespass Notice, Croft violated his liberty interest to be present in a public place without due process. Federal courts recognize a protected liberty interest to enter and remain in a public place. See Vincent v. City of Sulphur, 805 F.3d 543, 548 (5th Cir. 2015) ("there is a general right to go to or remain on public property for lawful purposes"); Kennedy v. City Of Cincinnati, 595 F.3d 327, 336 (6th Cir. 2010) (plaintiff had a liberty interest to remain in a public place); Vasquez v. Rackauckas, 734 F.3d 1025, 1042-43 (9th Cir. 2013) (there is a liberty interest in "use

of public places").[8]

Construing the evidence and reasonable inferences in favor of Segaline, the facts show he had a liberty interest to enter and remain in the L&I East Wenatchee office. But deprivation of a liberty interest is not unconstitutional unless it occurred without due process. Zinermon v. Burch, 494 U.S. 113, 125-26, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990). Procedural due process prohibits the state from infringing on an individual's protected liberty interests without notice and an opportunity to be heard. Mathews v. Eldridge, 424 U.S. 319, 332-33, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); Fuentes v. Shevin, 407 U.S. 67, 80, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).

> In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law.

Zinermon, 494 U.S. at 125[9] (quoting U.S. CONST. amend. XIV, § 1).

"Whether an asserted federal right was clearly established at a particular time" is a question of law we review de novo. Elder v. Holloway, 510 U.S. 510, 516, 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994).

The dispositive question is whether issuing the Trespass Notice in 2003 violated a clearly established right to due process. The qualified immunity analysis "is limited to 'the facts that were knowable to the defendant officers' at the time they engaged in the conduct in question." Hernandez, 2017 WL 272240917, at *4 (quoting White, 137 S. Ct. at 550). "Facts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant." Hernandez, 2017 WL

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[8] We note the liberty interest to be in a public place is not unfettered. See Reza v. Pearce, 806 F.3d 497, 505-06 (9th Cir. 2015) (government official may remove an individual from a limited public forum if the individual is disruptive).

[9] Emphasis in original.

272240917, at *4. "A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.' " Mullenix v. Luna, ___ U.S. ___, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015) (quoting Reichle v. Howards, 566 U.S. 658, 664, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012)).

A government official's conduct violates a clearly established right only when, at the time of the challenged conduct, " '[t]he contours of [a] right [are] sufficiently clear' " that every " 'reasonable official would [have understood] that what he is doing violates that right.' " Ashcroft, 563 U.S. at 741[10] (quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). There must be either " 'controlling authority' " or a "robust 'consensus of cases of persuasive authority.' " Ashcroft, 563 U.S at 741-42 (quoting Wilson v. Layne, 526 U.S. 603, 617, 119 S. Ct 1692, 143 L. Ed. 2d 818 (1999)). "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." Ashcroft, 563 U.S. at 741.

The Supreme Court has " 'repeatedly told courts . . . not to define clearly established law at a high level of generality.' " Mullenix, 136 S. Ct. at 308[11] (quoting Ashcroft, 563 U.S. at 742); White, 137 S. Ct. at 552. The inquiry " 'must be undertaken in light of the specific context of the case, not as a broad general proposition.' " Mullenix, 136 S. Ct. at 308[12] (quoting Brosseau v. Haugen, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004)). The question is " 'whether the violative nature of particular conduct is clearly established.' " Mullenix, 136 S. Ct. at 308[13] (quoting Ashcroft, 563 U.S. at 742); White, 137 S. Ct. at 552; see Brosseau, 543 U.S. at 198-99.

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[10] Alterations in original.

[11] Alteration in original.

[12] Internal quotation marks omitted.

[13] Emphasis in original.

In Anderson, the Supreme Court cites the right to due process as an example of a right that is at too high of a level of generality to meet the test of a clearly established right. Anderson, 483 U.S. at 639.

> [T]he right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause . . . violates a clearly established right. . . . But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of [qualified immunity].

Anderson, 483 U.S. at 639 (quoting Harlow, 457 U.S. at 818-19). Because procedural due process analysis requires balancing a number of legal factors, "the law regarding procedural due process claims 'can rarely be considered "clearly established" at least in the absence of closely corresponding factual and legal precedent.' " Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist., 149 F.3d 971, 983 (9th Cir. 1998) (quoting Baker v. Racansky, 887 F.2d 183, 187 (9th Cir.1989)); see also Shinault v. Hawks, 782 F.3d 1053, 1059 (9th Cir. 2015) (same).

The cases cited by Segaline do not establish the level of specificity needed to place "beyond debate" the proposition that the decision in 2003 to issue the Trespass Notice violated the right to due process. Ashcroft, 563 U.S. at 741. Segaline cites a number of cases for the proposition that there is a liberty interest to remain in a public place. Those cases do not address whether a government official violates an individual's right to due process by issuing a trespass notice in response to arguably threatening and harassing behavior.

Segaline relies heavily on a 1996 federal district court case, Wayfield v. Town of Tisbury, 925 F. Supp. 880 (D. Mass. 1996), to argue he met his burden to show a clearly established right to due process. In Wayfield, the plaintiff argued on summary

judgment that the decision to suspend his library privileges without a hearing violated due process. Wayfield, 925 F. Supp. at 881. The court concluded that under Mathews, the library "did not afford [the plaintiff] adequate due process." Wayfield, 925 F. Supp. at 888-89 (citing Mathews, 424 U.S. at 321). The district court decision does not establish Croft violated a clearly established right. Wayfield, 925 F. Supp. at 889. The decision of a district court "is not 'controlling authority' in any jurisdiction, much less in the entire United States," and "falls far short of . . . a robust 'consensus of cases of persuasive authority.' " Ashcroft, 563 U.S. at 741-42 (quoting Wilson, 526 U.S. at 617).

Segaline also cites a number of federal and state cases, including State v. Green, 157 Wn. App. 833, 239 P.3d 1130 (2010), that were decided after 2003[14] to argue Croft violated a clearly established constitutional right. But as previously noted, the court does not "consider later decided cases" in determining whether a right was clearly established at the time of the challenged conduct. Plumhoff v. Rickard, ___ U.S. ___, 134 S. Ct. 2012, 2023, 188 L. Ed. 2d 1056 (2014); Brosseau, 543 U.S. at 200 n.4 (cases postdating the conduct in question are "of no use in the clearly established inquiry"); Gallegos, 172 Wn. App. at 634 n.12.

We conclude the trial court correctly ruled that Segaline did not establish that Croft violated a clearly established constitutional right to due process when he issued the Trespass Notice in 2003. The court ruled neither the facts nor Green showed a clearly established right to due process.

Segaline concedes Green was decided in 2010 but argues the cases cited in Green that were decided before 2003 show a clearly established right to notice and an

[14] See, e.g., Kennedy, 595 F.3d at 337-38; Hunger v. Univ. of Haw., 927 F. Supp. 2d 1007, 1016 (D. Haw. 2013); Anthony v. State, 209 S.W.3d 296, 307-08 (Tex. App. 2006).

opportunity to be heard before issuing a trespass notice. The cases cited in Green do not support his argument.

In Green, a school district issued a no-trespass notice based on the disruptive behavior of the mother of a student. Green, 157 Wn. App. at 838. The notice prohibited the mother from going to her child's elementary school except in limited circumstances. Green, 157 Wn. App. at 838-39. The State charged the mother with criminal trespass. Green, 157 Wn. App. at 841. At trial, an attorney for the school district testified about the reasons for issuing the trespass notice but admitted he had no personal knowledge of the underlying events. Green, 157 Wn. App. at 852. We reversed the conviction. We concluded the testimony did not establish a factual basis to revoke the mother's statutory right to access to the school.[15] Green, 157 Wn. App. at 852-53. We held that "absent a determination based on competent evidence that the restrictions were lawfully imposed and absent minimal notice of due process rights," the State did not prove criminal trespass. Green, 157 Wn. App. at 852 (citing State v. R.H., 86 Wn. App. 807, 813, 939 P.2d 217 (1997)).

The court in Green cited Mathews and Nguyen v. Department of Health, Medical Quality Assurance Commission, 144 Wn.2d 516, 29 P.3d 689 (2001), for general due process principles. Green, 157 Wn. App. at 847. Green states Mathews uses a balancing test "to determine whether additional procedures are required to meet procedural due process requirements." Green, 157 Wn. App. at 847. Green cites

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[15] RCW 28A.605.020 states:

Every school district board of directors shall, after following established procedure, adopt a policy assuring parents access to their child's classroom and/or school sponsored activities for purposes of observing class procedure, teaching material, and class conduct: PROVIDED, That such observation shall not disrupt the classroom procedure or learning activity.

Nguyen for the proposition that "[p]rocedural due process requires notice and an opportunity to be heard before the government can take a person's liberty or property interests." Green, 157 Wn. App. at 847. The other case cited in Green, R.H., is also unpersuasive and distinguishable.

In R.H., a restaurant manager told several youths who were skateboarding and loitering in the restaurant parking lot to leave, but they did not comply. R.H., 86 Wn. App. 808. R.H. was not part of the group. R.H. arrived at the restaurant later to wait for a friend and eat at the restaurant. R.H., 86 Wn. App. 808-09. At the manager's request, a police officer told all of the youths, including R.H., that they would be arrested for criminal trespass if they did not leave. R.H., 86 Wn. App. 809. When R.H. did not leave, he was arrested and charged with criminal trespass. R.H., 86 Wn. App. 810. The evidence at trial established R.H. repeatedly told the arresting officer he was waiting for another customer and if R.H. had been planning to eat at the restaurant, he had permission to be on the premises. R.H., 86 Wn. App. 811. We held the State did not prove R.H. committed criminal trespass because he complied with " 'all lawful conditions imposed on access.' " R.H., 86 Wn. App. at 812 (quoting RCW 9A.52.090(2)).

Because Croft was entitled to qualified immunity, the court erred in denying the motion for judgment as a matter of law to dismiss the 42 U.S.C. § 1983 claim. Where "the law did not put the [government official] on notice that his conduct would be clearly unlawful," it is improper for a trial court to allow the claim to proceed to trial, even if there is an issue of fact on an alleged constitutional right. Saucier v. Katz, 533 U.S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

Although we need not reach the challenge to instructing the jury on due process, we conclude the court erred by instructing the jury on the legal factors to consider in deciding whether Croft violated due process. Jury instruction 13 states:

> Due Process is a flexible concept and that the procedures required depend upon the facts of a particular circumstance. Due process requires the opportunity to be heard at a meaningful time in a meaningful manner. You may consider the timing of the trespass notice but are not to consider issues as to the legalities or form of the notice. In determining the reasonableness of the opportunity for hearing, you should consider;
>
> The nature of Mr. Segaline's interest;
>
> The risk of a wrongful deprivation by the procedures, if any, that were used and the value of additional procedures;
>
> and the government's interest, including the burdens that accompany additional procedures.
>
> You should also consider whether there was notice and opportunity to be heard available to remedy any wrongful deprivation.

Jury instruction 13 essentially asks the jury to consider the Mathews factors and decide whether as a matter of law, Croft violated Segaline's right to due process.

> What process is due under the Constitution is a legal question that the judge should resolve. The judge then should put to the jury any factual questions relating to the application of that standard.

McGee v. Bauer, 956 F.2d 730, 735 (7th Cir. 1992); see also State v. Chambers, 81 Wn.2d 929, 932, 506 P.2d 311 (1973) (A court errs by asking the jury to resolve "questions of law inherent in the factual situation.").

Because Segaline did not meet his burden to show a clearly established right when Croft issued the Trespass Notice in 2003, as a matter of law Croft was entitled to qualified immunity and dismissal of the 42 U.S.C. § 1983 claim.

We reverse the jury verdict on the 42 U.S.C. § 1983 claim against Croft and remand to vacate the judgment and award of attorney fees.

Schindler, J.

WE CONCUR:

Cox, J.

Becker, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MICHAEL SEGALINE, a single person, Respondent, v. THE STATE OF WASHINGTON, DEPARTMENT OF LABOR AND INDUSTRIES and ALAN CROFT Appellants.	No. 76010-6-I ORDER CALLING FOR AN ANSWER TO MOTION FOR RECONSIDERATION

Respondent Michael Segaline filed a motion for reconsideration of the opinion filed on July 17, 2017. A panel of the court has determined that an answer to the motion should be called for. Now, therefore, it is hereby

ORDERED that the clerk request counsel to file an answer to the motion for reconsideration within 15 days of the date of this order, and that a copy thereof be served on opposing counsel.

DATED this 31st day of August, 2017.

For the Court:

Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MICHAEL SEGALINE, a single person, Respondent, v. THE STATE OF WASHINGTON, DEPARTMENT OF LABOR AND INDUSTRIES and ALAN CROFT Appellants.	No. 76010-6-I ORDER DENYING MOTION FOR RECONSIDERATION

Respondent Michael Segaline filed a motion for reconsideration of the opinion filed on July 17, 2017. Appellant Washington State Department of Labor and Industries filed an answer to the motion. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Judge

APPENDIX IV

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

MICHAEL SEGALINE
Plaintiff,

vs.

WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES and ALAN CROFT,
Defendants.

No. 05-2-01554-1

SPECIAL VERDICT

We, the jury, answer the questions submitted by the Court as follows:

A. Did Alan Croft violate Michael Segaline's Fourteenth Amendment Right to enter a public office. X YES ___ NO

If you answer "yes" Answer question 1, 2, and/or 3 regarding this claim.

If you answer "no" go to question B below.

1. Do you award damages to Mr. Segaline? X YES ___ NO

If you answer "no", go to question 2.

If you answer "yes" answer the following:

What is the amount you award for economic damages? $203,000

What is the amount you award for non-economic damages? $750,000

2. Do you award punitive damages to Mr. Segaline?

___ YES _X_ NO

If you answer "yes", what is the amount you award: _____

If you awarded punitive damages, go to question B below

If you answer "no", go to the next question.

3. Do you award nominal damages to Michael Segaline?

___ YES _X_ NO

(INSTRUCTION: Go to question B)

B. Did The State of Washington Department of Labor and Industries, through its employees, maliciously prosecute Michael Segaline? ___ YES _X_ NO

If you answer "yes", then answer part 4, regarding this claim below:

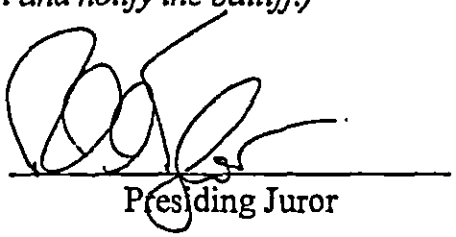
If you answer "no", then Date and Sign this Special Verdict Form and give it to the bailiff.

4. Do you award damages to Michael Segaline for this claim?

___ YES ___ NO

If you answer "yes", what is the amount you award: _____

(INSTRUCTION: Sign this verdict form and notify the bailiff.)



12 Nov 15
DATE

Presiding Juror

APPENDIX V

insurance or other funding available to a party, the question of who pays or who reimburses whom would be decided in a different proceeding. Therefore, in your deliberations, do not discuss any matters such as insurance coverage or other possible sources of funding for any party. You are to consider only those questions that are given to you to decide in this case.

INSTRUCTION NO. 7

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

INSTRUCTION NO. 8

The term "proximate cause" means a cause which in a direct sequence produces the injury or event complained of and without which such injury or event would not have happened.

There may be more than one proximate cause of an injury event

INSTRUCTION NO. 9

Michael Segaline claims that by directing him not to come to the L&I office, Alan Croft deprived Michael Segaline of rights without due process of law as guaranteed by the Fourteenth Amendment to the Constitution.

Michael Segaline further claims that Alan Croft's conduct was a proximate cause of injuries or damage to Mr. Segaline.

Alan Croft denies that directing Mr. Segaline not to come to the L&I office deprived Mr. Segaline of due process.

Alan Croft claims that Mr. Segaline did not provide sufficient facts to support a violation of a constitutional right.

Michael Segaline denies these claims.

Alan Croft further denies the nature and extent of the claimed injuries or damage.

Michael Segaline also claims that The Department of Labor and Industries, through its agents, maliciously prosecuted him, causing and / or continuing a criminal prosecution without probable cause. The Department of Labor and Industries denies this. They also deny the nature and extent of the claimed injuries and damage.

INSTRUCTION NO. 10

The forgoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed; and you are to consider only those matters that are established by the evidence. These claims have been outlined to aid you in understanding the issues.

INSTRUCTION NO. 11

To enforce civil rights guaranteed to persons by the United States Constitution, Congress has enacted a law, known as Section 1983, which provides:

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

INSTRUCTION NO. 12

To prevail on his Section 1983 claim Michael Segaline must prove each of the following by a preponderance of the evidence:

That Alan Croft subjected, or caused Michael Segaline to be subjected, to deprivation, of his liberty interest to enter the East Wenatchee Department of Labor and Industries by keeping him out of the East Wenatchee Department of Labor and Industries from approximately June through October, 2003;

That Alan Croft was acting under color of law; You are instructed that the parties agree that Alan Croft was acting under color of law;

That Alan Croft acted intentionally; and

That Alan Croft did not provide Michael Segaline with due process prior to depriving him of his interest.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for Michael Seglaine on this claim. On the other hand, if any of these propositions have not been proved, your verdict should be for Alan Croft on this claim.

INSTRUCTION NO. 13

Due process is a flexible concept and that the procedures required depend upon the facts of a particular circumstance. Due process requires the opportunity to be heard at a meaningful time in a meaningful manner. You may consider the timing of the trespass notice but are not to consider issues as to the legalities or form of the notice. In determining the reasonableness of the opportunity for hearing, you should consider:

The nature of Mr. Segaline's interest ;

The risk of a wrongful deprivation by the procedures, if any, that were used and the value of additional procedures;

and the government's interest, including the burdens that accompany additional procedures.

You should also consider whether there was notice and opportunity to be heard available to remedy any wrongful deprivation.

INSTRUCTION NO. 14

A person subjects another to the deprivation of a constitutional right, within the meaning of Section 1983, if he does an affirmative act, participates in another's