

NO. 35823-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL SEGLAINE
Appellant.

vs.

STATE OF WASHINGTON DEPARTMENT OF LABOR AND
INDUSTRIES,
Respondent,

BRIEF OF APPELLANT

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DIVISION II
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I. ASSIGNMENT OF ERRORS

1. The trial court erred as a matter of law by dismissing the defendants based upon immunity granted under RCW 4.24.510;
 - A. The statute's protection of "person" does not include the state.
 - B. Whether the statute protects the state is at minimum a question of fact regarding good faith, and should not have been summarily determined.
 - C. As applied, the statute is Constitutionally overbroad, and violates plaintiff's right to access to the courts.
 - D. Even if applicable to this case, it was error to dismiss the Malicious Prosecution case because that cause of action is a specific exception to RCW 4.24.510.
2. The trial court erred in dismissing the action for a violation of civil rights since persons have a constitutional liberty interest and right to enter public places of business if they are licensed, invited, or otherwise privileged to do so;
 - A. There is a liberty interest in Mr. Segaline's right to enter L & I, and to exercise his free speech rights.
 - B. The elements of 42 USC 1983 are supported by evidence herein.
 - C. State law establishes property and due process standards for L

& I's decisions regarding Mr. Segaline.

- D. Excluding Mr. Segaline from L & I violated his property and liberty interests.
 - E. Mr. Segaline had a constitutional liberty interest to enter L & I.
 - F. Mr. Croft is not entitled to qualified immunity, thus the 1983 action was erroneously dismissed..
3. The trial court erred by granting summary judgment dismissal of Plaintiff's causes of action against the State.
- A. Evidence of record created a question of material fact for the elements of Negligent Infliction of Emotional distress.
 - B. Evidence of record created a question of material facts for the elements of negligent supervision.
 - C. Evidence of records created a question of material fact for the elements of malicious Prosecution.
 - D. The trial court erred as a matter of law in limiting the relation back of the First Amended Complaint, to incidents occurring after August 4, 2003.
5. The trial court erred as a matter of law by applying the statutory penalty of \$10,000, or by summarily granting the penalty when there was an issue of fact regarding good faith.

II STATEMENT OF CASE

A. PROCEDURE

On December 5, 2005, the Department of Labor and Industries (L&I) responded to plaintiff's first set discovery requests, and in response to Interrogatory number 6, indicated that "Alan Croft" drafted and designed the notice (of trespass). CP 223, 228. The parties pursued further discovery, exchanging numerous public records disclosures and medical records. The parties substantially completed document exchanges in April, 2006-- prior to depositions because many witnesses were located in cities in Eastern Washington. CP 223-4

Mr. Croft's address was not disclosed in the responses to interrogatories, although plaintiff's requests demanded addresses as part of the witness identification. CP 224, 227. The parties agreed upon depositions in Olympia on May 18; East Wenatchee depositions were set for May 22. However, Mr. Croft was not produced for deposition until June 9, 2006. He testified that he made the decision to issue the "no trespass" notice without specific direction from any other L&I employees. CP 223—225; 230—241. The deposition was not transcribed, however, until June 25, CP 241; and received by plaintiff at the end of June. In his deposition, Mr. Croft was directed by the Attorney General to disclose

only his office address.

On July 3, 2006 plaintiff filed his response opposing the motion for summary judgment by L & I, and first gave notice of the possibility of amending the lawsuit to name the recently discovered official responsible for issuing the trespass notice. CP 190.

The court orally dismissed all of plaintiff's causes of action against the State Department of Labor and Industries on July 14, 2006. CP 251. The written order on the motion was entered August 4, 2006. CP 251—2. On August 3, plaintiff filed his motion to amend the complaint to individually name an employee of defendant, Alan Croft, under 42 USC § 1983. CP 220.

B. STATEMENT OF FACTS

Alan Croft is the regional Safety and Health Coordinator for the East Wenatchee Department of Labor and Industries. CP 60. Mr. Croft requested an opinion, process, or protocol from the attorney general via his Chain of command in the Department of Labor and Industries, regarding when members of the public may be excluded from State Offices. He requested an opinion multiple times starting shortly after he met with plaintiff on June 19, 2003. CP 62—4. The request included needed guidance on the issues with Mr. Segaline, and also the need for a policy. CP 66. There is no written departmental policy or procedure on

this issue, CP 68. The common practice for the department would be to “deal with” the incident locally, then to refer it “eventually” to the security coordinator for the department, contact the person of interest and provide guidance regarding the level of threat the person presents. CP 68,69.

In October, 2003, Security Coordinator Sgt. Patty Reed, CP 69, informed Mr. Croft she had still not heard back from the attorney general regarding issuing No Trespass notices to the public. CP 65. In fact, Mr. Croft never received any direction how to make a decision of when to bar a member of the public from a State office. CP 67; CP 419—426; CP 90-91 He is not sure that it is ever permissible to use a “trespass notice”, and he was aware of this issue prior to issuing it in June, 2003. CP 91—2.

In June 2003, Mr. Croft believed L & I employees felt intimidated and harassed, or felt like business was being disrupted, and one employee was fearful of Mr. Segaline. CP 71.

Mr. Croft had never met Mr. Segaline, and was not present for any of the incidents being complained about, and he denied having concluded, prior to June 19, that Mr. Segaline had intimidated or harassed any Labor and Industries staff, or had disrupted business in that office. CP 72. Mr. Dave Whittle was the other person that Mr. Croft invited to the June 19 meeting with Mr. Segaline. He did not include a member of the security coordinator’s office and there was no security concern at that point. CP

73,74. Mr. Segaline was not told that the meeting would relate to any security concerns. CP 175. Both parties agreed to tape record the meeting. CP 75. Mr. Segaline did not yell at the meeting. He raised his voice a few times. He did not call Mr. Croft any names. He did not use profanity. CP 74,75. At the end of the meeting Mr. Segaline left, stating he would go and talk to Ms. Guthrie, the person in the office whose staff he usually dealt with to purchase electrical permits. CP 175. According to Mr. Croft, his voice was elevated or raised a bit, but he did not yell. Cp 76, 77. In fact, during the entire meeting, his voice sounded like he was trying to be reasonable. CP 77. Mr. Croft noticed that Mr. Segaline had a red face, but admitted at his deposition that Mr. Segaline naturally has a red face much of the time. CP 97.

Without warning to Mr. Segaline, when Mr. Segaline left the meeting, Mr. Croft called the police. He did not tell Mr. Segaline he intended to call the police or request any change in Mr. Segaline's behavior before deciding to call. He called the police prior to asking Mr. Segaline to leave the office. CP 78—80.

On June 19, Mr. Croft had never thought of issuing a "trespass notice." CP 81. He never notified Mr. Segaline that a notice might be issued. While discussing the situation with police officers after Mr. Segaline left that day, one of the officers mentioned that excluding a

person from a public place might be “controversial”. CP 82. On June 26, while doing some research to learn about whether or not he could issue a no trespass notice, he discovered RCW § 9A.52.090, the trespass criminal statute, which provides the defense to trespass for a member of the public complying with lawful conditions to remain on the premises. CP 93. On June 23, Mr. Croft wrote a memorandum to his supervisors, in part:

The right of trespass by the department is being explored. If valid, procedures should be established, including a formal trespass warning form or letter.

If Mr. Segaline’s inappropriate behavior continues or escalates, other alternatives should be considered.
CP 335.

Mr. Croft claimed, in this memorandum to his supervisors, to have informed Mr. Segaline to do business through the electrical supervisor Dave Whittle, and that a letter would be sent to Mr. Segaline confirming this protocol. CP 335—6. None was sent. CP 175—6.

No such advice is contained in the transcript of the taped recording of that meeting. There was a general assertion to Mr. Segaline that he had made “threats” to the staff. CP 439, but no specifics although specifically requested. CP 439. Mr. Segaline immediately denied any threats, and he was told, “Actually, we might have to look at you not coming back to this office until you can deal with our staff in a civil manner.” Mr. Segaline affirmed he is “very civil”. CP 439. Later in the meeting, Mr. Segaline

was told he was being asked not to come but to delegate somebody to go into the department, to which he replied that he, Segaline, would come in.

CP 440. The Department of L & I response was

“Alright then we will have to discuss, we will happily discuss, then, how we are going to handle that. We are asking you not to do that as the administrator of the company. OK so you need to make sure that you follow the rules of the company. And all of the rules of the RCW. We are asking you not to come in here because you are harassing our staff and are asking you not to do that. CP 441.

Mr. Segaline replied that he did not harass the staff, and he intended to limit his contact with the staff to strictly business and he intended to record the actions of the Department. CP 441.

Mr. Croft knew there was no inappropriate behavior by Mr. Segaline on June 30, when he was given the trespass notice, nor on August 22, when he was arrested CP 94—6

Mr. Croft created the notice, and he provided it to the staff supervisor, Ms. Guthrie, to use. CP 85. He had the authority to issue the “no trespass” notice and he had informed all of the persons in his line authority regarding this issue. CP 88—90; 98.

Mr. Croft admitted that a member of the public saying that the department is wasting his time and that they will sue the department, is not a threat. CP 83--84. He had investigated Mr. Segaline, by interviewing a

former employee, and concluded Mr. Segaline was not a high risk. CP 97.

Ms. Guthrie testified that she understood that all members of the public have a right to be served in that public office. CP 102. She knew Mr. Segaline, and saw him come into the office to conduct business from the years 1992 to 2003, approximately once every 3 months, and during all those years his behavior was not an issue. CP 103; 131-132.

On June 9, 2003 she recalled a telephone call from Mr. Segaline in which he was complaining about a “bogus CD account.” He was not making sense to her. CP 110-111. He told her he would bring in a tape recorder and a lot of people would be behind bars, talked about people being held accountable, and if it costs your job, “so be it”; then his voice trailed off, and she thought he hung up, so she hung up the telephone. CP 105—109. This telephone call was transferred to her from a staff person and Ms. Guthrie thought the staff member felt threatened, but does not really remember more than in her notes. No notes were produced indicating the staff member felt threatened. Mr. Segaline talked very loudly but she would not call it yelling. CP 107—109. The call lasted less than 5 minutes. CP 133.

On June 10, Mr. Segaline came to the counter in the office for 3 or 4 minutes and Ms. Guthrie was on the other side of the waist high counter. CP 111, 112. He informed her that he planned to tape record the meeting

with Mr. Croft. . CP 113. His voice was calm. Ms. Guthrie felt that his desire to tape record the future meeting was an “implied threat” because there could be a confrontation if he was not allowed to do so. However, Mr. Segaline did not do anything that day that was confrontational. CP 115—117. His face did not get red. He did not raise his voice. He left of his own accord. CP 120.

Ms. Guthrie also met with Mr. Segaline in June, along with Ms. Sanchez, her staff person, regarding issuing 4 permits. It lasted ½ hour. She felt that Mr. Segaline talked too loudly and was disruptive. She stated he was waving his hands, but not at her, rather, gesturing at a clock on the wall and saying that L & I was wasting his time. CP 121—126.

After the June 19 meeting with Mr. Croft, Ms. Guthrie heard Mr. Segaline come out of the meeting, and she said he was ‘yelling’ CP 127 which contradicts Mr. Croft’s testimony that he did not yell. CP 176.

Ms. Guthrie observed Mr. Segaline came to the department on June 30. She saw Lou Hawkins try to give the trespass notice to Mr. Segaline. CP 128. She testified that Mr. Segaline was in the department public area and that he stayed about 5 minutes, that Mr. Segaline said that he had a right to be here and he could come anytime he wanted and he could record if he wanted. CP 128,9.

Ms. Guthrie observed Mr. Segaline purchase an electrical permit

on August 21. He was in the office less than 5 minutes, and he did not raise his voice or do anything inappropriate that day. CP 136.

She observed him being arrested on August 22, and she does not recall him raising his voice when Mr. Hively told him the police were called. CP 137,138. There were no other times that Ms. Guthrie had any difficulties working with Mr. Segaline. CP 141.

Alice Lou Hawkins also knew Mr. Segaline since 1991, as an electrical contractor. CP 147. Prior to 2003, she never had concerns about his behavior, although she saw him approximately monthly. There were only two incidents that she related that were of concern to her. CP 148, 156. In June, 2003, (the same June 9 incident related by Ms. Guthrie), she indicated the Mr. Segaline was red faced and said “one of us is going to jail”; Ms. Hawkins told Ms. Guthrie she felt uncomfortable with this, and that she also told Mr. Segaline to leave the department, and that Mr. Segaline said he could be in the office if he wanted. She testified he was yelling. CP 149—151. She said she was intimidated and afraid because Mr. Segaline’s face was red and his voice was loud and for a minute he leaned across the counter and directed his comments to her. He left on his own accord. CP 156—159. Unlike Ms. Guthrie, she recalls this meeting with Mr. Segaline as lasting only 2 to 3 minutes. CP 159.

She also testified about giving him the trespass notice on June 30,

and that he “yelled, and he told her “we” (the department” needed to get an attorney. CP 152—155. Ms. Hawkins has issued permits several times to Mr. Segaline since 2003 without incident. CP 161.

Officer Michael Schultz was present on the date Mr. Segaline was arrested. He testified that Mr. Segaline told him that the trespass notice was not a legal document. CP 163-164. He put Mr. Segaline in handcuffs. CP 165. The officer admitted he did not know the criteria under which a member of the public had a right to be in a public building, but also indicated his job was simply to respond and defuse the situation by removing a person. CP 167,168. For purposes of that situation, he took the word of Mr. Hively and the department of L & I; he did not see Mr. Segaline do anything to threaten anyone. CP 169, 170.

Mr. Segaline denies ever yelling or conducting himself in a threatening manner. He carefully informed the department personnel that he had a right to be in the building and conduct his business and that they needed to consult an attorney. He told them that they were trampling on his rights. He informed them he had a right to tape record in the public area, per his attorney’s advice. He peacefully came into the department to do business on August 22, and was arrested without warning; CP 176; He had not been warned prior to police being called June 19, or prior to issuance of the “trespass notice.” CP 174—178.

After he was arrested, Mr. Segaline was charged with the crime of trespass, which charges were voluntarily dismissed by the City of Wenatchee. CP 426. Although he had purchased a permit without incident August 21, L&I staff had confirmed with Mr. Croft later that day that the trespass 'notice' should be enforced the next time he came in. CP 428. Furthermore, after the charges of trespass were dismissed, Mr. Croft continued to try to obtain a legal opinion that he could exclude Mr. Segaline from the L&I offices, and he continued to brand Mr. Segaline as a law breaker in public record, informing staff that Mr. Segaline could enter the premises if he did not break "another" law. C P 422--426.

Mr. Segaline has suffered significant primary damage having his constitution rights violated, and subsequent damages consisting of economic and emotional damages. CP 171—178;216—219.

Dr. Mays found a specific diagnosis for Mr. Segaline's emotional distress proximally caused by the conduct of the State, separate from the criminal proceeding. The diagnosis is Adjustment Reaction with Anxiety; Dr. Mays declared:

[a] separate and distinguishable cause of his emotional difficulties has been his incapacity to function as had previously been the case through seeking licenses, authorizations, and as I understand it, inspections, all of which required physical access and contact with this facility. It should be understood that Mr. Segaline's primary investment in life is not in his own marriage and

family, since he has none, nor is it in his social group, since that is limited. He's not a person with great interests or activities. His primary investment in his identity and the way in which he connects with other people, is that of his work as an electrician.

III. ARGUMENT

1. IMMUNITY BASED UPON RCW § 4.24.510

A. There is no immunity because the government is not a person under that statute.

The court below dismissed all claims against the state, except Negligent Infliction of Emotion Distress tied to the act of excluding him from the office, pursuant to RCW § 4.24.510. RCW § 4.24.510 provides:

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

In *Gontmakher v. City of Bellevue*, 120 Wn. App. 365 (2004),

Division I held that a city is considered a person under RCW § 4.24.510.

The trial court dismissed all portions of Mr. Segaline's actions based upon calling the police and being prosecuted for trespass.

The *Gontmakher* case, which is not binding on this court, reasoned that since RCW § 4.24.510 did not define “person”, the court should use the general definitions contained in RCW § 1.16.080;

The term “person” may be construed to include the United States, this state, or any state or territory, or any public or private corporation, as well as an individual.

One flaw in the court’s ruling is that construing the word “person” in this statute to include the state is not mandatory, since RCW § 1.16.080 uses the permissive term, “may. “

Secondly, in RCW § 4.24.500, the legislature had a particular purpose in mind and if the Legislature intended to allow the state to take advantage of this statute, then the Legislature would have or could have included the “state” in the statutory terms.

Further, RCW § 4.24.500, which expresses the intent of this particular statute, provides that the purpose of the statute is to protect “individuals”, and “citizens”. The term “person” cannot be interpreted without considering those words. The court must not ignore unambiguous words, and interpret the statute as a whole, so that no part of it is rendered meaningless. . *State v. Delgado* 148 Wn.2d 723, 727, 63 P.3d 792 (2003); *Davis v. Dept. Licensing* 137 Wn 2d 957, 963, 977 P.2d 554 (1999), quoting *Whatcom County v. City of Bellingham,* 128 Wn. 2d 537, 546, 909 P.2d 1303 (1996)). The statute written to protect individual persons, and the legislative history of this type of statute (known as anti-

SLAPP statutes) is to protect the rights of the individual citizen or small groups against large corporations or big government, and not to protect state offices or officials (see parts 2 and 3 below).

B. There is no state immunity under the statute because there is a question of fact regarding whether the state acted in good faith.

Even though RCW § 4.24.510 does not explicitly require a good faith determination,” RCW § 4.24.500 specifies:

Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government. The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. The costs of defending against such suits can be severely burdensome. The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies.

Thus, even though RCW § 4.24.510 does not contain a good faith element/allegation requirement, the court, if it finds that the statute applies, must construe the legislative intent contained in RCW § 4.24.500 to require the court to determine whether or not the defendant contacted the government on a good faith basis. The issue of good faith is a fact that should be determined by a jury, since there is a material issue of fact as to the good faith of defendants L& I and Croft: it was known that there was a significant question regarding whether or not L & I could issue a trespass notice; it was known that Mr. Segaline was not a safety threat; the

exclusion from the department was arbitrary and not based upon whether or not he was conducting himself properly.

Furthermore, in *Reid v. Dalton*, 124 Wash. App. 113, 126, 100

P.3d 349 (2004), the court held:

The purpose of anti-SLAPP statutes is to protect the First Amendment right of citizens to petition the government for redress of grievances. Litigation that does not involve a bona fide grievance does not come within the First Amendment right to petition. See, e.g., Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 743, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983).

Therefore, if there is no bona fide grievance, then there should be not protection for a defendant via RCW § 4.24.510. Here, the department found Mr. Segaline to be an annoyance, but he was not a danger to public safety, and there was no bona fide grievance upon which the police were called.

C. Interpreting the statute to dismiss this case will not only pervert its intent, but frustrate plaintiff's right of access to the courts.

Plaintiff's right of access to the courts will be abridged if the court grants immunity under RCW § 4.24.510. *Hough v. Stockbridge*, 113

Wash.App. 532, 539 -40, 54 P.3d 192 (2002), held:

Access to courts is a fundamental constitutional right. See Bounds v. Smith, 430 U.S. 817, 828, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977). The Supreme Court has grounded the right of access to the courts in several provisions of the Constitution, including the Petitions Clause of the First Amendment, the Privileges and Immunities Clause of Article IV, the Due Process Clause of the Fifth

Amendment, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Christopher v. Harbury, U.S. , 122 S. Ct. 2179, 2186-87 n.12, 153 L. Ed. 2d 413 (2002)

In *Richmond v. Thompson*, 130 Wash.2d 368, 922 P.2d 1343

(1996), the court addressed the issue of whether citizen complaints regarding police conduct are absolutely privileged under either the federal and state constitutions or common law in a defamation case.

The court held:

Similarly, we are not persuaded that the petition clause of the First Amendment is a basis for affording Thompson an absolute privilege. In McDonald v. Smith, 472 U.S. 479, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (1985), the Supreme Court considered and flatly rejected the argument that the petition clause provides greater protection than the speech clause. . . . The defendant argued that when a citizen communicates directly with the government about matters of public concern, the petition clause requires the court to accord an absolute privilege to such communication rather than the New York Times qualified privilege. McDonald, 472 U.S. at 481-82. The Court rejected this argument, stating "the right to petition is cut from the same cloth as the other guarantees of [the First] Amendment." McDonald, 472 U.S. at 482. It explained that the petition clause was never intended to provide absolute immunity for defamation:

To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis

for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.

McDonald, 472 U.S. at 485 (citations omitted).

Id. at 378. In addition, the Defendant argued that the Washington petition clause, Const. art. I, sec. 4, affords greater protection than the First Amendment in the form of an absolute privilege to petition government.

The court held:

Thompson and the ACLU-W argue the use of the "being responsible" language in art. I, sec. 5 and absence of such language in art. I, sec. 4 shows the framers intended a qualified right for free speech but no such qualification on the right to petition. Thompson and amicus ACLU-W, however, overlook the "for the common good" language in art. I, sec. 4. This language does qualify the right to petition. See State v. Gossett, 11 Wash. App. 864, 527 P.2d 91 (1974) (right to petition is subject to reasonable limitations). And, in this case, recklessly made false statements are not in the common good.

Id. at 380.

For purposes of this appeal, the discussion regarding the balancing of Constitutional Rights is instructive. The right of citizens to contact the government to seek help can not be granted an absolute immunity, rather it must be qualified with a good faith requirement, or else the right to free speech is made superior to the right to petition, and neither constitutional right is pre-eminent over the other. Here, L&I made a bad faith report to the police partly, at least, in violation of Mr. Segaline's First Amendment

right to express his political opinion, and the immunity granted in the statute, which was fashioned to protect free speech of citizens and small groups, cannot be perverted and used to allow a powerful state office to trample on the first amendment rights of a citizen.

An issue similar to this was addressed by a Florida court. In *Florida Fern Growers Association, Inc. V. Concerned Citizens of Putman County*, 616 So.2d 562 (Fla. 5th DCA 1993), the court held:

A SLAPP suit has been described as "one filed by developers, unhappy with public protest over a proposed development, filed against leading critics in order to silence criticism of the proposed development." Westfield Partners, Ltd. v. Hogan, 740 F. Supp. 523, 525 (N.D. Ill. 1990). In Monia v. Parnas Corp., 227 Cal. App. 3d 1349, 278 Cal.Rptr. 426, 435 (Cal. Ct. App. 1991), Dr. Canan defined: SLAPP suits as civil actions for damages brought against individual citizens or citizens' groups for advocating issues of public importance by contacting a public official or the electorate. SLAPP suits are characterized by an effort to punish political opponents for past behavior, an attempt to preclude their future political effectiveness, the desire to warn others that political opposition will be punished, the use of the judicial system as a part of an economic strategy. . .

. . . extending absolute immunity to such activities would seem to extend to these activities a broader protection than the Constitution itself guarantees. . . . To extend absolute immunity to appellees for their activity in the instant case would be to deny appellant its access to the courts. This we will not do.

If the statute is applied without a requisite showing of good faith, then it would be void for over breadth and vagueness.

If the court applied this statute without requiring that there is a finding of good faith, then the statute is void on the basis of an over breadth challenge. The standard concerning overbroad application based upon the First Amendment is as follows:

In general, the First Amendment prevents the government from proscribing speech or expressive conduct. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). Over breadth analysis measures how statutes that prohibit conduct fit within the universe of constitutionally protected conduct. *City of Tacoma v. Luvene*, 118 Wn.2d 826, 839, 827 P.2d 1374 (1992). 'A law is overbroad if it sweeps within its prohibitions free speech activities protected under the First Amendment.' *State v. Halstien*, 122 Wn.2d 109, 122, 857 P.2d 270 (1993). 'The first task in over breadth analysis is to determine if a statute reaches constitutionally protected speech or expressive conduct.' *Id.* at 122-23. If the answer is 'yes,' then the court examines whether the statute prohibits a 'real and substantial' amount of protected conduct in contrast to the statute's plainly legitimate sweep. *Id.* at 123. 'If possible, a statute must be interpreted in a manner that upholds its constitutionality.' *Id.*

Application of the over breadth doctrine should be employed by a court sparingly and only as a last resort. *O'Day v. King County*, 109 Wn.2d 796, 804, 749 P.2d 142 (1988).

Certain types of speech, such as fighting words and 'true threats' receive no protection under the First Amendment. *State v. Knowles*, 91 Wn. App. 367, 373, 957 P.2d 797, review denied, 136 Wn.2d 1029 (1998). A 'true threat' is made under circumstances that a reasonable person would interpret to convey a serious expression of intent to inflict bodily harm. *Id.* (citing *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir. 1990)). Threatening an individual with financial or personal harm that is not physical does not constitute a 'true threat.' *Knowles*, 91 Wn. App. at 374.

The government may regulate protected speech by view-point neutral, reasonable time, place and manner restrictions. *Knowles*, 91 Wn. App. at 374-75 (citing *City of Seattle v. Ivan*, 71 Wn. App. 145, 152, 856 P.2d 1116 (1993)). The extent of permitted regulation depends on whether the speech is conducted in a private or public forum. *City of Seattle v. Huff*, 111 Wn.2d 923, 926-27, 767 P.2d 572 (1989). Speech receives greater protection in the public forum. *Knowles*, 91 Wn. App. at 375.

Private speech may be regulated if the distinctions drawn are reasonable in light of the purpose of the statute and if they are view-point neutral. *Knowles*, 91 Wn. App. at 375-76 (citing *City of Seattle v. Eze*, 111 Wn.2d 22, 32, 759 P.2d 366, 78 A.L.R.4th 1115 (1988)).

The state is not immune because it is not a person under this statute, and to interpret the statute without a requirement of good faith would render it to be unconstitutional.

D. Based upon statutory interpretation principles, that the specific controls over the general, RCW 4.24.510 does not prevent an action for malicious prosecution.

Even if RCW § 4.24.510, the SLAPP statute, is found to apply to Mr. Segaline's case for actions arising from L & I's reports to police, malicious prosecution is a specific statutory exception to that immunity because it is defined as a cause of action by part of that same statute.

Numerous statutes prohibit reports made in bad faith, i.e.:

RCW § 4.24.350 (1) In any action for damages, whether based on tort or contract or otherwise, a claim or counterclaim for damages may be litigated in the principal action for malicious prosecution on the ground that the action was instituted with knowledge that the same was false and unfounded, malicious and without probable cause in the filing of such action, or that he same was filed as part of a conspiracy to misuse the judicial process by filing an action known to be false and unfounded.

RCW § 9.62.010 Every person who shall, maliciously and without probable cause therefore, cause or attempt to cause another to be arrested or proceeded against for any crime of which he or she is innocent:

- (1) If such crime be a felony, is guilty of a class c. felony and shall be punished by imprisonment in a state correctional facility for not more than five years; and
- (2) If such crime be a gross misdemeanor or misdemeanor, shall be guilty of a misdemeanor

See also, e.g., false reporting of an emergency, RCW 9A.84.040 (1), and specific penalties for false reporting by employers, RCW § 51.48.020.

All of the false reporting statutes prohibit falsely reporting to a government agency, and specifically to a law enforcement agency.

When there are conflicting terms in statutes, statutory construction must not result in absurd results. *State v. Delgado* 148 Wn 2d 723, 63 P.3d 792 (2003). If 2 statutes conflict with each other, the more specific statute controls. *State v. Collins* 55 Wn.2d 469, 348 P.2d 214 (1960). In this case, the statutes cited above are all specifically relating to malicious prosecution, and false reports to law enforcement agencies that result in arrest and prosecution. These are decidedly more specific than RCW § 4.24.510, which generally grants immunity for any ‘person’ reporting to a government agency.

It would be absurd for the court to nullify the statutes above, along with common law Malicious Prosecution. In *Tacoma v. Taxpayers* 108 Wn.2d 679, 743 P.2d 793 (1987), the court held that the rule that a specific statute controls over a more general statute applies when the statutes deal with the same subject-matter and cannot be harmonized. RCW § 4.24.510 cannot be harmonized with the false report statutes without implicitly repealing them. Thus, it was error to dismiss plaintiff’s

malicious prosecution case, because he is protected by specific statutes, and not subject to the general immunity under RCW § 4.24.510.

2. VIOLATION OF CIVIL RIGHTS

A.Liberty interest in limited public forum.

Persons have the right to enter public places of business if they are licensed, invited, or otherwise privileged to do so. RCW § 9A.52.010(3); *State v. Finley*, 97 Wn. App. 129, 136, 982 P.2d 681(1999). Mr. Segaline is a licensed electrical contractor who has a legitimate purpose to enter the Department of Labor and industries, and who in fact entered that office either at the invitation of the office or to conduct his business, which required that he obtain permits issued by that department.

Per the holding in *Chicago v. Morales*, 527 U.S. 41 (1999):

On the other hand, as the United States recognizes, the freedom to loiter for innocent purposes is part of the “liberty” protected by the Due Process Clause of the Fourteenth Amendment. . .

. . . We have expressly identified this “right to remove from one place to another according to inclination” as “an attribute of personal liberty” protected by the Constitution. *Williams v. Fears*, 179 U.S. 270, 274 (1900); see also *Papachristou v. Jacksonville*, 405 U.S. 156, 164 (1972). Indeed, it is apparent that an individual’s decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is “a part of our heritage” *Kent v. Dulles*, 357 U.S. 116, 126 (1958), or the right to move “to whatsoever place one’s own inclination may direct” identified in Blackstone’s

Commentaries. 1 W. Blackstone, Commentaries on the Laws of England 130 (1765).

The Supreme Court established three types of forums in *Perry Education Association v. Perry Local Educator's Association*, 460 U.S. 37, 103 S. Ct. 948 (1983). The first is a "traditional public forum" which includes streets, parks, public sidewalks, or other public places, which have been devoted to assembly and debate.

The second category is "limited public forum" which is property that the government has intentionally opened for use by the public. The courts will apply intermediate scrutiny to rules that regulate conduct, but will apply the same strict limitations to content-based decisions or restrictions. Intermediate scrutiny requires that restrictions of speech-related activities be viewpoint neutral and reasonably related to a legitimate interest.

The final category consists of a "non-public" forum, which is not designated as an arena for public communication. In private forums, owners are not restricted to content neutrality. They may make any decisions regarding content, distribution, or quality. L&I was a non-public forum as to the public at large, but not as to its own electrical contractor licensees, since it invited persons in that occupation into the premises to comply with the permit-issuance part of the occupation.

In this case, defendant is a limited public forum, since Mr. Segaline was using the L&I to practice his licensed occupation, which was

the purpose for which the public area was opened. Thus, L&I had no right to limit Mr. Segaline's participation in the forum except in a "viewpoint neutral" way. Evidence of record shows that L & I employees did not like hearing Mr. Segaline express his political opinions. He told them they were wasting his time, they were there to serve the public, that he could tape record public business transactions, and that he would sue them if they violated his rights. These statements were viewed by L&I staff as a "threat". Exclusion from L&I was not viewpoint-neutral, since it reacted to the content of Mr. Segaline's speech, which was not a "threat", but rather the exercise of free speech that irritated them personally.

A case that is instructive regarding a heightened scrutiny of a government action when it is not politically neutral is *Cornelius v. NAACP Legal Defense and Educational Fund* 473 U.S. 778, 105 S.Ct. 3439, 87 L.Ed 2d 567 (1985), which discusses the right to eject speakers based upon politically neutral bases, qualifies that right by stating that a speaker can be excluded if not a member of the class of people the forum was created to benefit. Since L&I was a forum created to specifically benefit Mr. Segaline, a licensee, he was a member of the class of people the forum was created to benefit. Under *NAACP*, the operable analysis is not to determine if L&I is public, limited public, or private, but first, whether it is a forum created to benefit Mr. Segaline.

Since Mr. Segaline's right to be present in a public place is a liberty interest, he is entitled to due process prior to his right being curbed. The elements of due process minimally are notice and an opportunity to be heard in a meaningful time and in a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983 (1972).

B.VIOLATION OF 42 USC § 1983

The cause of action against Mr. Croft is based upon the following statutory language of 42 USC § 1983:

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.

For a person to be liable under this statute, proximate cause must be proven. Causation is established by the individual directly participating in the deprivation of rights, or by setting in motion a series of events which the actor should reasonably know would cause another to suffer a constitutional injury. *Arnold v. International Business Machines* 637 F.3d 1350, 1355 (9th Circ.1981) cited in *Moranga v. Vue* 85 Wn. App 822, 935 P.2d 637 (1997) at 834.

Mr. Segaline has alleged a series of actions that deprived him of his civil rights. As to each violation, the cause accrued when it occurred.

A cause of action for deprivation of property without due process is ripe immediately because the harm occurs at the time of the violation as does the cause of action. (citations omitted.) *Mission Springs v. city of Spokane* 965 134 Wn. 2d 947, 954 P.2d 250 (1998), at 965.

In this case, defendant Croft acted under color of his position with L & I and took actions to directly deprive Mr. Segaline of his rights, and also set in motion a series of events that resulted in depriving Mr. Segaline of his rights. First, he issued a Notice of Trespass at the end of June, 2003. He caused Mr. Segaline to receive notice of the trespass issue on June 30, 2003. L & I sold a permit to Mr. Segaline without incident on August 21. Mr. Croft, however, confirmed his instructions to L&I staff to have Mr. Segaline removed and arrested, to L&I staff, later in the day on August 21, 2003. The arrest occurred on August 22, 2003. Mr. Segaline was allowed to amend his complaint to join Mr. Croft as an individually named party, but he was not allowed to relate his allegations back to the filing of this matter. He was allowed to relate the allegations back to the time of filing the motion to amend, August 3, 2006. CP 485,6.

However, all of the facts led up to the August 22 arrest, (which was within the 3-year statute of limitations), and thus all of the

foundational facts should have been allowed to relate back. It was error for the trial court to disregard that the August 22 arrest was an independent violation for purposes of the statute of limitations. Further, it was error to limit the relation back of the course of actions of Mr. Croft.

C. STATE LAW ESTABLISHES PROPERTY AND DUE PROCESS RIGHTS

Mr. Segaline holds a license as an electrician, and as an Administrator under RCW Chapt. 19.28. The “department” designated as the issuing and enforcement authority for this license is the Department of Labor and Industries. RCW § 19.28.006 (5). For specified reasons, i.e., fraud, incompetence, or failure to remedy a serious violation that presents imminent danger to the public, the department may revoke or suspend the license (RCW § 19.28.241); before this may occur, Mr. Segaline has a right to written notice, by registered mail, return receipt requested, with the allegations enumerated, and giving the license holder the opportunity to request a hearing before the Board. At the hearing the licensee has the right to present witnesses and give testimony, and the hearing must be conducted in compliance with RCW Chapt. 34.05, the Administrative Procedures Act. An impartial Board, the majority of which must agree with suspension, will hear the allegations of the Department. RCW § 19.28.241 (3). Mr. Croft is charged with knowing this process.

The notice of the department to the licensee is effective 20 days after its issuance; if the licensee appeals, the action is stayed pending appeal. RCW § 19.28.341. The 20 days do not begin to run until a notice in compliance with this chapter is served by certified mail.

Mr. Croft recognized that his decisions were valid only in so far as he had the authority to regulate Mr. Segaline under his license, since when he asked Mr. Segaline not to come into the department, he did so by reminding him that as a licensee Mr. Segaline must follow all the rules of the company and of the RCW's. CP 441.

When a person has a right to have a permit issued, it is a deprivation of property and liberty interests if the issuing agency withholds the right to the permit. *Mission Springs v. City of Spokane* 134 Wn. 2d 947, 954 P.2d 250 (1998). In the *Mission* case, the plaintiff had a present right to have a building permit issued; here, Mr. Segaline had a present right to have a permit issued on August 22, 2003. The court in the former case found that the building permit was withheld without any process, let alone "due" process. (at 967). The counsel members, who withheld service to the contractor despite their knowledge that he had a present right to purchase a permit, were not shielded by immunity because the court found that denial was an arbitrary action. (id at 968). The court

further cited numerous consistent federal cases and found that federal law governs the application of the federal statute. *Id.* Here, Mr. Seglaine came on August 22 to purchase a permit, and he could not be deprived of his right to conduct his business under his license without the certified mail notice and other mandated process set forth above, by statute. Thus, his right to do business and to receive procedural and substantive due process prior to being deprived of that right was statutorily established.

Further, state law also provides that persons have the right to enter public places of business if they are licensed, invited, or otherwise privileged' to do so. RCW § 9A.52.010(3)(the trespass statute); A defense to the crime of "trespass" incorporates the exception regarding the constitutional right to be in a public place, when the premises are open to members of the public and the actor reasonably believes he is licensed to enter and complies with lawful conditions for being on the premises. These elements of a defense allow the defendant to put into issue the validity of any claimed trespass order. *State v. Finley*, 97 Wn. App. 129, 136, 982 P.2d 681(1999).

**D.MR. SEGLAINE'S RIGHT TO ENGAGE IN
BUSINESS WITH HIS LICENSE IS A PROPERTY
AND LIBERTY INTEREST.**

The U.S. Supreme Court has repeatedly ruled that a license to practice one's profession is a protected property right. *Bell v. Burson* 402 U.S. 535, (1971):

Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases, the licenses are not to be taken away without the procedural due process required by the Fourteenth Amendment. *Id at 539.*

By establishing statutory processes for revoking Mr. Segaline's license, the State of Washington has expressly provided for procedural due process required by the Fourteenth Amendment. L & I or its employees, may not accomplish the deprivation of the right to use the license through a means other than the lawful process. By depriving Mr. Segaline of the right to enter the premises, Mr. Croft effectively deprived Mr. Segaline of this right. "[i]n reviewing State action in this area, . . . we look to the substance, not the bare form, to determine whether constitutional minimums have been honored." *Id. at 541. Bell* further holds that the hearing must be meaningful and appropriate to the nature of the case, and :

It is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford "notice and opportunity appropriate to the nature of the case" before the termination becomes effective. *Id at 542.*

The record establishes that there was no “emergency” on June 30 that resulted in the need to give a summary “notice of trespass” to Mr. Segaline, there was no “emergency” on June 19 or August 22, justifying calling the police, and there was no “emergency” need to eject Mr. Segaline from L&I offices on August 22, 2003. He had a right to the process set forth by State law to protect Mr. Segaline’s liberty interest and property interest in conducting his profession.

An issue similar to Mr. Segaline’s case arose in *Sidham v. Peace Officer Standards and Training, Utah State*, 265 F.3d 1144 (10th Cir. 9/24/2001). There, a state licensing authority claimed it did not violate a certificate holder’s rights because it had not moved to suspend or revoke the license; instead, it disseminated other, allegedly defamatory statements that the plaintiff claimed effectively deprived him of exercising his profession, and effectively removing the validity and benefit of the certification. In that case, the state office, like L & I in this case, had statutory authority to issue or to revoke or suspend licenses after due process. In *Sidham*, the court recognized that actions of the state could constitute “effective revocations.” It quoted the case of *Reed v. Village of Shorewood* 704 F.2d 943 (7th Cir 1983) :

The defendants never succeeded in taking away the plaintiffs’ license either by revocation or non-renewal. .

.but “deprive” in the due process clause cannot just mean “destroy.” If the State prevents you from entering your house it deprives you of your property right ever: if the fee simple remains securely yours. A property right is not bare title, but the right of exclusive use and enjoyment. [Here] the plaintiffs were deprived of their property right in the license even though the license was never actually revoked.

In addition to a property interest in a licensee’s right to pursue his profession, there is a recognized liberty interest. In *Schwartz v. Board of Bar Examiners* 353 U.S. 232, 238-39 (1957), the U.S. Supreme Court held: “A State cannot exclude a person from the practice of [any] occupation in a manner or for reasons that contravene the Due Process or Equal Protection clause of the Fourteenth Amendment.”

By depriving Mr. Segaline of the right to enter and do business at L & I, without due process, Mr. Croft violated well established Constitutional rights to property and liberty belonging to Mr. Segaline.

E. MR. SEGALINE HAD A CONSTITUTIONAL LIBERTY INTEREST TO BE ABLE TO ENTER THE DEPARTMENT OF LABOR AND INDUSTRIES.

A second and independent constitutional bases upon which Mr. Segaline had a right to enter L & I was as a public premises, or a “semipublic forum” or ‘private forum’ open to the public.

This basis was analyzed in depth in the case of *Wayfield v. Town of Tisbury* 925 F. Supp. 880 (D. Mass. 05/21/1996). In that case, the

plaintiff was a patron of the local library, who had an unpleasant confrontation with a library staff person. The library issued a letter, several days later, informing him that he would no longer be permitted in the library because of the “disruptive incident.” When the plaintiff returned to the library, he was arrested and charged with trespass. The charges were dropped, and the plaintiff sued for deprivation of his constitutional rights without due process. The Segaline case could be said to track that case on all fours.

The *Wayfield* court recognized that there is a property and liberty interest in a citizen’s access to a public library, more generally defined as “rights recognized by state law as being common to all citizens; being so recognized they achieve the status of “liberty “ or “ property” interests when they are altered or extinguished.” (citing *Paul v. Davis* 424 U.S. 693, 708, 47 L. Ed 2d 405, 96 S.Ct. 1155 (1976).) While that court engaged in a detailed analysis to establish that a library was established for the plaintiff’s access, it opined that the right would be clearer in the event that entry was related to a privilege or license. *Wayfield*, therefore, expanded the analysis to include any person in a place open to the public.

The *Wayfield* case held that in a non-emergency situation, it was a violation of the plaintiff's right to due process to deprive him of access to the library. That is the holding that this court must also properly make.

Other U.S. Supreme court authority is instructive regarding government buildings to which citizens must go in order to exercise their rights under their profession or future profession. In *Goss v. Lopez* 419 U.S. 565 (1975) the issue was whether students could be suspended for 10 days without due process. In that case, the U.S. Supreme Court dispelled the argument that there was no right to due process because there was no right to education at public expense, by explaining that protected interests in property and liberty are defined by independent sources such as State statutes or rules entitling citizens to benefits. The court held:

Having chosen to extend the right to an education to people of appellee's class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred. *Id at 574—citations omitted—* Although Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so and has required its children to attend. Those young people do not 'shed their constitutional rights' at the schoolhouse door.

Mr. Segaline is dependent upon the State to practice his profession and his rights cannot be withdrawn without reasonable process.

The length and severity of a deprivation is to be weighed in determining the form of a hearing, but the basic right to a hearing accrues upon the violation of the right. *Fuentes v. Shevin* 407 U.S. 67, 86 (1972).

In this case, there was no emergency, and no reason why process was not afforded to Mr. Segaline prior to depriving him—indefinitely—of the right to routinely purchase permits for his business. The harm was extreme, because it limited him from practicing his profession. The probability of abuse of discretion was great, because there were no established procedures set forth to handle this type of issue. *Wayfield* 925 F.Supp 880. The need for extensive protections was great, as already acknowledged by the Legislature by establishing detailed laws to protect licensees from deprivation of their right to perform their occupation.

F. MR. CROFT HAS NO QUALIFIED IMMUNITY IN THIS MATTER.

The above authority demonstrates clearly that the first prong of immunity analysis—that of whether a clearly recognized right has been violated—is satisfied by plaintiff. The second prong is whether Mr. Croft (or whether a reasonable state official) could have in good faith thought that his actions are consistent with the known constitutional rights, also must be resolved in plaintiff's favor.

This case is much like the previously cited *Mission* case, in which the Washington courts rejected the defense of qualified immunity for arbitrary action in denying a licensee from obtaining a permit, when the licensee had satisfied all of the licensing requirements and approvals to obtain the permit. In this case, Mr. Segaline was an invitee and licensee who had the right to come to the state office to conduct his business, a right that could not be taken without due process. Mr. Croft arbitrarily took that right without due process. His actions were arbitrary as there was no established procedure for depriving Mr. Segaline of his rights, (other than specific process legislatively defined for any license violation—a process ignored by Mr. Croft).

Mr. Croft knew there was no established procedure, and that the “trespass notice” might violate Mr. Segaline’s rights, as repeatedly documented in this record. From June, 2003 through at least October, 2003, he continued to ask for legal advice, and he was not sure he had the right to issue the notice without violating Mr. Segaline’s rights. There is a material issue of fact that Mr. Croft did not act with a good faith in persisting to bar Mr. Segaline from L & I. Mr. Croft’s credibility in this matter is at issue and therefore granting summary judgment on the basis of immunity was error.

3.SUMMARY JUDGMENT DISMISSALS WERE ERROR.

A. THERE IS A GENUINE ISSUE OF MATERIAL FACT REGARDING THE CAUSE OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

The main case in the area of on negligent infliction of emotional distress is *Hunsley v. Giard*, 87 Wn.2d 424 (1976). As with any claim sounding in negligence, where a plaintiff brings suit based on negligent infliction of emotional distress the plaintiff's negligence claim must prove the established concepts of duty, breach, proximate cause, and damage or injury.' *Hunsley* at 434.

The State had a duty to serve Mr. Segaline as a member of the public. Further it had a duty not to deprive him of his constitutional rights without due process. It breached its duty by wrongfully removing him and refusing to serve him when he presented himself in a manner that complied with the requirements for being present in the department facilities. Plaintiff provided medical evidence of emotional distress, per elements of this cause of action. CP 216—219; 171—173. The evidence in this case demonstrates a diagnosis with a specific mental disorder, and includes his breakdown and his ultimate treatment in Eastern State hospital. Plaintiff has presented a genuine issue of material fact as to each element of this cause of action.

However, the trial court accepted the state's argument that the damages were not sufficiently foreseeable.

Dr. Mays explained how his occupation was plaintiff's vehicle for self-image in his social world, and how loss of faith in the government caused severe emotional distress. CP 171—173; 216—219; 174—178.

Foreseeability for NIED is addressed in numerous cases. In *Whaley v. State* 90 W.App 658, 956 P.2d 1100 (1998), the court summarized the correct legal standard:

The scope of any duty is bounded by the foreseeable range of danger. A defendant who is under a duty of care is liable for emotional distress caused by a breach of that duty if emotional distress was a field of danger that the defendant should reasonably have anticipated and guarded against. Whether a defendant reasonably should have anticipated a general field of danger is a factual question that may properly be put to a jury. *Id.*, at 674.

In *Whaley* the court found that creation of false reports was a known danger, and it was foreseeable that a false report could cause emotional distress, and it was further foreseeable that a false report involving a child would create emotional distress for that child's mother. This was sufficient to create an issue of fact for trial of the cause of NIED. In this case, the State was aware that excluding a member of the public from purchasing permits to further his own business would be likely to cause emotional distress. Thus, Mr. Segaline's emotional distress was within the "foreseeable range of danger."

Other courts have allowed emotional distress damages for purely

economic or property damage, i.e. for timber trespass, *Birchler v. Castello Land co.* 133 Wn. 2d 106, 942 P.2d 968 (1997) (for 'intentional interference with property interests, id at 117). Here, the State intentionally interfered with Mr. Segaline's property interest when it violated his right to access to the department for his licensed activities.

In other contexts, emotional distress as a result of having one's constitutional rights violated has been repeatedly affirmed. For actions of discrimination, an expert opinion is not required, only testimony regarding actual emotional distress as a result of the discrimination. *Den v. Municipality of Metro* 104 Wn. 2d 627, 641, 708 P.2d 393 (1985.) Damages are presumed if one's civil rights are violated. *Miles v. F.E.R.M. Enterprises*, 29 Wn. App 61, 627 P.2d 564 (1981). Therefore, when Intentional Infliction of Emotional Distress is based upon an underlying violation of a constitutional right, emotional distress is within the scope of harm to be expected, and testimony by a licensed psychologist that the state's conduct caused emotional distress and that said reaction to stress constitutes a medical diagnosis, articulates the elements of NIED sufficient to survive summary judgment.

**B. THERE IS A GENUINE ISSUE OF FACT REGARDING
NEGLIGENT SUPERVISION**

'An employer can be liable for negligently supervising an employee.' *Herried v. Pierce County Pub. Transp. Benefit Auth. Corp.*, 90

Wn. App. 468, 475, 957 P.2d 767 (citing *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993), review denied, 123 Wn.2d 1027 (1994); *Peck v. Siau*, 65 Wn. App. 285, 827 P.2d 1108, review denied, 120 Wn.2d 1005 (1992)), review denied, 136 Wn.2d 1005 (1998).

The employee's conduct must be inside the scope of the employment unless the employer knew, or in the exercise of reasonable care should have known, the employee presented a risk of danger to others. *Thompson v. Everett Clinic*, 71 Wash. App. 548 (1993) (Citing *Peck v. Siau*, 65 Wash. App. at 294 (citing Restatement (Second) of Torts § 317(b)(ii)); see also *Scott v. Blanchet High Sch.*, 50 Wash. App. 37, 44, 747 P.2d 1124 (1987), review denied, 110 Wash. 2d 1016 (1988)).

An employer can be liable even when an employee is acting outside of the scope of employment if the employee was aided in accomplishing the tort by the existence of the agency relation. *C.J.C. v. Corporation of the Catholic in Bishop of Yakima*, 88 Wash.App. 70 (1997) (Citing Restatement (Second) of Agency 219(2)(d); *Thompson v. Berta Ent.*, 72 Wash. App. 531, 538, 864 P.2d 983 (1994)).

Negligent supervision is consistent with the traditional notion of *respondeat superior*. *Niece v. Elmview Group Home*, 929 P.2d 420, 131 Wash.2d 39 (1997) (held that an employer is vicariously liable for the torts of an employee who is acting on the employer's behalf. However, the scope of employment is not a limit on an employer's liability for a breach

of its own duty of care.) Even where an employee is acting outside the scope of employment, the relationship between employer and employee gives rise to a limited duty, owed by an employer to foreseeable victims, to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others. This duty gives rise to causes of action for negligent hiring, retention and supervision. Liability under these theories is analytically distinct and separate from vicarious liability. These causes of action are based on the theory that "such negligence on the part of the employer is a wrong to [the injured party], entirely independent of the liability of the employer under the doctrine of *respondeat superior*." *Scott v. Blanche High Sch.*, 50 Wash. App. 37, 43, 747 P.2d 1124 (1987) (quoting 53 Am. Jur. 2d Master and Servant sec. 422 (1970)), review denied, 110 Wash. 2d 1016 (1988).

In this case, under all of the various theories, the defendant department is liable for the actions of its employees. The employees were acting within the scope of their duties, per the testimony of Mr. Croft. The employer knew what he was doing at all times and he reported to his superiors. Further, he requested training and guidance on this specific matter and did not receive any assistance providing to him the constitutionally mandated processes one must pursue in removing a citizen from a public place. Further, it was a duty by the state directly owed to Mr. Segaline, to provide a safe public forum in which to conduct business,

so that regardless of whether the employees were acting within the scope of their duties, the department breached its duty of plaintiff. Mr. Croft's superiors were clearly notified of his actions and negligently failed to train, advise, supervise, or control Mr. Croft. Under NIED and Negligent Supervision, all these theories, the facts in this case support liability by the State for the actions of its employees. Under Negligent Supervision, there is no case-law requirement that distress be measured by a specific diagnosis by a medical professional. The trial court erroneously found the testimony of plaintiff's expert, Dr. Mays, insufficient. However, that finding was irrelevant to the negligent supervision cause of action and thus, it was error to dismiss that action, independently from the dismissal of the NIED action.

C.THERE IS A GENUINE ISSUE OF MATERIAL FACT FOR ALL ELEMENTS OF MALICIOUS PROSECUTION.

In order to maintain an action for malicious prosecution in this state, a Plaintiff must plead and prove the following elements: (1) that the prosecution was instituted or continued by the defendant; (2) that there was want of probable cause for the institution or continuation of the prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the proceedings terminated on the merits in favor of the plaintiff, or were abandoned; and (5) that the plaintiff

suffered injury or damage as a result of the prosecution. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 558, 852 P.2d 295 (1993); *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 497, 125 P.2d 681 (1942). "Although all elements must be proved, malice and want of probable cause constitute the gist of a malicious prosecution action." *Hanson*, 121 Wn.2d at 558.

A dismissal or termination of the criminal proceeding may establish a prima facie case of malice. The rule is stated in *Pallett v. Thompkins*, 10 Wash. 2d 697, 699-700, 118 P.2d 190 (1941):

A prima facie case of want of probable cause (from which malice may be inferred) is made by proof that the criminal proceedings were dismissed or terminated in plaintiff's favor. But malice is not necessarily to be inferred from such prima facie showing of want of probable cause. (Citations and italics omitted. Italics ours.) See also *Peasley v. Puget Sound Tug & Barge Co.*, supra at 498 (malice may be inferred from lack of probable cause). Second, in a malicious prosecution action, malice takes on a more general meaning, so that the requirement that malice be shown as part of the plaintiff's case in an action for malicious prosecution may be satisfied by proving that the prosecution complained of was undertaken from improper or wrongful motives or in reckless disregard of the rights of the plaintiff. *Peasley v. Puget Sound Tug & Barge Co.*, supra at 502. Whether Nordstrom's actions between January 6 and January 22 manifested "reckless disregard" for the appellant's rights is a factual question. See *Peterson v. Littlejohn*, 56 Wash. App. 1, 781 P.2d 1329 (1989).

Here, there was no probable cause to arrest plaintiff except for the information communicated to the officer, that the department had

‘trespassed’ plaintiff from its premises. The officers observed no unlawful activity. CP _____. The actions to have plaintiff arrested did not serve a legitimate safety need. It is uncontested that Mr. Segaline never physically threatened any person, and that on the date of arrest, August 22, 2003, he was conducting himself in a peaceful fashion. He was arrested based upon a trespass notice that violated his constitutional rights. The elements of malicious prosecution are presented by competent evidence in this matter and must be submitted to the jury.

D. THE TRIAL COURT ERRED IN LIMITING THE RELATION BACK OF THE FIRST AMENDED COMPLAINT TO INCIDENTS OCCURRING AFTER AUGUST 4, 2003.

Cr 15(a) provides that a party shall amend pleadings by leave of court, and “leave shall be freely given when justice so requires”

CR 15 (b) allows amendments that conform to the evidence. The evidence regarding the actions of Mr. Croft was transcribed for counsel only 39 days before the motion to amend was filed. This rule provides that the court shall allow the pleadings to be amended and “shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission

of such evidence would prejudice him in maintaining his action or defense.”

CR 15 (c) when the amendment arose out of the same transaction originally pled, the amendment relates back to the original pleading. This includes adding a party, even if the statute of limitations is past, if the person had actual knowledge of the pendency of the claim and knew that he could have been joined originally in the action.

Naming Mr. Croft as a party defendant in no way changes the discovery, trial preparation, or proof in the ultimate trial in this matter. There is no surprise, in fact, it was defendant who, in its summary judgment motion, alleged that plaintiff had “sued the wrong party” and that individual members of L&I should have been sued. Plaintiff could not have known the participation of each of the numerous L & I actors in this matter, until the depositions of state employees. Plaintiff informed the trial court that he did not oppose a trial continuance if any delay in preparation was claimed by the state.

4. THE TRIAL COURT ERRED IN AWARDING THE STATUTORY PENALTY OF \$10,000 WHEN THE STATUTE DOES NOT APPLY, OR WHEN THERE WAS AN ISSUE OF FACT REGARDING GOOD FAITH.

If the court rejects appellant's argument that the anti-SLAPP statute does not apply to this case, At minimum, the issue of whether or not the report to the police was in good faith is a factual question and cannot be determined upon a summary motion. Evidence of record shows that Mr. Alan Croft, knew when the "trespass notice" was issued, there was no authority for it. He repeatedly requested guidance from his superiors and his legal resources. He had personally investigated and evaluated Mr. Segaline and found a very low risk to the office, and it was uncontested that on August 22, the date that Mr. Segaline was arrested, plaintiff's conduct was proper in every way, and that he had been at L & I the previous day, also with proper conduct.

Furthermore, e-mails, CP 419--426, discovered later through the public disclosure process, evidence that the L & I staff sought ways to exclude plaintiff from the office even after the charges of trespass were dismissed by the court. These persistent attempts to bar Mr. Segaline from the office are not consistent with a "good faith" belief that the "no trespass notice" was valid—because it had already been found not valid at that point. They are consistent with showing malice against Mr. Segaline and

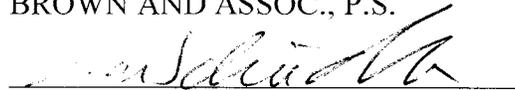
evidencing that the complaints about him were made in bad faith, and not in response to any real or perceived danger. If the trial court can properly entertain an award of penalty in this matter, (which it cannot if the SLAPP statute is not applicable to plaintiff's causes of action) then the issue of good faith, if not summarily determined to be absent, must be presented to the jury.

CONCLUSION

Plaintiff Appellant there fore requests that this court reverse and remand this matter for trial on the merits.

DATED THIS 30TH DAY OF MARCH, 2007.

LAW OFFICES OF JEAN SCHIEDLER-
BROWN AND ASSOC., P.S.



Jean Schiedler-Brown, WSBA # 7753

Attorney for Mr. Segaline

1 EXPEDITE

2 Hearing is set (None)

3 The Honorable Paula Casey

COURT OF APPEALS
DIVISION II

07 APR -2 PM 1:56

STATE OF WASHINGTON
BY Jan Schiedler-Brown
DEPUTY

7 **IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
8 **DIVISION II**

9 STATE OF WASHINGTON DEPARTMENT OF
LABOR AND INDUSTRIES,

10 Respondent,

11 vs.

12 MICHAEL SEGLAINE

13 Appellant.

THURSTON COUNTY SUPERIOR
COURT NUMBER

No. 05-2-01554-1

APPEALS COURT NUMBER 358239

CERTIFICATE OF SERVICE

15 I hereby certify that I caused a true copy of the following documents:

16 Brief of Appellant

17 This certificate of Service

18 To be delivered to the attorney general at his address of record, to wit:

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

19 Olympia, WA

By legal messenger, next day service, to be delivered on or before April 2, 2007.

20 DATED this 30thth day of April, 2007

21 
22 _____
23 Jean Schiedler-Brown, WSBA #7753
24 Attorney for Plaintiff/Appellant