

NO. 36722-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

RICKEY CALHOUN,

Appellant,

v.

STATE OF WASHINGTON, DR. HENRY RICHARDS, ALAN
MCLAUGHLIN, DR. VINCE GOLLOLGY, THEODORE SPARKHUL,
WILLIAM HUTTERMAN, JOHN DOE – AKA B. FRYE, DAROLD
WEEKS, RICK RAMSETH, AND KEVIN TROTTER,

Respondents.

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I. NATURE OF THE CASE

Rickey Calhoun is an African American resident of and pre-trial detainee at the Special Commitment Center, a secure, “total confinement facility” that provides supervision and sex offender treatment services for sexually violent predators.¹ SCC is operated by the Department of Social and Health Services on McNeil Island. Calhoun filed a lawsuit against the state, SCC, eight individually-named current or former SCC employees, and one former employee of the DSHS Division of Child Support. Calhoun asserted a number of statutory and tort claims based on alleged racial discrimination and retaliation occurring between February 2001 and September 2004. The defendants moved for summary judgment on several grounds. The trial court granted the motion in its entirety and dismissed the case. Calhoun now appeals the trial court’s dismissal on only two of those grounds.

II. COUNTERSTATEMENT OF THE ISSUES

1. Should summary judgment dismissal of affected claims be affirmed where the trial court determined, as a matter of law, that Calhoun, as a resident of SCC, was not in an employee-employer relationship with SCC when he participated in a resident job, under the terms of SCC Policy 214, and therefore the provisions of RCW 49.60 –

¹ RCW 71.09.020(17).

the Washington Law Against Discrimination – do not apply in this case?

2. Should summary judgment dismissal of affected claims be affirmed where the trial court determined, as a matter of law, that the provisions of RCW 74.34 – the Vulnerable Adult Act – do not apply in this case, as SCC is not a facility defined under RCW 74.34.020(5), but rather is governed under RCW 71.09, and Calhoun is not a vulnerable adult, as defined under RCW 74.34.020(13)(d), or a “whistleblower” under RCW 74.34.180, but rather is an individual for whom a judge has determined there is probable cause to believe he is a sexual predator whose detention at SCC is governed by the provisions of RCW 71.09?

3. Should summary judgment be summarily affirmed on those claims dismissed as time barred, those claims against named individual defendants dismissed because service of process was deficient, those claims dismissed for failure to show any genuine issue of material fact to support claimed intentional and/or negligent tortious conduct by the defendants, and Calhoun’s failure to produce any evidence of damages, where Calhoun has neither assigned error to nor offered any argument for reversing summary judgment with respect to those rulings on summary judgment by the trial court?

III. COUNTERSTATEMENT OF THE FACTS

Individuals committed to or detained at SCC are referred to as “residents.” CP² at 166; RCW 71.09.200(3); WAC 388-880-010, -020. Those civilly committed have been found by a judge or jury to be a “sexually violent predator” under RCW 71.09. CP at 166; RCW 71.09.020(16); WAC 388-880-010 – -020. “Pre-trial detainees” are residents for whom a judge has determined there is probable cause to believe the individual is a sexual predator and therefore should be in custody awaiting a civil commitment trial. CP at 166; RCW 71.09.040; WAC 388-880-030, -042(1).

Calhoun was first sent to SCC on January 2, 2001. CP at 166. He was returned to the custody of the Department of Corrections on February 9, 2001, but was then returned to SCC on July 17, 2002. CP at 166. Since that time, Calhoun has remained at SCC as a pre-trial detainee; his civil commitment trial has been stayed pending the outcome of his appeal of his underlying criminal sentence. CP at 166.

On March 31, 2003, Calhoun filed a tort claim with the state’s Office of Financial Management. CP at 230. His claim was directed to both DSHS and DOC, listing incidents from February 9, 2001, to February 21, 2003. CP at 230, 235, 236. In his claim he complained of

² “CP” refers to Clerk’s Papers.

several acts of alleged “blatant” racial discrimination against him by numerous SCC employees, because of his “active participation in the African American Collective.” CP at 230, 235-276.

In 2004 Calhoun held a resident job in the SCC Maintenance Department. DSHS SCC Policy 214 governs resident jobs, job training, and supervision at SCC. CP at 166, 170-173. That policy, in effect at all times during Calhoun’s residency at SCC, states that resident jobs, placement, training, supervision, and evaluation within the SCC secure facility are a component of the overall training program, which in turn is part of the total therapeutic treatment program at SCC. CP at 166, 170. “Job” means a resident vocational training position. CP at 166, 170. The policy further explains that resident jobs are privileges. CP at 166, 171. Residents are normally assigned jobs with no fixed end date, but no resident “owns” his or her job. CP at 166, 172.

Calhoun was supervised in his maintenance job, from June 21, 2004 until October 11, 2004, by William Hutterman. CP at 167, 195, 592. On September 15, 2004, Hutterman, who is a Caucasian, wrapped a chain around Calhoun’s waist and made a racial innuendo. CP at 195, 197, 652.

On October 1, 2004, Calhoun approached SCC Custodial Supervisor Bridgett Burgess and asked if there were any custodial job

openings. CP at 175. Calhoun reluctantly disclosed the reason he wanted a transfer was the chain incident, and other interactions with Hutterman. CP at 175. Burgess urged Calhoun to file a grievance, but Calhoun refused. CP at 175.

Later that day, Custodial Supervisor Burgess reported Calhoun's allegations to SCC Grievance Investigator Darold Weeks. CP at 175, 178. Burgess also reported Calhoun's allegations to her supervisor, Vocational Program Manager Tom Stepanek. CP at 175, 188. Stepanek, in turn, reported the allegations to Associate Superintendent Rick Ramseth verbally on October 8, and in writing on October 11. CP at 162, 188.

Upon receiving the reports of Calhoun's allegations against Hutterman, Weeks, Stepanek and Ramseth each sought-out Calhoun to talk with him about the situation and urge him to file a grievance. CP at 162, 178, 179, 188. Calhoun repeatedly refused to talk about the situation or to file a grievance. CP at 162, 178, 179, 188. Instead, on October 23, 2004, Calhoun wrote to SCC Superintendent Dr. Henry Richards, complaining of the chain incident and alleging that Hutterman had created a racially-hostile working environment. CP at 195. In his letter, Calhoun advised Superintendent Richards that he had rebuffed repeated attempts by Weeks, Stepanek, and Ramseth to discuss his allegations against Hutterman, and to get him to file a grievance.

CP at 195. Calhoun did not indicate he had any complaints against Weeks, Stepanek, Richards, or Burgess. CP at 195. Calhoun informed Superintendent Richards that Stepanek had arranged a job transfer to the Custodial Department, without loss of pay for the few days it took to arrange the transfer.³ CP at 195, 196, 593.

Given the nature of Calhoun's allegations, on November 1, 2004, Superintendent Richards requested an investigation by DSHS Human Resources Division. CP at 196, 652. On November 4, 2004, Calhoun was notified that HRD was initiating an investigation. CP at 197.

In May 2005, HRD completed its investigation and so advised both Richards and Calhoun by letter. CP at 197. HRD substantiated the chain incident occurred and concluded that Hutterman's conduct was racially motivated. CP at 197, 652. HRD advised Calhoun that SCC was taking remedial measures. CP at 197. Based on the HRD investigation, Hutterman was formally disciplined by Superintendent Richards for violation of SCC Policy 140, Resident Abuse. CP at 197, 652, 653.

On March 16, 2005, Calhoun filed another tort claim with OFM. CP at 230, 278-288. This claim, against SCC, addressed only the September 15, 2004, chain incident. CP at 230, 278-285.

³ Calhoun then worked in the SCC Custodial Department from October 18, 2004 until April 13, 2006. CP at 592, 593.

Calhoun's complaint in this lawsuit was filed on July 31, 2006. CP at 2-21, 230, 290-309. Calhoun alleged DSHS was his employer, and that SCC was both a place of accommodation and an employer, as defined in RCW 49.60.040. CP at 2-21, 291, 297, 301-305. He pled 11 claims: (1) unfair practices in a place of public accommodation in violation of RCW 49.60.030, .215; (2) unfair practices of an employer in violation of RCW 49.60.030, .180; (3) unfair or deceptive acts in trade or commerce in violation of RCW 49.60.030 and RCW 19.86.020; (4) discrimination for opposing an unfair practice in violation of RCW 49.30.030 and RCW 49.60.210; (5) retaliatory discharge in violation of public policy; (6) assault and battery; (7) false imprisonment; (8) malicious harassment in violation of RCW 9A.36.080; (9) intentional infliction of emotional distress (outrage); (10) negligent failure to protect from discrimination; and (11) negligent failure to provide medical care. CP at 2-21, 301-308.

On August 9, 2006, Calhoun filed an amended complaint. CP at 22-45, 230, 313-336. The allegations were essentially the same as in the original complaint, but two new claims were added: (12) abuse of a vulnerable adult in violation of RCW 74.34.200, and (13) official misconduct in violation of RCW 74.34.035, .063, .200. Calhoun also claimed violations of duties allegedly owed to him under RCW 74.34.180. CP at 34, 35.

By way of relief, in addition to attorney fees and costs, Calhoun sought “an award of damages for the injuries sustained” on each of his 13 claims.⁴ CP at 35, 36, 37, 38, 39, 40, 41, 42, 43, 44.

Calhoun served individual defendants Richards, McLaughlin, Sparkhul, Hutterman, Weeks, and Ramseth on or about, June 22, 2007, seven months beyond the service deadline under RCW 4.16.170. CP at 471. Calhoun never served the remaining individual defendants Gollogly, Trotter and Frye.⁵ CP at 471.

Defendants filed a summary judgment motion that was heard on July 27, 2007. The trial court granted the motion on the following grounds: (1) several of Calhoun’s claims were barred by the statute of limitations; (2) service on the individually-named defendants was deficient; (3) RCW 49.60 was not applicable to Calhoun’s claims;

⁴ Calhoun also sought punitive damages under RCW 9A.36.083 on his claims of malicious harassment, assault and battery, and false imprisonment. CP at 41, 42.

⁵ The facts relevant to defendants Richards, Hutterman, Weeks and Ramseth have been addressed above. As to the other named defendants: Sparkhul was the Quality Assurance Manager, but no longer works at SCC; McLaughlin was an Associate Superintendent, but no longer works at SCC; Gollogly was the Clinical Director at SCC, but now is in private practice; Trotter was the Support Services Manager, but no longer works at SCC; Frye never worked at SCC, rather he was a Support Enforcement Officer with DSHS’s Division of Child Support, but no longer works for the state. Calhoun has not shown any connection of these defendants to the issues he has raised on appeal. *See* VI. Legal Argument D.2., pp. 28-29, *infra*.

(4) RCW 74.34 was not applicable to Calhoun's claims; (5) Calhoun failed to demonstrate any genuine issues of material fact that the defendants treated him in a tortious manner; and (6) Calhoun produced no evidence of damages. CP at 675-76.

In this timely appeal, Calhoun assigns error only to the trial court's rulings that RCW 49.60 and RCW 74.34 are not applicable to his claims.

IV. SCOPE AND STANDARDS OF REVIEW

The scope of review on appeal is governed by RAP 2.4(a). Under this rule, an appellate court will review a trial court decision, or parts of a decision, designated in the notice of appeal (and related decisions not applicable here). RAP 2.4(a). Calhoun appealed the grant of summary judgment, and then assigned error to and argued only certain issues involving the applicability of RCW 49.60 and RCW 74.34.⁶ Review of these rulings will be *de novo* and the inquiry will be the same as in the

⁶ Specifically, Calhoun takes issue only with whether he should be considered an employee of SCC under RCW 49.60, whether as a resident of SCC he should be considered a vulnerable adult under RCW 74.34, and in turn whether he qualifies as a whistleblower under RCW 74.34 for complaining of his alleged abuse as a "vulnerable adult." Br. of Appellant at 1. He does not argue on appeal that SCC is a "place of public accommodation" under RCW 49.60, as he did below, so he has waived that issue on appeal. *See Escude ex rel. Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003). Similarly, Calhoun has not argued on appeal that SCC engaged in any deceptive acts in trade or commerce in violation of RCW 49.60.030 or RCW 19.86.020, as he did below, waiving those issues, as well. *Id.*

trial court. *Cummins v. Lewis County*, 156 Wn.2d 844, 852, 133 P.3d 458 (2006). Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* An appellate court reviews issues of law *de novo*. *State v. Campbell*, 125 Wn.2d 797, 800, 888 P.2d 1185 (1995). Interpretation of a statute is also a question of law reviewed *de novo*. *Washington Public Ports Ass'n v. State, Dep't. of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003).

Even when a decision is properly within the scope of review, where there is no assignment of error and no argument or citation of authority in support of an alleged error, the issue is waived and should not be considered by the appellate court. *Escude ex rel. Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003) (citing cases). In addition to not challenging dismissal of his “public accommodation” claims under RCW 49.60, and his “deceptive acts in trade or commerce” claims under RCW 49.60 and RCW 19.86.020,⁷ Calhoun has left unchallenged the trial court’s summary dismissal of his claims based on: (1) statute of limitation violations; (2) defective service on the individually-named defendants; (3) no evidence of intentional or negligent tortious conduct on the part of the

⁷ See footnote 5, *supra*.

defendants; and (4) no evidence of damages. These unchallenged rulings are therefore beyond the scope of review and should be summarily affirmed.

V. SUMMARY OF ARGUMENT

The only issues properly before this Court are: (1) whether Calhoun was an employee of SCC under RCW 49.60, thus implicating the Act's anti-discrimination provisions for employers against SCC; and (2) whether Calhoun, as a resident of SCC, was a "vulnerable adult," as defined in RCW 74.34.020(13)(d), and therefore subject to the protections for such persons under RCW 74.34; and, in turn, (3) whether Calhoun was a "whistleblower," as defined in RCW 74.34.180(3)(a), for complaining of his alleged abuse as a "vulnerable adult."

As a matter of law, the trial court correctly ruled that neither chapter 49.60 RCW nor chapter 74.34 RCW apply to Calhoun as a resident of SCC. Summary judgment of dismissal of all claims based on alleged violations of those Acts should be affirmed.

Calhoun has not perfected his appeal to reach any other grounds on which the trial court granted summary judgment in favor of the state and individually-named defendants. Those unchallenged rulings should be affirmed without further review.

VI. LEGAL ARGUMENT

A. RCW 49.60 Does Not Apply To Residents Of SCC

Calhoun brought several causes of action based on the notion he was mistreated as an employee of SCC. The trial court ruled in granting summary judgment that RCW 49.60, which in part prohibits discrimination against an employee by an employer, does not apply to Calhoun as a resident of SCC. Accordingly, the trial court dismissed all of Calhoun's employment discrimination claims based on RCW 49.60. Calhoun's grounds for challenging this ruling are without merit.

Those involuntarily confined to an institution for the treatment of sexually violent or dangerous persons have no employee-employer relationship with the institution. *Miller v. Dukakis*, 961 F.2d 7, 8-10 (1st Cir. 1992), *cert. denied*, 506 U.S. 1024 (1992) (those committed to Massachusetts Treatment Center for Sexually Dangerous Persons who work at various jobs at the center are not "employees" of Treatment Center entitled to minimum wage under Fair Labor Standards Act, 29 U.S.C. § 206(a), nor are they entitled to minimum wage as an element of treatment).

Calhoun's status at SCC is governed by RCW 71.09, and his work at any of the various jobs at SCC is governed by DSHS SCC Policy 214. That policy provides that resident jobs, placement, training, supervision,

and evaluation within the SCC secure facility are components of the overall training program, which is part of the total therapeutic treatment program at SCC. CP at 166, 170.

Calhoun's "job" was a component of his treatment program at SCC; as a matter of law, he was not an "employee" of the institution. Accordingly, dismissal of his claims based on violations of RCW 49.60, and other claims based on the existence of an employer-employee relationship, including retaliatory discharge, should be affirmed.

1. Fair Labor Standards Act Does Not Apply

Calhoun argues that "[b]ecause our Courts have not examined the relationship between patient-employees and treatment facility employers," the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, is "persuasive authority" in determining whether he was an "employee" of SCC for purposes of RCW 49.60. Br. of Appellant at 8, n.1. He also argues that this determination "is a factual issue, requiring examination of the alleged vocational programs, including the job skills and length of training." Br. of Appellant at 7.

Both assertions are wrong. As a matter of law, the FLSA does not apply to those committed to SCC for treatment as sexually violent predators. Moreover, the Washington Minimum Wage Act, RCW 49.46, expressly excludes residents of rehabilitative institutions from the

definition of “employee” covered under the Act.

In *Miller*, the appellant residents of the Massachusetts Treatment Center for Sexually Dangerous Persons, the equivalent of Washington’s SCC, attempted, as Calhoun has done here, to style themselves as “patients” of the Treatment Center for the purpose of relying on cases holding that the FLSA applies to mental patients who work for the hospitals in which they reside. 961 F.2d at 8. The First Circuit rejected this contention, adopting instead the state’s position that sexually dangerous persons at the Treatment Center should be treated more like “prisoners” for purposes of determining if the FLSA applies.

The brute fact is that the appellants would not be at the Treatment Center had they not committed, and been convicted of, serious crimes. Their placement at the Treatment Center was intended, at least in part, to protect society. This alone justifies treating inmates [of the Treatment Center] as “prisoners” for most purposes, including the payment of wages, and distinguishes them from the mental patients and mentally retarded people accorded FLSA coverage in [reported cases].

Id. at 9 (citations omitted).

The same rationale applies to “residents” of SCC. Under the provisions of RCW 71.09, only those who meet the criteria of a “sexually violent predator” are involuntarily committed for confinement and sex offender treatment services at SCC. The statutory definition of a “sexually violent predator” is:

. . . any person who has been convicted of or charged with a crime of sexual violence who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

RCW 71.09.020(16).

After noting that “courts have uniformly denied FLSA and state minimum wage law coverage to convicts who work for the prisons in which they are inmates”, *Miller*, 961 F.2d at 8 (citations omitted), the court went on to note that the FLSA was inapplicable to sexually dangerous persons committed to the Treatment Center because a “minimum wage is not needed to protect the appellants’ well-being and standard of living” as is the congressional policy behind the FLSA. *Id.* at 9. “SDP’s, like the more common run of prisoners, are cared for (and their standard of living is determined, within constitutional limits) by the state.” *Id.* See also, *Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005) (in explaining why FLSA does not apply to prisoners, noting: “Prisoners are not imprisoned for the purpose of enabling them to earn a living. The prison pays for their keep.”); *Hale v. Arizona*, 993 F.2d 1387, 1396 (9th Cir. 1993) (en banc) (“[T]he primary policy concern of the FLSA - ensuring a minimum standard of living for all workers - is simply inapplicable to prisoners ‘for whom clothing, shelter, and food are provided by the prison.’” (citation omitted)).

As is true in the prison context, the necessities of a minimum standard of living are provided by the state for residents of SCC. Under RCW 71.09, DSHS “provide[s] evaluation, care, control, and treatment of persons court-detained or court-committed to the sexual predator program.” WAC 388-880-007. For these purposes, “[c]are’ means a service the department provides during a person’s detention or commitment within a secure facility toward adequate health, shelter, and physical sustenance.” WAC 388-880-010.

Moreover, under Washington’s Minimum Wage Act, the definition of “employee” specifically excludes “[a]ny resident, inmate, or patient of a state, county, or municipal correctional, detention, or rehabilitative institution.” RCW 49.46.010(5)(k). Since the Act thus excludes residents of SCC as “employees”, there is no need to turn to the FLSA to determine whether Calhoun was or is an employee of SCC.

Calhoun’s reliance on *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 712-714, 106 S. Ct. 1527, 89 L. Ed. 2d 739 (1986), is similarly misplaced. Calhoun cites *Icicle Seafoods* as support for his contention that

[t]o determine whether an employer-employee relationship exists under RCW 49.60 between a treatment facility and a patient-employee is a factual issue, requiring examination of the alleged vocational programs including the job skills and length of training.

Br. of Appellant at 7.

However, contrary to Calhoun's assertion, *Icicle Seafoods* does not stand for this proposition. The case was brought by employees on a fish-processing barge, against their employer, seeking to recover overtime benefits under the FLSA. *Icicle Seafoods* has nothing to do with discrimination, "treatment facilities" and "patient-employees," or vocational programs. The case is inapposite to the issues in this lawsuit.

Calhoun's reliance on *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 81 S. Ct. 933, 6 L. Ed. 2d 100 (1961), is equally inapposite to the issues here. In *Goldberg*, the Secretary of Labor sought to enjoin a home-workers' cooperative from violating FLSA provisions concerning minimum wages. However, as argued above, as a matter of law Calhoun was not an "employee" under the FLSA.

Calhoun's citations to *Souder v. Brennan*, 367 F. Supp. 808 (D.D.C., 1973); *Weidenfeller v. Kidulis*, 380 F. Supp. 445 (E.D. Wis., 1974); *Davis v. Balson*, 461 F. Supp. 842 (N.D. Ohio, 1978); and *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala., 1972), are also misplaced, as these cases were also brought under FLSA. Additionally, in *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (U.S. Dist. Col., 1976), the Supreme Court held the 1966 and 1974 amendments to the FLSA wage provisions invalid insofar as they operated to displace states' ability to structure employer-employee relationships.

426 U.S. at 851-52. The Court held that Congress had acted beyond its authority under the Commerce Clause in applying the FLSA to state institutions. 426 U.S. at 852, 854-55. Accordingly, an inmate performing janitorial, kitchen worker, and similar labor at the direction of the Department of Prisons was not entitled to minimum wages under FLSA, as the inmate did not qualify as an “employee” under the Act. *Vanskike v. Peters*, 974 F.2d 806 (7th Cir. 1992).

Under RCW 49.60, the definition of “employee” excludes only an “individual employed by his or her parents, spouse, or child, or in the domestic services of any person.” RCW 49.60.040(4). However, as with the FLSA, where “[t]he reason the FLSA contains no express exception for prisoners is probably that the idea was too outlandish to occur to anyone when the idea was under consideration by Congress”, *Bennett*, 395 F.3d at 410, the reason RCW 49.60 contains no express exception for sexually violent predators confined at SCC is that the idea was likewise too outlandish to occur to our Legislature.

2. SCC Policy 214 Governed Calhoun’s Resident Job

The relationship between SCC and Calhoun arises out of Calhoun’s detention under the provisions of RCW 71.09. The primary purpose of this detention is confinement and treatment, not employment. RCW 71.09.010.

SCC Policy 214 governs the terms, conditions, and expectations for resident jobs, job training, evaluation, and supervision. CP at 166, 170. That policy first became effective on September 1, 1998, and is still in effect. CP at 166. The policy specifically provides that participation in a resident job is a component of the overall training program, which is part of the total therapeutic treatment program at SCC. CP at 166, 170, 171. The policy further states that a “job” – a resident vocational training position – is a privilege and no resident “owns” his or her job. CP at 166, 170, 172.

SCC exercises control and direction over Calhoun’s treatment program and work performance. CP at 166, 172, 592. Calhoun receives monetary compensation for his work, but that compensation is minimal. CP at 166, 172, 592-594. Calhoun is not required to work at SCC, but in doing so he is participating in the overall therapeutic treatment program. CP at 166, 171.

The trial court was correct in deciding, as a matter of law, that Calhoun was not and is not an employee of SCC, and the provisions of RCW 49.60 do not apply in this case. Therefore, summary dismissal of all Calhoun’s claims brought under RCW 49.60 should be affirmed.

B. RCW 74.34 Does Not Apply To Calhoun And SCC

In his lawsuit, Calhoun claimed that he is a vulnerable adult, and SCC and individually-named SCC employees violated RCW 74.34, with respect to him. The trial court ruled, as a matter of law, that RCW 74.34 does not apply to SCC and Calhoun as a resident of SCC. Calhoun's challenge to this ruling is without merit, and summary judgment should be affirmed.

RCW 74.34 is the Abuse of Vulnerable Adults Act. When the Legislature adopted the statute in 1995, it created a new cause of action in favor of vulnerable adults who suffer neglect, abuse, abandonment or exploitation while residing in a nursing home, adult family home, or other institutional setting, such as a boarding home. RCW 74.34.200; *Schumacher v. Williams*, 107 Wn. App. 793, 795, 28 P.3d 792 (2001). It was never the Legislature's intent to extend the protection of this Act to sexually violent predators confined for treatment at SCC.

1. SCC Is Not A "Facility" Under RCW 74.34

Under RCW 74.34.020(13)(d), a "vulnerable adult" includes a person "[a]dmitted to any facility." A "facility" is defined, under RCW 74.34.020(5), as "a residence licensed or required to be licensed under RCW 18.20, boarding homes; RCW 18.51, nursing homes; RCW 70.128, adult family homes; RCW 72.36, soldiers' homes;

RCW 71A.20, residential habilitation centers; or any other facility licensed by the department [DSHS].” This list does not include SCC, which is governed by RCW 71.09. Further, SCC is not licensed by DSHS. RCW 71.09 does not require SCC be operated or maintained only with a license, as required, for example, by RCW 18.20 (“After January 1, 1958, no person shall operate or maintain a boarding home as defined in this chapter within this state without a license under this chapter.”)

Calhoun’s only basis for asserting his claims under RCW 74.34 is his contention that he is “admitted” to a “facility”, under the definition of “vulnerable adult” found at RCW 74.34.020(13)(d). Because SCC is not a “facility” under RCW 74.34.020(5), his claims under the Act fail.

2. State Defendants Are Not Proper Parties

Additionally, the Legislature specifically limited the class of persons who might be liable under RCW 74.34.

This action shall be available where the defendant is or was a corporation, trust, unincorporated association, partnership, administrator, employee, agent, officer, partner, or director of a facility, or of a home health, hospice, or home care agency licensed or required to be licensed under RCW 70.127, as now or subsequently designated, or an individual provider.

RCW 74.34.200(1).

The words “state agency” or anything similar is missing from this language. Accordingly, by its plain language, the statute does not create a cause of action against the state or its agencies, to include SCC.

Nor may a cause of action be inferred. “Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the Legislature.” *State v. Swanson*, 116 Wn. App. 67, 75, 65 P.3d 343 (2003). The Legislature did not include state agencies among the list of potential defendants in a cause of action brought under RCW 74.34, and the inclusion of SCC should not be inferred.

Moreover, the Legislature specifically directed “[t]he state of Washington shall [not] be liable for failure to seek relief on behalf of any person under this section”. RCW 74.34.150. Calhoun’s claims against the state for allegedly failing to refer his complaints of abuse under the statute to law enforcement authorities are likewise beyond the purview of the statute.

RCW 74.34 applies only to licensed facilities in whose care a vulnerable adult has suffered abuse, neglect, exploitation or abandonment. This does not include Calhoun and the SCC.

3. Calhoun's Status Is Determined Under RCW 71.09

Calhoun also argues that the provisions of RCW 74.34 apply to state mental hospitals operated by DSHS, so the statutory scheme should apply to SCC as well. Again, Calhoun is mistaken.

State mental hospitals are governed under RCW 71.05. Just as with the SCC – governed under RCW 71.09 – State mental hospitals are specifically excluded from the definition of “facility” under RCW 74.34.020(5). The statutory scheme, under RCW 71.05, provides for commitment of mentally disordered persons. A person with a “mental disorder” has an organic, mental, or emotional impairment which has substantial adverse effects on the person’s cognitive or volitional functions. *See* RCW 71.05.020(22).

Contrary to Calhoun’s assertion, the SCC is not operated for “mental patients.” It is a civil commitment facility for the care and confinement of persons detained or civilly committed under RCW 71.09. RCW 71.09 provides the statutory scheme for sexually violent predators. A “sexually violent predator” is a person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(16). These individuals do not have a mental

disease or defect that renders them appropriate for the existing involuntary treatment act, RCW 71.05, which is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment to individuals with serious mental disorders and then return them to the community. RCW 71.09.010.

In contrast to persons appropriate for civil commitment under RCW 71.05, sexually violent predators generally have personality disorders and/or mental abnormalities which are not amenable to existing mental illness treatment. *Id.* The existing involuntary commitment act, RCW 71.05, is inadequate to address the risk to reoffend. *Id.* Treatment modalities for the sexually violent predator population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act, RCW 71.05. *Id.*

Calhoun is an individual for whom it has been judicially determined that there is probable cause to believe he is a sexually violent predator. Accordingly, Calhoun's status is governed by RCW 71.09, not RCW 74.34. *See* RCW 71.09.010, .020, and .040.

The trial court correctly dismissed Calhoun's claims brought under RCW 74.34.

C. Calhoun Is Not A “Whistleblower” Under RCW 74.34.180

Calhoun maintains he was a “whistleblower” under the provisions of RCW 74.34.180. As argued above, and as the trial court correctly ruled, RCW 74.34 does not apply to SCC and SCC residents.

Under RCW 74.34.180(1), an employee or contractor who is a whistleblower may not be subjected to workplace reprisal or retaliatory action. As also argued above, Calhoun was not an employee of SCC and SCC was not Calhoun’s employer. Under RCW 74.34.180(3), a resident of a facility governed by the provisions of RCW 74.34 may be a whistleblower. However, as Calhoun was not a resident of a facility subject to the provisions of RCW 74.34, he likewise was not a whistleblower under the Act.

The trial court’s summary judgment ruling that RCW 74.34 was inapplicable to this case should be affirmed.

D. Other Grounds For Dismissal Not Appealed By Calhoun Should Be Summarily Affirmed

Calhoun has not argued for reversal of the trial court’s summary judgment decisions based on statute of limitations violations, deficient service, and no evidence of negligent or intentional tortious conduct.⁸ By

⁸ Calhoun has also not challenged the trial court’s ruling that he failed to produce any evidence of damages. However, while defendants argued this point indirectly on their motion for summary judgment, they did not expressly raise the issue as a ground for dismissal.

failing to address these grounds in his opening brief, Calhoun has waived any issue pertaining to dismissal of his claims on those grounds.

It is well settled that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error.

Escude, 117 Wn. App. at 190 n.4 (citing *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 689 n.4, 974 P.2d 836 (1999)); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *CTVC of Hawaii, Co. Ltd. v. Shinawatra*, 82 Wn. App. 699, 706 n.2, 919 P.2d 1243, 932 P.2d 664 (1996), *review denied*, 131 Wn.2d 1020 (1997).

Nor may Calhoun resurrect these issues in his reply brief. *Cowiche Canyon*, 118 Wn.2d at 809 (“An issue raised and argued for the first time in a reply brief is too late to warrant consideration.” (citing *Sacco v. Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990))). This Court should summarily affirm dismissal of Calhoun's claims on these unchallenged issues.

1. Statute Of Limitations Violations

One ground upon which the trial court based dismissal of several of Calhoun's claims was that were brought beyond the statute of limitations. Calhoun's Complaint was filed on July 31, 2006, and his Amended Complaint was filed nine days later. Calhoun was required to

bring his personal injury action within three years. RCW 4.16.080(2), .170. Accordingly, incidents he raised which occurred between 2001 and August 1, 2003, were barred by the statute of limitations: placement in the general population at McNeil Island Correctional Center; SCC requiring him to take an industrial safety class; alleged negligent medical treatment at SCC; and placement in a SCC unit for residents who refused treatment.

The trial court properly dismissed these claims. Because Calhoun has not argued for reversal on appeal, those rulings should be summarily affirmed.

2. Defective Personal Service

Another ground upon which the trial court based dismissal of some of his claims, which Calhoun has not argued on appeal, was defective service of the individually-named defendants. Defendants Frye, Trotter and Gollogly were never served. The trial court never had jurisdiction over them and therefore their dismissal from this lawsuit was proper.

Dismissal of these defendants also warranted dismissal of any issue regarding them premised on negligent or intentional conduct: garnishment of Calhoun's resident-job pay for delinquent child support (Frye); having to take an industrial safety class and a resident-job reassignment (Trotter); and alleged negligent medical treatment (Gollogly).

Calhoun's service on the remaining defendants was deficient, as well. Under RCW 4.16.170, an action is deemed commenced when the complaint is filed or summons is served, whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff must personally serve the defendant within ninety days from the date of filing the complaint. If service is not so made, the action is deemed to not have been commenced for purposes of tolling the statute of limitations. Since Calhoun's Complaint was filed on July 31, 2006, and his Amended Complaint on August 9, 2006, he was required to serve the named defendants by November 9, 2006.

However, defendants McLaughlin, Sparkhul, Hutterman, Ramseth, Weeks, and Richards were not served until July of 2007, well beyond the period allowed under RCW 4.16.170. The only issue Calhoun raised against Sparkhul involved reassignment to a housing unit at SCC in February of 2003. Therefore Calhoun's service on Sparkhul was outside the period of the statute of limitations. With respect to the remaining defendants, while Calhoun's service on them was beyond the 90 days provided, it was within the limitations period.

The trial court's dismissal of defendants Frye, Trotter, Gollogly, and Sparkhul, for deficient service of process, should be summarily affirmed.

3. No Negligent Or Intentional Tortious Conduct

Calhoun also did not argue for reversal of the trial court's dismissal of his various tort claims from this lawsuit based on his failure to raise a genuine issue showing negligent or intentional tortious conduct on the part of any of the defendants. The claims affected are: retaliatory discharge in violation of public policy; negligent or intentional infliction of emotional distress; and negligent failure to protect from discrimination and abuse. Calhoun has waived his right to have appellate review of these rulings, and the trial court's decision to base dismissal of the affected claims on this ground should be summarily affirmed.

VII. CONCLUSION

The trial court's rulings that RCW 49.60 and RCW 74.34 do not apply to the facts and circumstances of this case were correct as a matter of law, and should be affirmed. Additionally, Calhoun did not assign error to or argue for reversal of the trial court's summary judgment dismissal of many of his claims in this case on grounds of statute of limitations violations, defective service, and no evidence of negligent or intentional tortious conduct. Calhoun has waived these issues on appeal, and those rulings should be summarily affirmed.

For the foregoing reasons, and as briefed above, the State of Washington, SCC, and the individually-named defendants, request that

the trial court's order granting summary judgment of dismissal in favor of
all defendants on all claims be affirmed.

RESPECTFULLY SUBMITTED this 13th day of February, 2008.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in cursive script, appearing to read "Wendy S. Lux".

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PROOF OF SERVICE

I certify that I served a copy of the Respondents' Brief on all parties
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I certify under the penalty of perjury under the laws of the state of
Washington that the forgoing is true and correct.

DATED this 13th day of February, 2008, at Olympia, WA.



DEE SHARP
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