

No. 46532-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

VERNON PAUL VANCE,

Plaintiff/Appellant,

v.

PIERCE COUNTY, a governmental subdivision of the State of
Washington; PIERCE COUNTY SHERIFF'S DEPARTMENT, a
subdivision of the State of Washington, et ux., et al.,

Defendants/Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE JERRY COSTELLO

BRIEF OF APPELLANT

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I. INTRODUCTION

Vernon Paul Vance was convicted in Colorado of kidnapping an adult in 1989. After serving a nine-year sentence, he was released from prison and transferred to Washington State. Once here, Mr. Vance was directed by the defendants to register as a sex/kidnap offender, even though he was not convicted of a qualifying offense. Over the next fourteen years, Mr. Vance notified the defendants that he should not be required to register. His efforts included notifying the defendants verbally on various occasions, providing them with his conviction records showing the offense he was convicted of, and consulting with several attorneys.

In response to these efforts, the defendants threatened him with incarceration if he challenged the registration requirement, saying that he would go back to prison in Colorado if he “rocked the boat.” However, at the same time, Pierce County recognized that Mr. Vance was registered in error. Despite knowing this, Pierce County made multiple publications regarding his registration requirement and status and arrested and charged him for failing to register. They subsequently acknowledged that he was not convicted of a qualifying offense and dropped the registration requirement and criminal charges.

Shortly thereafter, Mr. Vance brought a lawsuit against the defendants seeking recovery of the damages caused to him by the

improper registration and publication of his status as a registered sex/kidnap offender. The trial court dismissed Mr. Vance's claims on summary judgment, concluding that the defendants enjoyed absolute immunity and that Mr. Vance's claims were barred by the applicable statutes of limitation. Because the trial court's decision to grant the defendants' motions for summary judgment was in error, Mr. Vance brings this appeal.

II. ASSIGNMENTS OF ERROR

- A. With respect to the claims asserted against Pierce County, the Department of Corrections, and the Washington State Patrol the trial court erred as a matter of law in granting summary judgment. These defendants were not entitled to immunity and Mr. Vance's claims were not barred by the statutes of limitation.
- B. With respect to the false arrest and malicious prosecution claims against Pierce County only, the trial court erred in granting summary judgment. There were genuine issues of material fact precluding summary judgment on these claims where Pierce County had actual notice that Mr. Vance was not convicted of a qualifying offense under the sex/kidnap offender registration statute, but was subsequently arrested and charged with failing to register.
- C. The trial court erred in extending its order granting summary judgment to Gay Lynn Wilke and her spouse, Curtis Wright and his spouse, and Andrea Rae Shaw and her spouse because it lost jurisdiction over them when it granted the parties stipulation to dismiss them without prejudice, before granting the motion for summary judgment.

III. STATEMENT OF THE ISSUES

- A. Should the trial court's entry of summary judgment in favor of Pierce County, the Washington State Patrol, and the Department of

Corrections be reversed regarding Mr. Vance's claims for defamation, invasion of privacy, negligence, gross negligence and deliberate indifference, and negligent infliction of be reversed because the defendants are not immune and these claims are either not barred by the statutes of limitation or should be subject to equitable tolling? YES.

- B. Should the trial court's entry of summary judgment in favor of Pierce County be reversed on Mr. Vance's claims for false arrest and malicious prosecution because the defendants are not immune where they knew that Mr. Vance as improperly required to register as a sex/kidnap offender but nevertheless arrested and charged him for failing to register? YES.
- C. Should the trial court's entry of summary judgment as to the individual Pierce County employees be reversed because the trial court lacked jurisdiction over them where it entered a stipulation dismissing without prejudice them prior to granting summary judgment? YES.

IV. STATEMENT OF THE CASE

A. Mr. Vance was convicted for kidnapping an adult, not a minor.

On February 25, 1989, Plaintiff Vernon Paul Vance pleaded guilty to one count of first degree kidnapping in La Plata County District Court in Colorado, among other charges. Clerk's Paper (CP) at 453. He did not plead guilty to any offense involving a minor; instead, his plea paperwork stated that he "forcibly seized and carried James Sower from one place to another...." CP at 454, 466. Mr. Sower was the president of Pine River Valley Bank. CP at 454.

Later in 1989, a conviction and sentence was imposed on Mr. Vance based on his plea. CP at 454. He spent nine years in prison and, upon his release, was transferred to Washington State. CP at 454-55.

B. Mr. Vance was improperly required to register as a sex/kidnap offender.

On February 26, 1998, Mr. Vance met with Washington State Department of Corrections Community Corrections Officer Bill Frank. CP at 455. Mr. Vance was told by Officer Frank that he was required to register as a kidnapping offender at the Pierce County Sheriff's Office. CP at 455. He asked Officer Frank why he had to register and was told that Washington had different laws than Colorado and he was required to register. CP at 455.

Later that day, Mr. Vance appeared, as directed by Officer Frank, at the Pierce County Sheriff's Office (Sheriff's Office). CP at 455. He notified the Sheriff's Office that he was there to register as a kidnap offender as requested by his Community Correction Officer. CP at 455. The Sheriff's Office provided him registration form, which said that it was for the sex offender registry. CP at 455. Mr. Vance told the Sheriff's Office that he was not a sex offender. CP at 455. The Sheriff's Office responded by telling him that the sex offender and kidnap offender

registry was one in the same and that it would charge him if he did not register. CP at 455. Mr. Vance complied. CP at 455.

On February 26, 1998, Mr. Vance was required to sign a Registration Notification form. CP at 457. According to that form, the registration requirement imposed on him could only be lifted by petitioning Thurston County Superior Court as an offender whom had been sufficiently rehabilitated. CP at 457. Despite believing that this option did not apply to him because he was never convicted of a qualifying offense, he was repeatedly told by Pierce County and the Department of Corrections that it was his only option. CP at 457.

C. The defendants discouraged Mr. Vance from challenging the improper registration requirement.

After being required to register, on February 26, 1998, Mr. Vance voiced his concern to Mr. Frank and other Community Correction Officers that he should not have been required to register because he was convicted of kidnapping an adult, not a minor. CP at 455-56. He was repeatedly told by them that he should “not rock the boat” and that, if he did, he would be sent back to prison. CP at 456.

On May 14, 2008, he took his conviction records to the Sheriff’s Office. CP at 457. There, Gaylene Wilke refused to review his records and he was once again threatened with incarceration if he did not sign the

registration paperwork. CP at 457. That paperwork, again, stated that his only option was petitioning the Thurston County Superior Court as a rehabilitated offender. CP at 457. Despite telling Mr. Vance that she would not review the records; it appears that she did. *See* CP at 255. That same day, she sent an email stating that: “Vernon Vance (DOC: 755593) registered with the Pierce County Sheriff’s Department back in 1998, and **I believe he may have been registered in error.**” CP at 255 (emphasis added). It appears that she took no further action. *See* CP generally.

In October 2008, Mr. Vance renewed his efforts with the Sheriff’s Office after discovering that he was listed on the internet as a “Known Registered Sex/Kidnapping Offender.” CP at 457. He was directed to the Sheriff’s Office’s legal advisor, Craig Adams. CP at 457. He told Mr. Adams that he should not be required to register because he was convicted of kidnapping an adult, not a minor. CP at 457. Mr. Adams refused to meet with him and told him that the Sheriff’s Office lacked information regarding his convictions, was unable to help him, and that his only option was to petition the Thurston County Superior Court. CP at 457.

Then, on October 25, 2008, Mr. Vance sent Mr. Adams, the Washington State Patrol, and others his conviction records, excerpts from the Revised Code of Washington related to the registration requirement, and a printout from a website listing him as a Level 1 Offender. CP at 460.

D. Mr. Vance acted diligently, seeking advice from multiple attorneys.

Mr. Vance also sought direction from other sources. *See* CP at 457-58, 460. In May of 2000, he met with an attorney, who told him that he would have to seek a modification of his sentence in Colorado. CP at 457-58. In October of 2008, he was told by another attorney that the process of petitioning Thurston County Superior Court was inapplicable to him. CP at 460. In April of 2010, he met with another attorney, who sent a letter to Mr. Adams questioning the imposition of the requirement. CP at 460, 496. Mr. Adams did not respond. CP at 460.

E. The defendants published false information about Mr. Vance and arrested and charged him for failing to register.

Mr. Vance discovered that the registration requirement imposed on him had been published by the defendants on multiple occasions. *See* CP at 459, 499, 460. On October 23, 2008, he first found himself listed on a Sheriff's Office website as a Known Sex/Kidnapping Offender. CP at 459. According to the Sheriff's Office listing, he was listed as having kidnapped a minor. CP at 499. On November 5, 2008, the Sheriff's Office website stated that he had absconded. *Id.* On January 4, 2010, he discovered that he was listed on the Pierce County Sex Offender website, now with a photograph and as a Level 1 Offender. CP at 460.

On February 21, 2012, Mr. Vance was summoned to court for failing to register as a sex offender. CP at 461. He appeared and was handcuffed and taken into custody. CP at 461. The next day, he accessed the website again and found that he was now “red flagged” for non-compliance because he changed residences without notification. CP at 461. On April 24, 2012, the charges against him were dismissed by the prosecutor. CP at 499.

Now, the defendants acknowledge that Mr. Vance should never have been required to register because he was not convicted of a qualifying offense. *See* CP at 112, 185. According to counsel for the Department of Corrections and the Washington State Patrol, Mr. Vance “technically should not have registered as a kidnapping offender.” CP at 112. On April 23, 2012, the defendants relieved Mr. Vance of the registration requirement. *Id.* at 175, 185. According to a form completed by Gay Lynn Wilke¹, Mr. Vance was “[r]egistered in error. Subsequently[, Pierce County] determined that the kidnapping of a minor charge was dismissed and the kidnapping conviction was an adult victim.” CP at 185.

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¹ Then named Gay Lynn Jackson.

F. Mr. Vance then instituted this action, which was improperly dismissed by the trial court on summary judgment.

On December 3, 2012, Mr. Vance filed a lawsuit against Pierce County, the Sheriff's Office, Gay Lynn Wilke and her spouse, Curtis Wright and his spouse, and Andrea Rae Shaw and her spouse. CP at 1-11. Pierce County had been previously served on November 27, 2012. CP at 17.

On September 3, 2013, he filed his Second² Amended Complaint, naming the Washington State Patrol and Department of Corrections as an additional defendants. CP at 64-89. On September 13, 2013, they were served. *Id.* at 121. The causes of action asserted by Mr. Vance were: false arrest (Pierce County³ only); defamation, malicious prosecution (Pierce County⁴ only); Gross Negligence and Deliberate Indifference; Negligent Hiring, Retention, and Supervision (Pierce County only); Negligent Infliction of Emotional Distress; Negligence; Outrage; and Invasion of Privacy. CP at 64-89, 248, 252.

The Washington State Patrol and Department of Corrections ("State Defendants") moved for summary judgment. CP at 111-33. They

² On May 2, 2013, he filed his First Amended Complaint, adding the Washington State Department of Corrections as a defendant. *Id.* at 43-54. It was not properly served on the Department of Corrections.

³ And associated individual defendants. AP at 64-89.

⁴ And associated individual defendants. AP at 64-89.

asserted that Mr. Vance's claims should be dismissed because they were barred by the statute of limitations, the defendants were entitled to quasi-judicial immunity, or the defendants enjoyed immunity based on RCW 4.24.550(7). CP at 112.

Then the Pierce County and associated individual defendants also moved for summary judgment. CP at 266-291. They asserted the same arguments as the State Defendants, but added the arguments that Mr. Vance's false arrest claim was barred by qualified immunity, his claim for false arrest should be dismissed because there was probable cause for his arrest, and that he cannot recast his claims as a negligence claim. CP at 266-291

In their reply brief, the Pierce County and the associated individual defendants: "concede[d] for purposes of summary judgment only that there is a dispute of material fact with respect to when the defamation claim accrued for purposes of the statute of limitations." CP at 609. They also – for the first time -- argued that Mr. Vance's claims were barred in part by prosecutorial immunity. CP at at 603-604.

At the hearing on the summary judgment motions, counsel for the Pierce County defendants and counsel for Mr. Vance entered into a stipulation on the record that the individual defendants associated with Pierce County (i.e. Gay Lynn Wilke, Curtis Wright, and Andrea Shaw)

were dismissed without prejudice. Report of Proceedings (RP) at 25. The trial court accepted the stipulation prior to granting the remaining defendants' motion for summary judgment. RP at 25. Nevertheless, the trial court judge extended his order regarding the individual defendants associated with Pierce County, even though they had already been dismissed. RP at 27-28.

The trial court granted the defendants' motions for summary judgment. CP at 625-27, 628-30. In his oral ruling, Judge Jerry Costello stated that:

[t]he motions for summary judgment are granted. The Court finds that Statute of Limitations applies in this instance to most claims. Immunity applies to these claims in one form or another. I am relying upon the arguments and authorities found in these briefs. I am granting the motions.

RP at 26. In response to counsel for Pierce County's request for clarification regarding quasi-judicial immunity, Judge Costello stated that he was finding that all of the factors for quasi-judicial immunity were met. RP at 26. The court did not, however, identify the claims to which he concluded that judicial immunity applied. *See* RP at 26.

Counsel for Mr. Vance then inquired about the impact of Pierce County's stipulation that there was a genuine issue of material fact regarding the accrual of the defamation claim. RP at 26-27. Judge Costello

responded by stating that “the immunity argument” precluded this case from going to the jury. RP at 26-27. When asked what to what specific immunity he was referring, Judge Costello said:

Counsel, I’m not going to go back and forth on - - I have told you that I am relying upon and have relied upon the arguments and the briefing, which I believe are thorough. You can take it up with the Court of Appeals.

RP at 26-27.

V. ARGUMENT

The trial court erred in three respects. First, it erred in granting the defendants motion for summary judgment based on claims of immunity and expiration of the statutes of limitation applicable to Mr. Vance’s claims against Pierce County, the Department of Corrections, and the Washington State Patrol. By improperly requiring Mr. Vance to register and publishing false information about him, their conduct does not warrant immunity. And while this action was institute years after the registration requirement was imposed, the statutes of limitation applicable to his claim should be tolled or did not expire given their accrual dates and the continuing-nature of the defendants’ tortious conduct.

Second, the trial court erred in granting summary judgment on Mr. Vance’s false arrest and malicious prosecution claims against Pierce County because of the existence of genuine issues of material fact. Pierce County had actual knowledge that the registration requirement was

improperly imposed, but nevertheless arrested and charged him for failing to register.

Third, the trial court erred in extending the order granting summary judgment to the individual defendants (i.e. Gay Lynn Wilke and her spouse, Curtis Wright and his spouse, and Andrea Rae Shaw and her spouse) because it lacked jurisdiction over them after accepting the stipulation to dismiss them without prejudice.

A. The trial court erred in granting summary judgment as to Mr. Vance's claims against Pierce County and the State Defendants based upon some unidentified immunity and expiration of the statutes of limitation.

Appellate courts review a trial court's decision to grant summary judgment de novo. *McDevitt v. Harbor View Med. Ctr.*, 179 Wn.2d 59, 64, 316 P.3d 469 (2013). Summary judgment is only warranted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). In determining whether a genuine issue of material fact exists, courts should consider "the facts and reasonable inferences from those facts in the light most favorable to the nonmoving party." *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083, (2012).

Here, the trial court erred in granting the defendants' motions for summary judgment because it erroneously concluded that (i) the defendants are immune from liability, (ii) the statutes of limitation should not be equitably tolled, and (iii) the statutes of limitation lapsed barring Mr. Vance's claims.

- i. The trial court incorrectly concluded that the defendants are entitled to some unidentified immunity in improperly requiring Mr. Vance to register and publishing false information about him where their actions were inconsistent with the sex/kidnap offender statute.

Absolute immunity should be dispensed with great caution and only when a defendant can prove a clear and established entitlement. In *Lutheran Day Care v. Snohomish County*, the Court recognized this, stating that:

Absolute immunity necessarily leaves wronged claimants without a remedy. This runs contrary to the most fundamental precepts of our legal system. Therefore, in determining whether a particular act entitles the actor to absolute immunity, we must start from the proposition that this is no such immunity.

Lutheran Day Care v. Snohomish Cnty., 119 Wn. 2d 91, 105-06, 829 P.2d 746 (1992). Accordingly, the burden of establishing an entitlement to immunity is on the party asserting it. *Id.*

Without identifying what immunity they may be entitled to, the trial court concluded that the defendants enjoyed *absolute* immunity for all of Mr. Vance's claims. *See* RP at 26-27 (stating that "[i]mmunity applies

to these claims in one form or another.”). The defendants asserted several distinct forms of immunity. CP at 127-132 (State), 277-280 (Pierce County). They collectively⁵ claimed quasi-judicial immunity and immunity pursuant to RCW 4.24.550. CP at 127-132 (State), 277-280 (Pierce County). Because the defendants were not entitled to either quasi-judiciary or statutory immunity, the trial court erred in granted the motions for summary judgment.

1. *The defendants do not qualify for quasi-judicial Immunity because their conduct was not analogous to judicial action, warranting protection from a policy perspective, or checked by any meaningful safeguard.*

Striving for quasi-judicial immunity, the defendants attempt to characterize their conduct as exercising a judicial function by setting the conditions of Mr. Vance’s release. *See* CP at 279, 621. That characterization is, however, belied by the facts. Their conduct, being administrative in nature, does not warrant quasi-judicial immunity.

In *Lutheran Day Care v. Snohomish County*, the Court adopted a three-part test for determining whether quasi-judicial immunity applies to a particular governmental officer:

First, the official must show that he or she performs a function which is analogous to that performed by persons entitled to absolute immunity, such as judges or legislators.

⁵ Pierce County asserts additional bases for immunity with respect to Mr. Vance’s false arrest and malicious prosecution claims, which are addressed *infra*.

Second, the official must show how the policy reasons which justify absolute immunity for the judge or legislator also justify absolute immunity for that official.

And third, the official must show that sufficient safeguards exist to mitigate the harshness to the claimant of an absolute immunity rule.

119 Wn.2d 91, 106, 829 P.2d 746 (1992). As these elements suggest, the focus of the inquiry is on the function performed by the actor, and how comparable it is to that of a judge. *Id.* at 100. Here, all three parts of the test weigh against extending immunity to the defendants.

First, the defendants have not engaged in conduct that is analogous to that of judges or legislators. In *Taggart v. State*, the Court set forth factors to consider in determining whether a function comparable to judicial action:

Whether a hearing was held to resolve the controversy, whether objective standards were applied, whether a binding determination of individual rights was made, whether the action is one that historically the courts have performed, and whether safeguards exist to protect against errors

118 Wn.2d 195, 206, 822 P.2d 243 (1992). The *Taggart* Court concluded that quasi-judicial immunity extends to acts that are an integral part of a judicial or quasi-judicial proceeding. *Id.* at 213. In contrast, quasi-judicial immunity is not available for non-discretionary and administrative acts. *See Id.* In *Taggart*, the Court recognized that “[m]uch of the work of a

probation officer is administrative and supervisory. Such activities are not part of the judicial function; they are administrative in character.” *Id.*

Here, the defendants’ conduct is purely administrative in nature and is not analogous to that of a judge. Collectively, they imposed upon Mr. Vance the requirement to register, continued that requirement, threatened him with incarceration if he failed to register or challenged the imposition of the requirement, published his status as a register sex/kidnap offender, and arrested and charged him for failing to register. CP at 455-61. There was no hearing, no binding determination of individual rights, and, as addressed in more detail *infra*, no meaningful procedural safeguards for Mr. Vance. *See CP generally.* Their actions were fundamentally inconsistent with the offender registration statute.

Community Corrections Officer William C. Frank II described his role in imposing the registration requirement as follows:

Based on my review of his file,⁶ I determined that offender Vance was convicted of Aggravated Robbery and 2nd degree kidnapping of a 15 year old and, based on the age of the victim, that offender Vance was required to register in compliance with RCW 9A.44.130. Accordingly, I notified Mr. Vance of the registration requirement and told him that

⁶ Mr. Frank notes that his declaration is based on his review of the file alone and that he has no independent recollection of “any interactions with [Mr. Vance].” CP at 137. Nevertheless, he claims to recall that he never made any statements to anyone outside DOC or law enforcement regarding Mr. Vance registering as a kidnap offender. CP at 137.

he would need to register with the Pierce County Sheriff's Office.

CP at 136. Despite directing⁷ Mr. Vance to register, Officer Frank claims that he “did not make the final determination regarding Mr. Vance’s duty to register nor did [he] have the authority to relieve him from the duty to register.” CP at 136. Without having the plea document that identified the victim of Mr. Vance’s offense, Officer Frank incorrectly determined on incomplete information that Mr. Vance was convicted of a qualifying offense. *See* CP at 136-37.

Officer Frank imposed upon Mr. Vance a requirement that was contrary to law, without any hearing or avenue for relief. As Officer Frank concedes, “[a]t the time Mr. Vance was paroled to Washington State, kidnapper registration was required for offenders with underlying convictions for kidnapping a minor where the minor was not the child of the offender.” CP at 136. Officer Frank’s conduct was administrative in nature. He did not include any discretionary assessment of his risk, nor could he have because the applicable statute identified the qualifying offenses. *See* CP at 136. Mr. Vance was not convicted of a qualifying offense, but nevertheless was required to register without a hearing or any procedural safeguard.

⁷ As discussed *infra*, Mr. Vance was required to sign an Interstate Compact Conditions of Probation and Parole document, which states that Mr. Vance is required to abide by “any written or verbal instructions issued by a Community Corrections Office.” CP 169.

Pierce County's conduct is similarly administrative. Having been notified by Mr. Vance on multiple occasions that he was not convicted of a qualifying offense, Pierce County imposed and continued the registration requirement. CP at 455-57, 460. According to legal advisor for the Pierce County Sheriff's Department Craig Adams:

Based on my review of the documents provided from the La Plata County District Attorney's office, it appeared that Mr. Vance kidnapped a 15 year old minor. **However, there was a discrepancy in the names used and the identity of the kidnap victim, wither it was bank president, James Sower, or his minor son, Larry Sower.**

CP at 408 (emphasis added). Another employee of Pierce County went further. Gay Lynn Wilke stated, in an email on May 14, 2008, that: "Vernon Vance (DOC: 755593) registered with the Pierce County Sheriff's Department back in 1998, and **I believe he may have been registered in error.**" CP at 255 (emphasis added). Despite being notified by Mr. Vance and recognizing the error in requiring him to register, Pierce County continued the registration requirement, made multiple publications to third parties regarding Mr. Vance's status as a sex/kidnap offender, and arrested and charged him for failing to register. CP at 455-61. Once again, there was no individualized, discretionary determination regarding whether registration would be appropriate for Mr. Vance and the community. *See CP generally.* Like the Department of Corrections, this

was administrative conduct, imposed without a hearing, and with no procedural safeguards.

The Washington State Patrol appears to have published information to third parties regarding Mr. Vance's status as a sex/kidnap offender. *See* CP at 171-72. According to the declaration of Becky Miner, the Washington State Patrol receives information regarding registered sex offenders from local law agencies and republishes it in a database that is accessible by law enforcement and the public. CP at 171-72. This administrative act is not judicial in nature and cannot support the State Defendants' claim of immunity.

Second, policy considerations also do not support the extension of quasi-judicial immunity to the defendants. The policy considerations that persuaded the Court in *Lutheran Day Care* include: "preventing injustice to officials whose position require them to exercise discretion"; "preventing the paralysis that might otherwise result if officials were constantly preoccupied with the liability-creating potential of their acts"; and "the fear that because of the potential of personal liability, no one will hold public office." 119 Wn.2d at 107.

These policy considerations have less weight when liability for the individual actors is not at issue because they "are concerned primarily

with maintaining the independence of individual officers.” *Id.* at 108. As the Court in *Lutheran Day Care* reasoned:

finding absolute immunity for the municipality where there is also absolute immunity for the individual leaves the victim entirely without a remedy, whereas eliminating municipal immunity accommodates both the decision-maker and the victim by allowing a certain degree of independence in individual decisionmaking, while also providing the wronged claimant with a remedy.

Id. at 108. Here, only the liability of the public entities is at issue. With the dismissal of the individual defendants by stipulation, Mr. Vance is not seeking to hold them personally liable. There is, therefore, no meaningful threat to their independent decision-making. Furthermore, given that the conduct of the defendants is administrative in character there is no threat to the exercise of discretion.

Instead, the defendants’ lack of diligence – despite recognition of an obvious discrepancy in Mr. Vance’s conviction records – led to an incorrect determination regarding an indisputable fact: the nature of Mr. Vance’s conviction. If anything, policy considerations weigh in favor of ensuring that public agencies act with heightened diligence when their conduct can have grave and irreversible consequences for any individual with no meaningful avenue for challenging the conduct, as they did here. The defendants’ conduct, in unlawfully imposing the registration requirement, continuing that requirement, publishing Mr. Vance’s

registration status, and arresting and charging him for failure to register, caused Mr. Vance substantial harm. *See e.g.* CP at 498 (Mr. Vance was the subject of a petition for a protection order based on his registration.).

Third, there were no procedural safeguards available to Mr. Vance. Initially, the registration requirement was imposed without a hearing or any other opportunity for Mr. Vance to present evidence to refute the condition. Thereafter, the record establishes that Mr. Vance made numerous attempts to convince the Department of Corrections and Pierce County to remove the requirement, including sending them all of the documents related to his conviction. CP at 460. These documents confirmed Mr. Vance's claims that he had not been convicted of a qualifying offense. CP at 460. Nevertheless, it was not until he was arrested and charged with failing to register that someone meaningfully considered Mr. Vance's requests for relief. *See* CP at 185.

As they did in response to Mr. Vance then, it is anticipated that the defendants will once again respond by identifying the statutory framework for petitioning Thurston County Superior for relief under RCW 9A.44.142. However, as the language of the statute makes clear, this avenue is not applicable to Mr. Vance, as a person whom should have never been required to register.

Instead, RCW 9A.44.142 provides a means by which a rehabilitated offender can be relieved of the registration requirement, but that avenue was not applicable or available to Mr. Vance. Specifically, it states that “[a] person who is required to register under RCW 9A.44.130 may petition the superior court to be relieved of the duty to register ... (c) [i]f the person is required to register for a federal or out-of-state conviction, when the person has spent **fifteen consecutive years in the community** without being convicted of a disqualifying offense during that time period.” RCW 9A.44.142(1) (emphasis added). Because Mr. Vance was first required to register on February 26, 1998, he was not eligible to petition for relief from the registration requirement, for his out-of-state conviction, until 15 years later on February 26, 2013. *See* CP at 455. RCW 9A.44.142 also allows for a petition to remove the community notice requirement; however, it also contains a 15-year perquisite. RCW 9A.44.142(b). Therefore, despite being directed to petition the courts by the defendants, under RCW 9A.44.142, he was not eligible to do so until after his lawsuit was filed. *See* CP at 1-11.

Even more, the focus of the petition process is not on whether the registration requirement was lawfully imposed; it is instead upon whether the offender is sufficiently rehabilitated. “The court may relieve a petitioner of the duty to register **only if** the petitioner shows by clear and

convincing evidence that the petitioner is **sufficiently rehabilitated** to warrant removal from the central registry of sex offenders and kidnapping offenders.” RCW 9A.44.142(4)(a) (emphasis added). For a court making this determination, the statute provides a list of 13 factors that can be considered, all of which relate to rehabilitation. *Id.* at (4)(b)(i)-(xiii). Mr. Vance was improperly required to register and, therefore, had no relief available to him via RCW 9A.44.142. There were no procedural safeguards available to Mr. Vance to ensure that the registration requirement and related conduct was not imposed upon him unlawfully, as it was here. Because the three factors for quasi-judicial immunity weigh against granting immunity for the defendants, this Court should reverse the trial court.

2. *The defendants are not entitled to immunity under RCW 4.24.550 because Mr. Vance was not convicted of a qualifying offense and, therefore, the defendants’ conduct does not fall within its scope and grant of immunity.*

The defendants are also not entitled to immunity under RCW 4.24.550. The state of Washington is “presumptively liable in all instances in which the Legislature has *not* indicated otherwise.” *Savage v. State*, 127 Wn.2d 434, 445, 889 P.2d 1270 (1995) (analyzing RCW 4.92.090).

RCW 4.24.550 sets forth limited circumstances in which public entities are immune from actions based on the release of information

regarding registered sex and kidnap offenders. Whether this immunity extends to the defendants is a question of statutory interpretation.

RCW 4.24.550(7) provides, in relevant part, that:

[a]n appointed or elected public official, public employee, or public agency as defined in RCW 4.24.470, or units of local government and its employees, as provided in RCW 36.28A.010, are immune from civil liability for damages for any discretionary risk level classification decisions or release of relevant and necessary information, unless it is shown that the official, employee, or agency acted with gross negligence or in bad faith.

The purpose of statutory interpretation is to discern and implement the intent of the legislature. *State v. Armendariz*, 160 Wn.2d 106, 110-11, 156 P.3d 201 (2007). The first step in ascertaining the Legislature's intent is to look to the plain language of the statute. *Id.* This inquiry extends beyond the specific words at issue and includes consideration of all that the Legislature has said in the statute and related provisions. *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002).

Here, the operative phrase in the statute is "relevant and necessary information." See RCW 4.24.550(7). Immunity extends only to the release of "relevant and necessary information." *Id.* The balance of the section provides guidance regarding the only reasonable interpretation of this phrase. Subsection (1) provides, in relevant part, that:

public agencies are authorized to release information to the public regarding sex offenders and kidnapping offenders when the agency determines that disclosure of the **information is relevant and necessary** to protect the public and counteract the danger created by **the particular offender**.

Id. (emphasis added). As this language makes clear, the relevant and necessary information is linked to the “offender.” This connection is underscored in the statute’s language regarding what information is “relevant and necessary”:

the extent of the public disclosure of relevant and necessary information shall be rationally related to:

(a) The level of risk posed by **the offender** to the community;

(b) the locations where **the offender** resides, expects to reside, or is regularly found; and

(c) the needs of the affected community members for information to enhance their individual and collective safety.

Id. at (2) (emphasis added). The statute also clarifies that offender is limited a person convicted of a qualifying offense:

[t]his authorization applies to information regarding:

(a) Any person adjudicated or convicted of a sex offense as defined in RCW 9A.44.128 or a kidnapping offense as defined by RCW 9A.44.128⁸;

⁸ RCW 9A.44.128(8)(a) defines “kidnapping offense,” in relevant part, as “[t]he crimes of kidnapping in the first degree, kidnapping in the second degree, and unlawful imprisonment, as defined in chapter 9A.40 RCW, **where the victim is a minor and the offender is not the minor’s parent**” or an out-of-state equivalent. (emphasis added)

(b) any person under the jurisdiction of the indeterminate sentence review board as the result of a sex offense or kidnapping offense;

(c) any person committed as a sexually violent predator under chapter 71.09 RCW or as a sexual psychopath under chapter 71.06 RCW;

(d) any person found not guilty of a sex offense or kidnapping offense by reason of insanity under chapter 10.77 RCW; and

(e) any person found incompetent to stand trial for a sex offense or kidnapping offense and subsequently committed under chapter 71.05 or 71.34 RCW.

Id. (emphasis added). Therefore, to be “relevant and necessary information” it must be about an “offender,” which the statute defines as a person convicted of a qualifying offense.

Consistent with this rationale, information about a person that is not convicted of a qualifying offense is not “relevant and necessary information.” The release of information about a person not convicted of a qualifying offense does not, therefore, fall within the scope of this statute and its protection.

As applied to this case, Mr. Vance was not convicted of a qualifying offense. He was convicted of kidnapping an adult, not a minor. He is not an offender under RCW 4.25.550. Therefore, information released about him cannot be “relevant and necessary” and any such release does not fall within the statutes grant of immunity. His crime does

not fit within the class of offenses that the Legislature designated as warranting disclosure to the public and, therefore, its grant of immunity is inapplicable.

The defendants have offered no alternative interpretation of RCW 4.25.550 that is reasonable⁹ and consistent with the axioms of statutory interpretation. Their position requires an interpretation of the statute that broadens it well beyond any reasonable bounds, including persons not convicted of a qualifying offense. *Mac's Shell Serv., Inc. v. Shell Oil Products Co. LLC*, 559 U.S. 175, 188, 130 S.Ct. 1251, 176 L.Ed.2d 36 (2010) (recognizing the well-established principle of statutory interpretation that statutes should be interpreted in a manner that gives effect to all of their provisions.). Fundamentally, the defendants cannot enjoy protection from a statute with which they did not comply.

Even if the language of the statute supported its extension to the defendants here, a genuine issue of material fact precludes summary judgment on the defendants' assertion of immunity. The grant of immunity does not apply when "it is shown that the official, employee, or agency acted with gross negligence or in bad faith." RCW 4.24.550(7).

⁹ "When statutory language is unambiguous, we do not need to use interpretive tools such as legislative history." *State v. Velasquez*, 176 Wn.2d 333, 336, 292 P.3d 92 (2013).

“Gross negligence means negligence substantially and appreciably greater than ordinary negligence.” *Bader v. State*, 43 Wn. App. 223, 228, 716 P.2d 925 (1986). Whether gross negligence exists is ordinarily a question for the jury. *See Id.* Here, the evidence presented, when considered in the light most favorable to Mr. Vance as required on summary judgment, establishes the presence of gross negligence. Beyond acting with a lack of information, the defendants persisted in publishing information about Mr. Vance after he notified them verbally on several occasions that he should not be required to register and then substantiated his claim.

On October 25, 2008, Mr. Vance provided the defendants with his conviction records, the applicable provisions of the Revised Code of Washington, and a printout from the website listing him as a registered offender. CP at 460. With this information, Mr. Adams, on behalf of Pierce County, recognized that “there was a discrepancy in the names used and the identity of the kidnap victim, wither it was bank president, James Sower, or his minor son, Larry Sower. CP at 408. Ms. Wilke appears to have determined that he was required to register in err on May 14, 2008. CP at 225.

Nevertheless, the listing was updated sometime before November 5, 2008, on January 4, 2010, and again on February 22, 2012. CP at 499,

460-61. These updates stated that he had absconded, added a photo and described him as a Level 1 Offender, and red-flagged him for noncompliance, respectively. CP at 499. All of which occurred after the defendants were on notice that Mr. Vance should never have been required to register in the first place. This is substantial evidence of gross negligence. Accordingly, this Court should reverse the trial court with respect to its determination that the defendants enjoy any immunity from Mr. Vance's claims.

- i. The trial court erred in refusing to equitably toll the statute of limitations where Mr. Vance was subjected to extraordinary circumstances, he acted diligently, and there is no prejudice to the defendants.

Before addressing the request for equitable tolling, it is important to clarify what claims appear to be at issue given the trial court's ruling. Specifically, Judge Costello ruled that "[t]he Court finds that Statute of Limitations applies in this instance to most claims." RP at 26. These "most claims" appear to be Mr. Vance's claims for gross negligence and deliberate indifference; negligent hiring retention and supervision; negligent infliction of emotional distress; negligence; outrage; and invasion of privacy. See CP at 64-89. This is because the trial court

appeared to give effect to Pierce County's concession¹⁰ that the accrual of the defamation¹¹ claim was a genuine issue of material fact. *See* RP 26-27. Furthermore, Pierce County did not argue that Mr. Vance's false arrest claim and malicious prosecution claims were barred by the statute of limitations. CP at 224-27. Nevertheless, to the extent that all of Mr. Vance's claims trigger statute of limitations concerns, those statutes should be tolled.

“Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S.Ct 1807, 161 L.Ed.2d 669 (2005). Equitable tolling is permitted in Washington when justice requires. *Thompson v. Wilson*, 142 Wn. App. 803, 814, 175 P.3d 1149 (2008). In Washington, courts have held that “limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute.” *Perez v. Garcia*, 148 Wn. App. 131, 142, 198 P.3d 539 (2009).

¹⁰ Pierce County “concede[d] for purposes of summary judgment only that there is a dispute of material fact with respect to when the defamation claim accrued for purposes of the statute of limitations.” CP 609.

¹¹ The accrual of the defamation claim against the State Defendants is addressed *infra*.

As applied to the general statutes of limitation, this requires inquiry into whether the defendants will be prejudiced in mounting their defense. *See State v. Duvall*, 86 Wn. App. 871, 876, 940 P.2d 671 (1997) (stating that the purpose of statutes of limitation is to avoid stale claims). Accordingly, tolling of the statute is warranted where (1) there are extraordinary circumstances standing in the way of a litigant, (2) he or she acted diligently, and (3) there is no undue prejudice to the defendants. Here, all of these factors are present and weigh in favor of tolling the statutes of limitation applicable to Mr. Vance's claims.

1. Mr. Vance was subjected to extraordinary circumstances, including being threatened with incarceration if he challenged the registration requirement.

Through the conduct of the defendants and others, Mr. Vance was subject to extraordinary circumstances, which weigh in favor of equitable tolling. Washington courts often recite an equitable tolling rule that requires bad faith, deception, or false assurances by the defendants. *See e.g. Thompson v. Wilson*, 142 Wn. App. 803, 814, 175 P.3d 1149 (2008). However, as applied, Washington courts have recognized that unintentional conduct of defendants and the conduct of third parties can form a sufficient basis for tolling. *See e.g. State v. Littlefair*, 112 Wn. App. 749, 51 P.3d 116 (2002) (applying equitable tolling where defendant was not notified of implications of guilty plea by his attorney and the court); *In*

re Hoisington, 99 Wn. App. 423, 431-32, 993 P.2d 296 (2000) (applying equitable tolling where the courts failed to consider argument in pro se party's appeals). Accordingly, this Court should include in its consideration the impact of third party conduct and unintentional conduct on Mr. Vance. However, even if this Court does not, there is a sufficient basis to toll the statutes of limitation.

Here, the defendants conduct was coercive and deceptive. The defendants repeatedly threatened Mr. Vance with incarceration if he challenged the registration requirement. CP at 455-57. In the words of his community correction officer, he should not "rock the boat" or he would be sent back to prison. CP at 456. These threats must be considered in light of the defendants' authority over Mr. Vance. When he arrived in Washington, Mr. Vance was required to sign an Interstate Compact Conditions of Probation and Parole document, which states that he was required to abide by "any written or verbal instructions issued by a Community Corrections Office." CP at 169. Therefore, Mr. Vance was both threatened by and subject to the authority of the defendants.

They also mislead him regarding his avenue for relief, repeatedly directing him toward a dead end. Having been threatened with incarceration if he challenged the registration requirement, Mr. Vance had reason to be suspicious of the defendants' instruction that he could only

challenge the registration requirement via RCW 9A.44.142. For example, on May 14, 2008, Vance was required to sign a document titled “Registration of Sex/Kidnap Offenders.” CP at 485-90. This document stated:

LENGTH OF REGISTRATION

How long you must continue to register depends upon the offense for which you were convicted.

- A. IF YOUR OFFENSE WAS A CLASS A FELONY, you *may only* be relieved of the duty to register by petitioning the superior court of the county in which you were convicted (or, in the case of foreign, federal, or out-of-state convictions, the Thurston County Superior Court)

CP at 289 (emphasis added). This avenue, which he was told repeatedly was his only option, was not available to him. As addressed *supra*, he was not convicted of a qualifying offense, his issue was not one of rehabilitation, and RCW 9A.44.142 precluded him from filing a petition for fifteen years.

Considering the defendant’s conduct, his case is comparable to *Thompson v. Wilson*. There, this Court reversed the entry summary judgment against the petitioner that was entered based on the expiration of the statute of limitations applicable to judicial review of a coroner’s decision. *Thompson v. Wilson*, 142 Wn. App. 803, 814, 175 P.3d 1149 (2008). The court, taking the petitioner’s allegations as true, found that she

tried to meet with the coroner repeatedly, then when he finally met with her he told her that he would review a report and meet with her again, and he then refused to meet with her again. *Id.* at 813-14. The coroner had a statutory duty to meet with the family of the deceased. *Id.* at 813.

Similarly, the Pierce County Sheriff's Office has a statutory duty to investigate whether a person's duty to register has ended. "Upon request of a person who is listed in the Washington state patrol central registry of sex offenders and kidnapping offenders, the county sheriff **shall investigate** whether a person's duty to register has ended by operation of law pursuant to RCW 9A.44.140." RCW 9A.44.141(1) (emphasis added). Admittedly, this statute was not technically violated by Pierce County, here, because Mr. Vance's registration requirement was improperly imposed initially and did not end by operation of law; however, the statutory obligation in *Thompson* was also not technically violated because the coroner did meet with the petitioner on one occasion. In both cases, the defendants' had a statutory duty to take action and their conduct was negatively impacted a litigant's pursuit for relief.

Beyond the defendants' conduct, Mr. Vance's pursuit of his claim was impacted by the conduct of third parties. Acting diligently, he consulted with multiple attorneys, who either declined to represent him or were also unable to identify an avenue for relief. One directed him back to

Colorado, another told him that petitioning Thurston County Superior Court was inapplicable to him, and a third tried to work with Mr. Adams to no avail. CP at 457-58, 460, 496. This is analogous to *State v. Littlefair*.

In *Littlefair*, the court applied the doctrine of equitable tolling to the one-year time limit to bring a collateral attack on a final judgment in a criminal case. 112 Wn. App. 749, 51 P.3d 116 (2002). The defendant had not been advised that by pleading guilty he was likely to be deported. *Id.* The court found that the first element of equitable tolling was established by “a series of mistakes by his attorney, the court, and arguably the INS,” in the failure to notify him. *Id.* at 762. Like the defendant in that case, Mr. Vance was directed by and relied on the advice of his attorneys. Their conduct and influence upon Mr. Vance is a consideration that supports equitable tolling.

2. *In light of these circumstances, Mr. Vance pursued his rights diligently, seeking counsel from multiple attorneys who offered him no viable avenue for relief.*

Considering that he had been threatened by defendants with incarceration, the defendants’ authority over him, that he was directed to an avenue for relief unavailable to him, and that the absence of an avenue for relief was confirmed by multiple attorneys, Mr. Vance’s conduct was diligent. He met with several attorneys who offered him no meaningful relief. *See* CP at 457-58, 460, 496. It was not until after Pierce County

recognized its error, after arresting and charging him, that the registration requirement was dropped and, with it, the threat of incarceration. CP at 499. Once the threat was removed, he promptly pursued his claims. CP at 1-11.

3. *There is no prejudice to the defendants where they have conceded that Mr. Vance was improperly required to register.*

The defendants are not prejudiced by delay. At summary judgment, the defendants attempted to conjure up prejudice by claiming that they will offer old, and irrelevant, evidence. Specifically, counsel for the State defendants argued before the trial court that “if this matter goes to trial, defendants will call Vance’s victims and Colorado law enforcement officers as witnesses.” CP at 620. Other than to impermissibly attack Mr. Vance’s character, this evidence has no potential relevance. The defendants have conceded that “he technically should not have registered as a kidnapping offender.” CP at 112.

This effort to reach back twenty years, beyond the bounds of admissible evidence, highlights the absence of prejudice to the defendants. Most of the relevant evidence in this case exists in the form of documentation. Mr. Vance’s conviction records, his agreements with and instructions from the Department of Corrections, Mr. Vance’s arrest and charging documents, and the defendants’ written communications are all

preserved. Emphasizing this point is Officer Frank's declaration. His declaration is founded upon his review of the file; based on which, he is apparently able to offer testimony regarding his assignment to Mr. Vance's case, his communications with Mr. Vance¹², and the fact that he did not inform anyone outside of law enforcement about Mr. Vance registering as a kidnap offender. CP at 134-37.

Furthermore, the defendants have been on notice of Mr. Vance's claims for some time. The day that Mr. Vance was required to register, he questioned the registration requirement. CP at 455. Thereafter, he repeatedly notified the defendants that he was not convicted of a qualifying offense. CP at 455-61. He restated this fact to the defendants on numerous occasions, verbally and in writing. CP at 455-61. He even provided Pierce County with notice of his claim through a tort claim notice, provided on November 13, 2008. CP at 404-06.

Given the notice to the defendants and the nature of the evidence at issue, there is no meaningful prejudice to the defendants. Accordingly, the trial court should have tolled the statutes of limitation applicable to Mr. Vance's causes of action until April 23, 2012 because of the defendants' conduct, Mr. Vance's diligence, and the lack of prejudice to the defendants.

¹² Stating that "I notified Mr. Vance of the registration requirement" CP at 136.

- ii. The Trial Court erred in granting summary based on the conclusion that the statutes of limitation applicable to Mr. Vance's claims had lapsed because they had not accrued or were subject to the continuing tort doctrine.

Alternatively, the trial court erred in concluded that most of Mr. Vance's claims were barred by expiration of the applicable statutes of limitations.

1. *Summary judgment was improper on Mr. Vance's defamation and invasion of privacy claims because there is a genuine issue of material fact as to when a publication occurred where the defendants appear to have made recent, distinct publications regarding Mr. Vance's registration status.*

The trial court erred in granting summary judgment regarding Mr. Vance's claims for defamation and invasion of privacy because there are genuine issues of material fact regarding their accrual dates. Defamation claims are subject to a two-year statute of limitations. RCW 4.16.100. Washington courts have applied this same two-year limitations period to invasion of privacy claims. *See e.g. Eastwood v. Cascade Broadcasting Co.*, 106 Wn.2d 466, 722 P.2d 1295 (1986).

Here, Mr. Vance served Pierce County on November 27, 2012, and filed against the State Defendants on September 3, 2013. CP at 17, 64-89. This appears to be within two years of the accrual of his defamation and invasion of privacy claims. These claims accrue with a publication. Pierce County conceded that summary judgment against it is not warranted

because the accrual of Mr. Vance's claims is a genuine issue of material fact. CP at 603. This concession is appropriate because Pierce County published additional information about Mr. Vance's registration within the two years preceding his filing of the Complaint. CP at 499, 460-61.

There is also a genuine issue of material fact regarding the accrual of Mr. Vance's defamation and invasion of privacy claims against the State Defendants. Mr. Vance's registration status was available through the Washington State Patrol database to the public until his registration requirement was dropped on April 23, 2012. CP at 172-73 (stating that criminal history is available to the public, including the registration requirement until relieved of the duty to register), 175 (stating that Mr. Vance's registration requirement was removed April 23, 2012).

According to the declaration of Becky Miner, "[t]he retention schedule for maintaining records of request from a member of the public for an offender's CHRI¹³ records of requests from a member of the public for an offender's CHRI records is one year and WSP does not have any record of a member of the public requesting Mr. Vance's CHRI from WSP." CP at 173. From this statement it is unclear to what one-year period she is referring, but it appears that she is referring to the most recent year preceding her declaration, which was executed in April of 2014. CP at

¹³ Criminal History Record Information, which includes whether the individual is a registered sex or kidnap offender. CP at 172.

173, 175. This timeframe is well after Mr. Vance's registration requirement was dropped in April of 2012 and, thus, is of no relevance. Therefore, the Washington State Patrol has failed to produce any evidence that it was not accessed by the public. To the extent that it may have been accessed since September 13, 2011, a claim of defamation has accrued.

More importantly, Mr. Miner stated in her declaration Mr. Vance still remains in a WSP database as someone previously required to register. Specifically, she stated that:

[i]f WSP receives a correction notice from local law enforcement or a court order indicating an offender has been relieved of his duty to register, WSP updates the record to reflect the relieved of duty status, which is not disseminated on a conviction background check, **but remains available to law enforcement and criminal justice agencies.**

CP at 174 (emphasis added). Consequently, Mr. Vance's status as a previously registered offender remains accessible by law enforcement and criminal justice agencies, incorrectly suggesting that he was at some point he was convicted of a qualifying offense. The Washington State Patrol has not alleged that this information was not accessed between September 13, 2011 and the filing of the Second Amended Complaint on September 13, 2013. *See* CP at 170-175.

The State Defendants also sought dismissal of Vance's defamation and invasion of privacy claims based on an incorrect application of the

single publication rule. The single publication rule provides that “any one addition of a book or newspaper, or any one radio or television broadcast, is a single publication.” *Momah v. Bharti*, 144 Wn. App. 731, 752, 182 P.3d 455 (2008). The State Defendants misconstrue this rule, alleging that material posted on the internet cannot constitute more than a single publication.

“It is the general rule that each communication of the same defamatory matter by the same defamer, whether to a new person or to the same person, is a separate and distinct publication, for which a separate cause of action arises.” *Id.* at 753 (quoting *Restatement* § 557A cmt. a). Under this principal, the Court concluded in *Herron v. KING Broadcasting Co.* that a statement made during an 11:00 p.m. broadcast was a separate publication from a similar statement aired during the 5:30 p.m. broadcast. 109 Wn.2d 514, 746 P.2d 295 (1987). The *Herron* court reasoned that “[t]he 11 p.m. newscast was the result of a **conscious independent act**, using a new script and broadcaster, and so clearly constitutes a separate publication, even under the single publication rule.” *Id.* at 521 (emphasis added).

Similarly, in *Momah v. Bharti*, the court concluded that the alleged defamer’s act of posting an article on his website quoting statements he made to the *King County Journal* constituted a separate publication from

his statement to the *Journal*. 144 Wn. App. at 752-754. In reaching this conclusion, the court focused on the alleged defamer's action: "Bharti **acted** on two separate occasions." *Id.* at 753 (emphasis added). As the courts recognized in *Herron* and *Momah*, separate acts give rise to separate causes of action. This is distinct from a communication placed on a website once and left there indefinitely.

Here, there is evidence that the Washington State Patrol acted within the statute of limitations. It appears that it updated its database after receiving a notice on December 27, 2011, regarding Mr. Vance's failure to update his address, and again on April 23, 2012, by listing him as someone previously required to register. CP at 172, 175. Because the Washington State Patrol acted by publishing information about Mr. Vance within the two-year period preceding his filing of the Second Amended Complaint, his defamation and invasion of privacy claims are timely.

2. *The trial court should have applied the continuing tort doctrine where Mr. Vance was subjected to a continuing course of conduct that damaged him.*

"Washington recognizes the theory of continuing torts." *Pacific Sound Resources v. Burlington Northern Santa Fe Railway*, 130 Wn. App. 926, 941, 125 P.3d 981 (2005). Washington courts have applied this doctrine in various contexts, including negligence claims. *Id.*; *See e.g. Doran v. City of Seattle*, 24 Wash. 182, 183, 64 P. 230 (1901). "When a

tort is continuing, the statute of limitations runs from the date of each successive cause of action accrues as manifested by actual and substantial damages.” *Pacific Sound Resources*, 130 Wn. App. at 941.

Here, the tortious conduct of the Pierce County was continuous from February 26, 1998 until Mr. Vance was removed from the registry on April 19, 2012. Pierce County repeatedly refused to remove Mr. Vance from the registry, continually threatened Mr. Vance with arrest and prosecution, and, ultimately, filed charges against Mr. Vance for failing to register as a sex/kidnap offender. Through its threats of prosecution and coercion, Pierce County actively kept Mr. Vance from pursuing his legal rights in removing his name from the registry.

B. For the claims asserted against Pierce County only, the trial court erred in granting summary judgment on Mr. Vance’s claims for false arrest and malicious prosecution because there are genuine issues of material fact where the Pierce County had actual knowledge that Mr. Vance was not convicted of a qualifying offense and then arrested and charged him for failing to register.

With regard to the claims asserted only against Pierce County, False Arrest and Malicious Prosecution, the trial court erred in granting summary judgment. These claims present several genuine issues of material fact.

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- i. There are genuine issues of material fact regarding the reasonableness of Pierce County's conduct preclude summary judgment on Mr. Vance's false arrest claim where it knew that Mr. Vance was not convicted of a qualifying offense prior to his arrest.

Mr. Vance was falsely arrested on February 21, 2012 when he was forcibly restrained. CP at 461 (Vance stating that he was “arrested, handcuffed, and taken into custody.”). The standard for false arrest is liberal. “A false arrest occurs when a person with actual or pretended legal authority to arrest unlawfully restrains or imprisons another person.” *Jacques v. Sharp*, 83 Wn. App. 532, 536, 922 P.2d 145 (1996). And, “[a] person is restrained or imprisoned when he is deprived of either liberty of movement or freedom to remain in the place of his lawful choice; and such restraint or imprisonment may be accomplished by physical force alone, or by threat of force, or by conduct reasonably implying that force will be used.” *Kilcup v. McManus*, 64 Wn.2d 771, 777, 394 P.2d 375, 379 (1964). Mr. Vance was handcuffed and taken into the custody. Accordingly, Pierce County’s argument that Mr. Vance was not “arrested” is without merit.

Pierce County’s arguments regarding qualified immunity are equally without merit. “An officer has state law qualified immunity from suit for false arrest where the officer “(1) carries out a statutory duty, (2) according to procedures dictated to him by statute and superiors, and (3)

acts reasonably.” *Staats v. Brown*, 139 Wn.2d 757, 779, 991 P.2d 615 (2000).

Here, Pierce County has failed to identify an applicable statutory duty. Mr. Vance was *never* statutorily required to register as a sex offender. Additionally, Pierce County’s conduct cannot be considered reasonable. It was on notice that Mr. Vance was improperly required to register. As addressed *supra*, Mr. Adams acknowledged in 2008 the discrepancy in Mr. Vance’s kidnaping records. CP at 408. Moreover, an employee of Pierce County sent an email on May 14, 2008, stating that: “Vernon Vance (DOC: 755593) registered with the Pierce County Sheriff’s Department back in 1998, and **I believe he may have been registered in error.**” CP at 255 (emphasis added). This was nearly four years before Mr. Vance was arrested and charged with failing to register. Accordingly, Pierce County should not have been granted summary judgment on Mr. Vance’s false arrest claim.

- ii. Summary judgment on Mr. Vance’s malicious prosecution claim was improper because of genuine issues of material fact regarding Pierce County’s lack of probable cause and malice where it charged Mr. Vance with failing to register despite knowing that he was not convicted of a qualifying offense.

“To maintain an action for malicious prosecution, a plaintiff must allege and prove that (1) the prosecution was instituted or continued by the defendant, (2) there was want of probable cause for the institution or

continuation of the proceeding, (3) the proceeding was instituted or continued through malice, (4) the proceeding was terminated on the merits in favor of the plaintiff or was abandoned, and (5) plaintiff suffered injury as a result of the prosecution.” *Bender v. City of Seattle*, 99 Wn.2d 582, 593, 664 P.2d 492 (1983). Here, there is no reasonable dispute that a prosecution was instituted. The remaining elements implicate genuine issues of material fact.

“Washington cases have long held that probable cause is deemed established as a matter of law with respect to a given defendant if it clearly appears that the defendant provided the prosecuting attorney with **a full and fair disclosure, in good faith, of all the material facts known to him or her, and the prosecutor thereupon preferred a criminal charge and caused arrest** *Bender*, 99 Wn.2d at 593 (emphasis added). Here, the evidence establishes that a full disclosure was not made. As addressed *supra*, Pierce County recognized in 2008 that Mr. Vance was improperly required to register. CP at 255, 408. He was not convicted of a qualifying offense.

“Malice may be inferred from lack of probable cause and from proof that the investigation or prosecution was undertaken with improper motives or reckless disregard for the plaintiff’s rights.” *Turngren v. King Cnty.*, 104 Wn.2d 293, 306, 705 P.2d 258 (1985). And, “[r]ecklessness

may be shown by establishing that the defendant actually entertained serious doubts.” *State v. Chenoweth*, 160 Wn.2d 454, 468, 158 P.3d 595 (2007). Here, malice is established by Mr. Adams’ own letters prepared in 2008 and 2009, as well as Ms. Wilke’s email in May of 2008. CP at 255, 408. In his letters, Mr. Adams explicitly questioned the validity of the minor kidnapping charge. CP at 409-10 In 2009, Mr. Adams stated, “the various records seemingly refer to him having kidnapped the bank president and not the son.” CP at 409. Ms. Wilke “believe[d]” that he may have been registered in error.” CP at 255. Pierce County entertained serious doubts as to the registration requirements of Mr. Vance but, nevertheless, it charged him with failing to register.

There is also a genuine issue of material fact regarding whether Pierce County has abandoned the charges against Mr. Vance. On April 24, 2012, Pierce County dismissed the charges against Mr. Vance for failing to register. CP at 461. Given that it has conceded that was not required to register in the first instance, it should be estopped from attempting to prosecute him in the future. In effect, by conceding that he was not required to register they cannot in the future prosecute him for failing to register and have abandoned the charges against him.

Pierce County is not protected by prosecutorial immunity.¹⁴ Prosecutorial immunity does not cover the actions of a sheriff's office or its legal advisor. *Burns v. Reed*, 500 U.S. 478, 492-96, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991); *Musso-Escude v. Edwards*, 101 Wn. App. 560, 570-71, 4 P.3d 151 (2000) (citing *Burns*). The individual prosecutor has involved here has not been named as a defendant, and there is no basis to cloak Pierce County in the individual prosecutor's immunity, particularly given its apparent failure to disclose to the prosecutor its evidence showing that Mr. Vance was not legally required to register. Accordingly, the trial court erred in dismissing Mr. Vance's malicious prosecution claim.

C. The trial court erred in extending the summary judgment to the individual defendants, whom had previously been dismissed without prejudice.

The trial court erred in extending its summary judgment to the individual defendants whom it previously dismissed. "The effect of a party's voluntary dismissal or withdrawal of an action renders the proceeding a nullity and leaves the parties in the same position as if the action had never occurred." *Spice v. Pierce Cnty.*, 149 Wn. App. 461, 467, 204 P.3d 254 (2009). A voluntary dismissal "generally divests a court of jurisdiction to decide the case on the merits." *Hawk v. Branjes*, 97 Wn.

¹⁴ This issue was first raised in Pierce County's reply brief at summary judgment.

App. 776, 782-83, 986 P.2d 841 (1999). Here, the trial court exceeded its jurisdiction by granted summary judgment in favor of the individual defendants after it had accepted the parties' stipulated dismissal without prejudice.

VI. CONCLUSION

Accordingly, Mr. Vance respectfully requests that this Court reverse the trial court's decision to grant the defendants' motions for summary judgment.

RESPECTFULLY SUBMITTED this 18th day of November, 2014.

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November 18, 2014 - 4:29 PM

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Court of Appeals Case Number: 46532-9

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NO. 46532-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON AT TACOMA

Pierce County Superior Court Cause No. 12-2-15285-9

VERNON PAUL VANCE,

Plaintiff/Appellant,

vs.

PIERCE COUNTY, a governmental subdivision of the State of
Washington; PIERCE COUNTY SHERIFF'S DEPARTMENT, a
subdivision of the State of Washington, et ux., et al.,

Defendants/Respondents.

**DECLARATION OF SERVICE
REGARDING
PLAINTIFF/APPELLANT'S OPENING BRIEF**

Trevor D. Osborne, WSBA #42249
Benjamin T. Zielinski, WSBA #43670
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DECLARATION OF SERVICE

On this date, I, Jody M. Waterman, legal assistant to Trevor D. Osborne, counsel for Appellant/Plaintiff Vernon Paul Vance, filed via JIS with the Clerk of the Washington Court of Appeals, Division II, PLAINTIFF/APPELLANT'S VERNON PAUL VANCE'S OPENING BRIEF.

I further declare that on this date I also emailed and did place in an envelope in the U.S. Mail, postage prepaid, said documents to the parties listed below as follows:

Michelle Luna-Green
Pierce County Prosecutor / Civil
955 Tacoma Ave. South, Suite 301
Tacoma, WA 98402

Eric C. Miller
Assistant Attorney General
Torts Division
7141 Cleanwater Drive SW
P.O. Box 40126
Olympia, WA 98504

I declare and state under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of November, 2014.

DAVIES PEARSON, P.C.



Jody M. Waterman
Legal Assistant to Trevor D. Osborne

DAVIES PEARSON PC

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