

NO. 362442

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JOHN L. CORRIGAN,

Appellant,

v.

GRANT COUNTY, et. al.

Respondents.

ON APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR KITTITAS COUNTY

The Honorable Richard Bartheld, Visiting Judge
Yakima County Superior Court

Case #: 162002547

BRIEF OF APPELLANT

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I. INTRODUCTION

This is a rather confusing motion to dismiss because the defendants were unable to get a stay of discovery while seeking a summary judgment motion. While that part is not so confusing, what is confusing is the references and arguments about previous trials for both federal and state proceedings. There is the initial state criminal proceeding, the reversal on appeal, the § 1983 federal action, the retried criminal proceeding (over 376 days after the appellate court determined reversal which is the basis for the abuse of process claim),¹ a state § 1983 action – removed to federal court, and a subsequent federal amended complaint remanded back to state court (this action) which was dismissed on motion to dismiss.

To try to simplify matters, the motion to dismiss should *only* be about Corrigan’s refiled criminal trial guilty conviction. However, the court and the defendants seem intent into rolling all the federal/state proceedings into a huge cauldron seeking a more harmonious outcome.

Standard of Review

A trial court’s ruling to dismiss a claim under CR 12(b)(6) is reviewed de novo. Dismissal is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove “any set of facts which would justify recovery.” The court presumes all facts alleged in the plaintiff’s complaint are true and may consider hypothetical facts supporting the plaintiff’s claims. *Id.* A motion to dismiss is granted “ ‘sparingly and with care’ ” and, as a practical matter, “ ‘only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.’ ” [Citations omitted]

Kinney v. Cook, 154 P.3d 206 (2007).

¹ The state had ample time to retry Corrigan. The appeal was overturned 06/20/2012 and overturned without prejudice 10/12/2012. Corrigan filed his civil rights suit 03/25/2013- 278 days after appellate reversal. The state refiled charges against Corrigan July 2, 2013 – 376 days after appellate reversal – hence the abuse of process complaint is based on: 1) the much delayed retrial; and 2) subsequent retaliation for filing a § 1983 federal suit.

II. ASSIGNMENTS OF ERROR

- A. The State failed to provide an adequate record to base the appeal on.
- B. The trial court erred by conflating an initial state trial, a federal complaint, a state re-trial, a removed § 1983 state complaint, and a remanded § 1983 federal complaint into a CR 12 motion.
- C. The trial court erred by finding absolute prosecutorial immunity for an abuse of process claim.
- D. The trial court erred by finding there was no Grant County negligence in this claim.
- E. The trial court erred by finding that judges have judicial immunity for declaratory judgment.
- F. The trial court erred by finding that the statute of limitations precludes this action.
- G. The trial court erred by finding that Defendant Kron's res judicata and service claims precludes his being a party to this action.
- H. The trial court erred by ruling on alleged material facts that Corrigan supported in his amended complaint.

Issues Pertaining to Assignments of Error

1. Did the state fail to provide an adequate Verbatim Report of Proceedings when it failed to capture numerous, significant statements at the telephonic hearing, requiring a reversal of the motion?
2. Did the trial court err by conflating various state and federal proceedings which prevented the court from distinguishing what was significant to the CR 12 hearing and what was not – providing an erroneous and irrelevant base for the dismissal, requiring a reversal of the motion?
3. Did the trial court err by determining the merits of at least six significant material facts, requiring a reversal of the motion?

4. Did the trial court judge show a hidden bias and prejudice against either the subject matter or Corrigan in granting defendants' motion to dismiss – relating to # 2 & 3 above, requiring a reversal of the motion?

III. STATEMENT OF FACTS²

On April 22, 2011, around 1:30 pm, Corrigan was eventually stopped and immediately arrested for failing to stop for an unmarked, privately licensed, Washington State Patrol vehicle. (AC 5) He was taken to Grant County Jail where he spent the night and was released on his own recognizance the following morning. (AC 7-8)

Corrigan was convicted for failure to stop for a police officer. Corrigan was never given a probable cause hearing as required by CrRLJ 3.2.1. (AC 8). He appealed and his conviction was overturned on June 20, 2012. On October 15, 2012, the superior court dismissed the action without prejudice. Finally, on January 11, 2013, the superior court remanded to the District Court and transmitted the Mandate to District Court on February 11, 2013. (AC 8-9)

Corrigan filed a federal 42 U.S.C. Section 1983 action on March 25, 2013. The state refiled their criminal complaint against Corrigan on July 3, 2013 with arraignment taking place July 18, 2014. (AC 9) Corrigan was again found guilty on November 12, 2013. Corrigan appealed to the Washington State Court of Appeals (affirmed), the Washington State Supreme Court (affirmed), and the U.S. Supreme Court (Cert denied). (AC 9-10)

Corrigan's federal action was dismissed – in part or in whole – because of his November 12, 2013 conviction. (RP 13:16) Corrigan filed another federal 42 U.S.C. Section 1983 action in Kittitas Superior Court based on his November 12, 2013, conviction. That action was transferred

² Reference to the Record: Amended Complaint, page number (AC 9); Report of Proceedings, page number:line number (RP 09:04).

to the U.S. District Court for the Eastern District Court of Washington by the defendants. (RP 13:25 – 14:10)

Corrigan submitted an amended complaint eliminating the federal questions, and the U.S. District Court - finding that they now lacked jurisdiction – remanded to the Kittitas Superior Court to rule on the amended state claims. (RP 14:11)

Corrigan is appealing the Kittitas Superior Court dismissal motions of his complaint by Defendant Kron (CRs 12(c), 12(b)(6), and 12(b)(5)) and by Defendants Grant County (CR 12(b)(6)) dated July 11, 2018 signed by the Honorable Richard Bartheld, Visiting Judge, Yakima County Superior Court.

IV. ARGUMENT

A. STATE FAILED TO PROVIDE AN ADEQUATE RECORD TO BASE THE APPEAL ON.

Corrigan requested a Verbatim Report of Proceedings. In this case, it would be a transcription of the Motion to Dismiss hearing held on June 18, 2018, before the Honorable Richard H. Bartheld, Superior Court Judge, Yakima, Washington, by telephone. However, the 24-page report is inadequate for Corrigan to satisfactorily respond to the appellate requirements. This puts Corrigan in an untenable situation, and as such, requires – in the interests of justice – reversal.

The court is responsible for properly recording trial proceedings. In Washington State’s case, that is handled by the courts through their electronic recording process. If that system fails, appellants should not be prejudiced by trying to re-create that which the court was required to provide – especially for purposes of the appeal process.

Corrigan's Verbatim Report of Proceedings indicates 56 instances of the comment "(unintelligible)." These instances are further broken down by the individuals involved in the hearing: Mr. Christensen (13); Ms. Zimmerman (4); Mr. Corrigan (3); and Judge Bartheld (36). Now there may be disagreement about the importance of Mr. Christensen's, Ms. Zimmerman's and Mr. Corrigan's (unintelligible) contributions, however, Judge Bartheld's (unintelligible) comments are critical to the understanding of why the court found it necessary to grant defendant's motions to dismiss and critical to Corrigan's argument to reverse that motion.

Consider these Judge Bartheld's comments:

(RP 18:08) – It's also noteworthy that the 2013 action filed in the United States District Court was summarily dismissed (unintelligible). But be that as it may, the Court cannot find (unintelligible) is in connection (unintelligible).

(RP 18:12) – The next issue we go to is retaliatory and malicious prosecution. That claim clearly fails because by the Plaintiff's own pleadings that (unintelligible) appealed and that he was not (unintelligible) the fact that he came out (unintelligible) that's clearly one of the (unintelligible) retaliatory or malicious prosecution is (unintelligible).

The court's failure to provide an adequate verbatim report of proceedings is reversible error.

B. THE TRIAL COURT ERRED BY CONFLATING FEDERAL/STATE PROCEEDINGS INTO A CR 12 MOTION.

The court improperly conflates Corrigan's: 1) first state trial; 2) first federal complaint; 3) state re-trial; 4) the 1983 civil rights action removed from state court; and 5) the state abuse of process claim that was removed from federal court (#4). The task before the trial court was to rule on a motion to dismiss, alleging abuse of process relating to the state's retrial (#3). The trial court's mission was not to rehash other actions so totally extraneous to the amended complaint, and Corrigan's Re-trial (#4). This is reversible and/or prejudicial error.

1. **First State Trial.** This has no relevance as the case was overturned on appeal and has nothing to do with the abuse of process claim.
2. **First Federal Complaint.** The only thing relevant relating to this complaint is how it relates to the essential elements of an abuse of process action: 1) the existence of an ulterior purpose to accomplish an object not within the proper scope of the process – re-trial was to retaliate against Corrigan for filing a § 1983 Civil Rights Action against mostly Grant County Defendants; and 2) an act in the use of legal process not proper in the regular prosecution of the proceedings – after originally abandoning the thought of re-trial, Grant County re-tried Corrigan for filing the § 1983 action. 29 Wash. Prac., Elements of an Action § 1:1 (2016-2017 ed.).

Other than the possible element to the abuse of process action relating to Corrigan’s re-trial conviction on November 12, 2013, this First Federal Complaint has no relevance to Corrigan’s abuse of process claim. Defendant Kron’s claim of *res judicata* about the state re-trial lacks merit because Corrigan’s re-trial conviction came 232 days after Corrigan filed his first § 1983 Civil Rights Action. This is reversible error.

3. **State Re-Trial.** The state had abandoned retrying Corrigan as evidenced by the days between the appellate court’s reversal and the refiled criminal charges. The state knew June 2012 that Corrigan’s First State Trial was overturned – and it knew October 2012 it was overturned without prejudice. Corrigan filed his First Federal Complaint March 2013 – 377 days after the state learned that the appeal was overturned. The state re-filed Corrigan’s criminal charge July 2013 – 377 days after the state learned that the appeal was overturned. The only reason that the state re-filed against Corrigan was to punish Corrigan and to interfere with Corrigan’s First Federal Complaint – retaliatory prosecution. The state

achieved their goal because Corrigan's First Federal Complaint was dismissed (December 10, 2013) in large part because of Corrigan's Criminal Trial Conviction (November 12, 2013) – hence, part of the claim for abuse of process.

Corrigan's claims against the prosecutors, the judges, Defendant Kron, and Grant County are limited to the period between the time when the state re-filed criminal charges against Corrigan (July 2, 2013), the criminal trial guilty determination, to the appellate court's affirmation. In general, claims like prosecutor misconduct, violations of judicial code of ethics (recusal when required), Defendant Kron's perjured testimony, Grant County's failure to properly train, supervise, and incorporate procedures to prevent violations of civil rights (prosecutors'), and the conspiracy of the parties to violate Corrigan's civil rights (denial of a fair trial),³ are all subsumed in the abuse of process claim (with the possible exception of Grant County's negligence claim).

- 4. The Civil Rights Action Removed From Federal Court.** Corrigan's state civil rights action was removed to federal court. The federal court reviewed motions relating to summary judgment based on various defenses that the defendants made (summary judgment, *res judicata*, statute of limitations, etc.). Reviewing this federal action and commenting on it in support of a state motion to dismiss is an abuse of discretion and shows a strong bias and prejudice against Corrigan.

(RP 03:13) – I have also gone back and reviewed by way of background . . . and I have also taken a look at the rulings in both of the Federal actions.

³ For example: Corrigan alleges that Defendant Kron committed perjury. The deputy prosecutor quashed Corrigan's witness subpoenas and successfully prevented other discovery for Corrigan – discovery which was critical to challenge Defendant Kron's testimony – an abuse of the process. This also shows the conspiracy of some of the parties involved.

(RP 14:04) – That case was then removed to the United States District Court for the Eastern District and on summary judgment Judge Mendoza dismissed the causes of action against the defendant in the case and found that the prosecutor and Judges were protected by qualified or absolute immunity and that Trooper Kron was dismissed as a result of the theory of res judicata.

(RP 19:23) – The bottom line is that (unintelligible) this issue regarding Trooper Kron has twice been determined by the District Court, and what's important in this case is [sick] that the second civil lawsuit, while filed in Kittitas County, was initially removed by the defendants to the United States District Court. Judge Mendoza dealt specifically with Trooper Kron in that particular case and relied upon the decision of the U.S. District Court Judge Rice found that it was, in fact, res judicata.

(RP 21:05) – By filing this Amended Complaint, it should relate back to the time when he was originally served, but the problem with that concept is that Trooper Kron was dismissed from the Federal action or dismissed from this lawsuit when it was in Federal Court.

Those statements above and others throughout the court's granting of defendants' motion to dismiss are very troubling. They show: 1) the state court is abdicating its responsibility to the federal court; 2) it is relying on federal law; 3) it relies on a federal summary judgment motion – when this state has specifically rejected the way summary judgment is determined in federal courts; 4) this court previously rejected the summary judgment motion that defendants' originally presented to the court but instead allowed the defendants' motion to dismiss; 5) *res judicata* claims are based on Corrigan's First Federal Complaint which were based on Corrigan's First State Trial – which of course is *before* Corrigan's re-trial and, therefore has nothing to do with Corrigan's re-trial; and 6) the court is in error in its understanding of how the federal court works as it relates to an amended complaint.

In federal court, what happened between the time the original complaint is placed on the docket and an amended complaint is accepted by the federal court – didn't happen. Claims by the trial court that this or that happened in federal court relating to summary judgment, res judicata, Defendant Kron's dismissal, etc. – are frivolous claims. Nothing happened in the

federal court other than the complaint came in – and the amended complaint came out. See *Desai v. Deutsche Bank Securities Ltd.*, 573 F.3d 931, Note 5 (2009) (In general, “an amended pleading supersedes the original pleading,” which is “treated thereafter as non-existent.”) [Citations omitted]

Reviewing this federal court’s decision is reversible and prejudicial error on the part of the court. Accepting Defendant Kron’s claims of *res judicata* and lack of service – both frivolous claims – shows a hidden bias and prejudice of the court.

C. THE TRIAL COURT ERRED BY FINDING ABSOLUTE PROSECUTORIAL IMMUNITY FOR AN ABUSE OF PROCESS CLAIM.

Consider the following two statements:

First of all, Prosecutors are absolutely immune from suits from damages arising from the performance of traditional functions of an advocate. *Kalina v. Fletcher*, 522 U.S. 118, 131 (1997); *Imbler v. Pachtman*, 424 U.S. 409, 424-425 (1976). Defendants Grant County, et. al. Motion for Dismissal Pursuant to CR 12(b)(6), page 7, line 19.

(RP 16:13) – Further, a prosecutor or a deputy prosecutor who acts with the scope of his or her employment in initiating or pursuing criminal prosecution is immune from liability, and the case law is clear on that issue.

Retaliatory prosecution is not a “traditional function” of an advocate, nor is it an “act within the scope of his or her employment.” Both the statements do not support the “absolute immunity” claim of both the Grant County Defendants and the court. Consider the following three hypothetical situations as they might relate to this action – understanding that Corrigan was first found guilty, appealed, and the appeal was overturned/remanded without prejudice:⁴

1. ***Prosecutors’ immediately recharge Corrigan for his crime.*** This is a “traditional function” of prosecutors and therefore prosecutors are subject to absolute immunity – but only because the prosecutors *immediately* recharge Corrigan for his crime.

⁴ Corrigan’s original trial was a “traditional function” of the prosecutor’s office and therefore prosecutors are subject to “absolute immunity under *Kalina* and *Imbler*.”

2. *Corrigan waits a week after remand and files a § 1983 Civil Rights Suit – the prosecutors immediately re-file criminal charges against Corrigan.* Are prosecutors absolutely immune from their action to re-file? Maybe and maybe not. If Corrigan can show (only through discovery) that the prosecutors acted in a retaliatory manner, then maybe yes. If the prosecutors can show that they were going to re-file anyway, then maybe no.
3. *Corrigan waits 278 days after prosecutors learn conviction was overturned and files a § 1983 Civil Rights Suit – the prosecutors wait an additional 98 days (376 days total) and re-file criminal charges against Corrigan.* This is “prosecutorial misconduct.” Now there is no question of retaliatory prosecution, something that the prosecutors are not absolutely immune from. The 376 days delay shows that the prosecutors had abandoned any desire to re-file criminal charges against Corrigan – and only did so because Corrigan filed a Civil Rights Suit against Grant County. This is an abuse of process and as such the prosecutors are not absolutely immune. This requires reversal.

D. THE TRIAL COURT ERRED BY FINDING THAT THERE WAS NO GRANT COUNTY NEGLIGENCE IN THIS CLAIM.

Grant County is negligent in that it failed to – among other things – properly supervise, train, and ensure adequate policies and procedures were in place to effectively and legally guide Grant County Prosecutors in the performance of their duties. There appears to be numerous public examples of the Grant County Prosecutor – Defendant Lee – allegedly playing fast and loose with the law and not applying the law in a consistent, unbiased manner. This requires reversal.

E. THE TRIAL COURT ERRED BY FINDING THAT JUDGES HAVE JUDICIAL IMMUNITY FOR DECLARATORY JUDGMENT.

Corrigan is seeking declaratory judgment against the Grant County judges. Every one of the judges should have recused themselves from the re-trial due to the appearance of bias and prejudice relating to Corrigan's Grant County § 1983 Complaint. In particular, the trial judge – Defendant Whitener-Moberg – should not have presided over Corrigan's re-trial because her brother-in-law's law firm was representing Grant County in Corrigan's § 1983 Complaint – a law firm where the judge's husband also worked. Washington State Code of Judicial Conduct, Rule 2.11(A)(1-3) – Disqualification. This requires reversal.

F. THE TRIAL COURT ERRED IN FINDING THAT STATUTE OF LIMITATIONS PRECLUDES THIS ACTION.

An action for abuse of process comes within provisions of statute of limitations applicable to injuries done to person. **Action accrues on termination of acts that constitute abuse complained of**, and mental suffering following injury is not continuing form of damages that tolls accruing of cause of action. *Nave v. City of Seattle*, 68 Wash. 2d 721, 724, 415 P.2d 93, 95 (1966). See RCWA 4.16.080(2) (three years). [Emphasis added]

29 Wash. Prac., Elements of an Action § 1:6 (2016-2017 ed.) – Limitations of actions – Statute of limitations. The abuse of process action accrues on termination of acts that constitute abuse complained of – which in Corrigan's case is the re-trial conviction that the court determined on November 12, 2013. Corrigan filed his § 1983 Complaint in Kittitas County on September 15, 2016. The statute of limitations for this type of action is 3 years.

The difference between November 12, 2013 and September 15, 2016 is less than 3 years. Therefore, Corrigan filed his abuse of process within the statute of limitations. The claim that Corrigan did not file his complaint within the statute of limitations – are not only false but frivolous.

This analysis was available to Grant County Defendants and also to the court. Grant County Defendants should be sanctioned under Rule 11. Also, the acceptance of this claim by the court shows the hidden bias and prejudice of the court.

(RP 18:18) – The other issue in this case that carries substantial weight is the fact that all of the acts in this case, negligence, abuse of process, retaliatory and malicious prosecution, denial of a fair trial, all arise out of this claim that on January 13th in this particular circumstance the defendant filed his cause of action more than three years after that date, and it was filed in September of 2016, I think clearly violates the statute of limitations and was barred by the statute of limitations.

Plaintiff was convicted in his refiled charges on November 12, 2013. He had 3-years from that date to file a lawsuit based on injuries done to person. Plaintiff filed on September 15, 2016 which is within the 3-year period. “Action accrues on termination of acts that constitute abuse complained of.” See Washington Elements, p. 3.

Plaintiff’s Opposition to Defendants Motion for Dismissal Pursuant to CR 12(b)(6), page 7, line 13.

I do not understand what the court is saying about the statute of limitations above (18:18). However, January 13th does not ring a bell and of course there is no year to narrow it down. The court is correct that Corrigan filed his lawsuit on September 2016. The court is very wrong in how it has calculated the statute of limitations relating to this action. Nevertheless, the court was on notice from Plaintiff’s Opposition on how the statute of limitations was calculated – a fact that the court completely ignores. This is reversible error.

G. THE TRIAL COURT ERRED BY FINDING THAT DEFENDANT KRON'S *RES JUDICATA* AND SERVICE CLAIMS PRECLUDES HIS BEING A PARTY TO THIS ACTION.

Defendant Kron's *res judicata* and service claims are frivolous, he should be sanctioned under Rule 11. Besides questions of federal/state courts, timing, merits, controversies, etc., the question of *res judicata* post-dated the initial complaint.⁵ See *Morgan v. Covington Township*, 648 F.3d 172 (CA3 2011) ("Five other Courts of Appeals have already adopted a bright-line rule that *res judicata* does not apply to events post-dating the filing of the initial complaint. [Citations omitted]).

The service question of Defendant Kron also lacks integrity. The federal court remanded Corrigan's abuse of process action after Corrigan's amended complaint was accepted by the federal court. Therefore, Defendant Kron received by electronic service, both the amended complaint when it was presented to the federal court by Corrigan, and again when it was federally remanded to the state court. Also, Defendant Kron's service concern is based on state law, not federal law.

It was an error for the court to determine the merits of these two questions. It requires reversal.

⁵ The complaint referred to is the refiled criminal charge dated 07/02/2013.

H. THE TRIAL COURT ERRED BY RULING ON ALLEGED MATERIAL FACTS THAT CORRIGAN SUPPORTED IN HIS AMENDED COMPLAINT.

The court improperly determined the merits of the following, alleged material facts that Corrigan present in his complaint:

- a. Abuse of Process;
- b. Statute of Limitations;
- c. Grant County Negligence;
- d. Defendant Kron's Service; and
- e. Defendant Kron's Res Judicata Claim.

A dismissal for failure to state a claim has no collateral estoppel effect because issues of fact are not actually litigated and resolved. See 14A Washington Practice: Civil Procedure § 35:34 (2d.ed.). See also, Howell v. Alaska Airlines, Inc., 994 P.2d 901 (Div. 1 2000) (On motion to dismiss for failure to state a claim, court accepts as true the allegations in the complaint, and the reasonable inferences that may be drawn therefrom); and Bravo v. Dolsen Companies, 888 P.2d 147 (1995) (Motions to dismiss for failure to state claim should be granted only sparingly and with care.)

Every one of the above alleged material facts was taken as untrue by the court. By rejecting Corrigan's alleged material facts, the court is abusing its discretion and showing a hidden bias and prejudice against Corrigan. This is reversible and prejudicial error on the part of the court, because: 1. the court does not actually litigate and resolve issues of fact; and 2.) the court is required to accept as true the allegations in the complaint.

This is reversible and prejudicial error.

V. CONCLUSION

The trial court made numerous reversible errors in granting defendants' motion to dismiss. This Court should reverse and remand for trial on Corrigan's claim of abuse of process. Further, defendants should be sanctioned for this Rule 11 violations relating to frivolous claims (statute of limitation, res judicata, abuse of process and service).

DATED this 5th day of December, 2018.

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