

FILED

No. 362566

JAN 17 2010

**COURT OF APPEALS
OF THE STATE OF WASHINGTON**

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

FREDERICK L. COLVIN, Appellant,

v.

DEPARTMENT OF CORRECTIONS, Appellee.

Superior Court for Spokane County
No. 17-2-02239-4

OPENING BRIEF

Jeffry K. Finer
Attorney for Appellant
West 421 Riverside • Suite 1081
Spokane, WA 99201
509 279-2709
WSBA No. 14610

TABLE OF CONTENTS

Table of Contents	2
Table of Authorities	3
Introduction	4
Assignment of Error & Issues Presented	4
Colvin’s Statement of the Case	6
Argument	8
I. The trial court erred in not considering Plaintiff’s actual complaint which sets forth separate causes of action for federal civil rights and state-based negligence claims; dismissing the state negligence claim was improper.	
Conclusion	15

TABLE OF AUTHORITIES

CASE AUTHORITY

<i>Berge v. Gorton</i> , 88 Wn.2d 756 (1977)	8
<i>Corrigal v. Ball & Dodd Funeral Home, Inc.</i> , 89 Wn.2d 959 (1978)	10
<i>Culpepper v. Snohomish County Dep't of Planning Dev.</i> , 59 Wn. App. 166 (1990)	12
<i>Dewey v. Tacoma Sch. Dist. 10</i> , 95 Wn. App. 18 (1999)	8, 11
<i>Haberman v. WPPSS</i> , 109 Wn.2d 107 (1987)	11
<i>Halverson v. Dahl</i> , 89 Wn.2d 673 (1978)	11
<i>Lewis v. Bell</i> , 45 Wn. App. 192 (1986)	10
<i>Molloy v. City of Bellevue</i> , 71 Wn. App. 382 (1993)	9
<i>Orwick v. Seattle</i> , 103 Wn.2d 249 (1984)	11
<i>Patsy v. Board of Regents</i> , 457 U.S. 496 (1982)	13
<i>Reid v. Pierce County</i> , 136 Wn.2d 195, 201(1998)	15
<i>Wilson v. Garcia</i> , 471 U.S. 261 (1985)	13

STATUTORY and RULE AUTHORITY

42 U.S.C. § 1983	7, 8, 12, 13, 14, 15
CR 1	7, 9
CR 8	8, 9, 10, 11, 12, 13, 16
CR 12(b)(6)	4, 5, 11

A. INTRODUCTION and SUMMARY

Plaintiff-appellant filed a suit alleging that Defendant Department of Corrections (“DOC”) assigned him a prisoner number previously given to another inmate, and even after DOC admitted the error, DOC’s delay in correcting the error caused Plaintiff to be “unreasonably subjected to penalties and restrictions,” CP 5, ¶ 3.3, resulting in Plaintiff “...sustain[ing] damages proximately caused by Defendants’ negligence in causing and failing to promptly correct the assignment of the wrong DOC number to Plaintiff, and/or its deliberate indifference to failing to timely correct the error in his DOC-assigned offender number...” CP 13, preamble to section IV. Damages.

Notwithstanding Colvin’s use of the term “negligence” throughout the complaint, defendant successfully argued that it was “abundantly clear that [Colvin] is not bringing this action as one under a negligence theory... CP 146.

B. ASSIGNMENT OF ERROR and ISSUES PRESENTED FOR REVIEW

Appellant Frederick L. Colvin makes the following assignments of error:

1. The Superior Court erred in dismissing the Plaintiff’s state-based negligence claim based upon the unsupported claim by Defendant in a reply brief to a motion to reconsider that Plaintiff had only raised a

single federal civil rights theory of liability and no state-based negligence claims.

The Issues are as follows:

- a. How many times must a plaintiff say “negligence” in a pleading in order to overcome a defendant’s argument that negligence was not plead?
- b. Does Civil Rule 12(b)(6) permit dismissal of a well-pled negligence claim for plaintiff’s failing to use a separate heading of “Negligence” as a cause of action?
- c. Under any review standard, may a trial court grant a 12(b)(6) motion to dismiss for plaintiff’s failure to allege negligence when the complaint explicitly included “Negligence” in the caption, explicitly included the term “negligence” in a cause of action, explicitly include the term “negligent” in the damages section, and included dozens of facts supporting a negligence claim, where at most it can be said that plaintiff failed only to label a paragraph with the heading “Negligence Count”?

C. STATEMENT OF THE CASE

Procedural facts pertaining to Fredrick Colvin’s suit. On June 13, 2017, Plaintiff Frederick L. Colvin filed his “Complaint for Civil Rights Violations and Negligence” suit against the DOC and various employees of the Department. The suit specifically included the word “Negligence” in the caption.

3	WASHINGTON STATE SUPERIOR COURT		
4	FOR THE COUNTY OF SPOKANE		
5	FREDERICK L. COLVIN,	} No.:	
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7		} Plaintiff,	
8			
9		} vs.	
10			
11		} COMPLAINT FOR CIVIL RIGHTS	
12			
13		} VIOLATIONS & NEGLIGENCE	
14			
15	DEPARTMENT OF CORRECTIONS,	}	
16	STACY KULM, KASEY NOLAN,		
17	TANNER MINK, ERIK BURT, JANE	}	
18	DOE, JOHN DOE,		
19		} Defendants.	
20			

CP 3.

On May 10, 2018, the defendants moved for summary judgment, CP 56-66, raising the following issues:

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IV. STATEMENT OF ISSUES

- 1. Whether Plaintiff's Property Deprivation Claims Under the Constitution Should be Dismissed.**
- 2. Whether Defendants are Entitled to Qualified Immunity.**
- 3. Whether Plaintiff has Failed to State a Claim Against Defendants Stacy Kulm and Erik Burt.**
- 4. Whether Plaintiff's Claims are Barred by the Statute of Limitations.**

CP 57. The gravamen of the Defendant's argument was that Section 1983 federal civil rights rules do not apply to any State or to state agencies, only to persons and municipalities. CP 59-60. Defendants stated that Plaintiff's only right of recovery stemmed from Washington State's post-deprivation procedures. CP 60.

On June 22, 2018, DOC argued at hearing that Frederick Colvin "failed to state a claim as to each individually names defendants [sic] under its 42 U.S.C. § 1983 cause of action." CP 132.

On June 22, 2018, the trial court dismissed the individual defendants from the § 1983 action. CP 130-31. The trial court also dismissed Colvin's civil rights property claim, but left two civil rights issues for trial: delays in dental treatment and delays in his release hearing. CR 130-31, and see CP 133:1-4.

On June 26, 2018, the remaining defendant — the DOC itself — moved for reconsideration, arguing that without the individual defendants there could be no civil rights liability for DOC. CP 132.

On June 27, 2018, Colvin responded to the motion to reconsider. CP 138.

On July 2, 2018, the DOC replied to Colvin's response to the motion to reconsider, CP 144-49, and argued for the first time that Plaintiff's complaint alleged solely a civil rights claim which could not be sustained once the individual defendants were dismissed. The DOC argued as follows:

Plaintiff through counsel in the current matter before this court has made abundantly clear that he is not bringing this action as one under a negligence theory...

CP 146 (citing the complaint, but no specific portion thereof).

On July 11, 2018, the trial court dismissed the case in its entirety, noting that "Plaintiff's last remaining claim involves * * * [an] action as a civil rights suit under 14 U.S.C. § 1983." 150-51.

No order was entered addressing or dismissing Plaintiff's state-based claims in negligence.

ARGUMENT

Summary. The rule is plain and well-established: Civil Rule 8 establishes a liberal requirement for notice pleading that does not require special rules, forms, or magic language. *Berge v. Gorton*, 88 Wn.2d 756, 759 (1977). Notice pleading requires the following: that plaintiff submit plain statement of the operant facts which would, if the facts were true, entitle the plaintiff to relief (CR 8), and plaintiff must apprise

the defendant of the “nature of the legal grounds on which the claim rests.” See *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 23-24, (1999) (general nature of legal claim must be asserted in complaint and it is insufficient to raise a theory by implication), citing *Molloy v. City of Bellevue*, 71 Wn. App. 382, 385 (1993) (insufficient complaint not cured by late amendment; summary judgment upheld). Thus, a complaint must at least identify the legal theories upon which the plaintiff is seeking recovery. *Molloy*, at 386. Here, there was sufficient identification of Colvin’s negligence theory and CP 150, 152 dismissing the state-based claims are wrong.

II. The trial court erred in not considering Plaintiff’s actual complaint which sets forth separate causes of action for federal civil rights and state-based negligence claims; dismissing the state negligence claim was improper.

i. Washington State’s Rules of Civil Procedure are intended to secure the just, speedy and inexpensive determination of every action.

Civil Rule 1 states that the rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.” CR 1.

ii. To state a claim for relief under Rule 8, a plaintiff need only assert a “short and plain statement of the claim showing that the pleader is entitled to relief....”

Civil Rule 8 states the following:

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim, or third party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief....

CR 8(a). No technical assertions are required, as was the case under the former pleading rules. CR 8(e)(1). “[A]ll pleadings shall be so construed as to do substantial justice.” CR 8(f).

The modern pleading rules do not require specialized terms or forms. The allegations must be sufficient to put a defendant on notice of the claim(s) asserted by plaintiff. Plaintiff must include “fair notice of what the claim is *and the [legal] ground upon which it rests.*” *Lewis v. Bell*, 45 Wn. App. 192, 197, 724 P.2d 425 (1986) (italics supplied), and see *Molloy v. City of Bellevue*, 71 Wn. App. 382, 385, 859 P.2d 613 (1993).

iii. Defending against a motion under 12(b)(6), a plaintiff need only prove a set of facts, consistent with the complaint, which would entitle the plaintiff to relief.

Civil Rule 12(b)(6) permits a defendant to challenge a claim for legal insufficiency. For the purposes of a 12(b)(6) motion, the factual allegations of the complaint are taken to be true. *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961. (1978). In any instance where the facts alleged in a complaint would, when taken as true, constitute a matter on which relief could be granted,

then the trial court may not dismiss under 12(b)(6). *Id.* “We have repeatedly said that a motion made pursuant to CR 12(b)(6) must be denied unless it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.” *Halverson v. Dahl*, 89 Wn.2d 673, 674 (1978), cited in *Orwick v. Seattle*, 103 Wn.2d 249, 254 (1984).

In general, our liberal notice pleading rules are intended “to facilitate the full airing of claims having a legal basis.” *Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187 (1977).

CR 12(b)(6), read together with CR 8(a)(1), requires the court to decide whether the allegations in a complaint constitute a short and plain statement of the claim showing that the pleader is entitled to relief. *Orwick*, at 254.

Haberman v. WPPSS, 109 Wn.2d 107 (1987).

A plaintiff may not generally insert a *new* theory of liability into a *trial* brief that was not raised in the pleadings. But this rule does not permit a trial court to ignore explicit legal theories of liability nor the plain facts that plainly support a such theories. See *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 26 (1999) (a party who fails to plead a cause of action “cannot finesse the issue by later inserting the theory into *trial* briefs and contending it was in the case all along”).

In *Dewey*, the plaintiff waited until the trial was over to seek an amendment to his claims. “Dewey’s motion to amend came at the last possible moment, following a summary judgment proceeding, a motion to dismiss, and after he had rested his case at trial.” This appeal does not arise from a last-minute attempt by plaintiff to insert a new legal theory into a case post trial. This case involves an early 12(b)(6) motion for failing to assert any state-based claims. The notion that Plaintiff failed to state any state-based claims arises purely from Defendant’s argument in its reply brief — which was itself in support of a motion to reconsider the lower court’s partial denial of Defendant’s 12(b)(6). In this reply brief the Defendant stated, with nothing more than a sweeping citation to the 11-page complaint, that it was “abundantly clear” that only a claim under § 1983 was pled, not negligence. Defendant did not mention the caption, the cause of action, or the claim for damages. The lower court also failed to mention any of the references to negligence in Colvin’s complaint. Each of these sections use the term “negligence.”

iv. Applied to the facts below set forth in the context of plaintiff’s entire complaint there is no basis to dismiss a claim for negligence against the DOC or the individual defendants.

In contrast to the late-stage developments in *Dewey*, this case is somewhat similar to *Culpepper v. Snohomish County Dep’t of Planning & Community*

Dev., 59 Wn. App. 166, 176, 796 P.2d 1285 (1990). In *Culpepper*, the court noted that in the early stage of a case, a hypertechnical application of the pleading rule “would have no effect other than to deny [the plaintiff] his day in court.” *Id.*

Defendant’s success in *Dewey* arose because of obvious prejudice to the defendant by a late-stage addition to the pleadings:

[T]he District had previously devoted two pretrial motions to the theories pled in Dewey's complaint and had prepared for trial on the remaining theories. The District correctly argued it did not receive proper notice that the First Amendment theory was an issue in the case. Allowing Dewey to amend his complaint would have caused actual prejudice to the District. The District, at the last minute, would have been required to refute the elements of a First Amendment claim

Dewey, *id.* at 28. But even *Culpepper* is not plainly on point: Colvin has not moved to amend his complaint. Why would he? He prominently referenced negligence in three places. Defendant DOC had not moved for a more specific pleading, suggesting that it had read and understood the gravamen of the complaint. Further, DOC’s first notice to Colvin that it interpreted the Complaint as advancing only a federal civil rights counts came at the latest possible point in time when Colvin had no right to respond.

Plaintiff’s complaint is not particularly complex. The caption states that the case is filed for “Civil Rights Violations and Negligence.” No ambiguity there.

Paragraph 3.8 states that a state-based claim for damages was presented on June 20, 2016 (#31084032). Such damage claims are never required for civil rights cases, but are required for state-based torts. See *Wilson v. Garcia*, 471 U.S. 261, 276, (1985) (state’s residual statute for personal injury actions governs § 1983 claims, no administrated exhaustion required) and see *Patsy v. Board of Regents*, 457 U.S. 496, 498 (1982).

Paragraph 4.1 is labelled in bold “42 U.S.C. § 1983” and that paragraph explicitly sets forth that the acts alleged to have occurred were done “under color of law” — a distinct requirement of section 1983 but which is not required of negligence claims. Paragraph 4.4 alleges that the failure to timely and properly reassign Colvin his own number was done through neglect (“neglecting to timely and properly reassign Plaintiff a correct DOC inmate number.”) Paragraph 4.7 refers to defendant “intentionally inflicting emotional distress.” Finally, the Damages section states:

Plaintiff has sustained damages proximately caused by Defendants’ *negligence* in causing and failing to promptly correct the assignment of the wrong DOC number to Plaintiff, and/or its deliberate indifference to failing to timely correct the error in his DOC-assigned offender number, as follows...

CP 11 (italics supplied; liability alleged against all defendants).

This explicit language, the fact that Colvin presented a claim to the DOC and plead claims that did not include as an element any state action — all these factors make the Defendant’s argument in his Reply Brief to his Motion for Reconsideration impossible to credit. It is not true, as alleged at CP 146, that Colvin made it “abundantly clear he was only bringing a civil rights action.” He made it clear, if not abundantly then at least explicitly, that he was bringing multiple claims, one for civil rights under color of law, one for intentional infliction of emotional distress, and one for negligence.

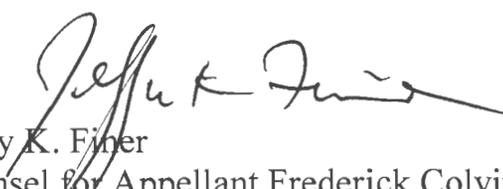
The lower court’s reliance on the argument, raised by DOC without specific citation or frank analysis of the text of the complaint, was not reasonable or proper on either a *de novo* or discretionary standard.¹ The trial court appears to have simply taken the Defendant’s assertion at face value and dismissed not only the § 1983 federal claim, but all other state-based claims as well. This matter should be reversed and remanded for Mr. Colvin to proceed with his state-based claims.

¹ The correct standard here is *de novo*. “Where, as here, the facts are not at issue, we conduct a *de novo* review of rulings on motions for summary judgment and motions to dismiss for failure to state a claim under CR 12(b)(6).” *Reid v. Pierce County*, 136 Wn.2d 195, 201(1998).

Conclusion

For the above reasons, Frederick Colvin asks this Court to reverse the Order of July 12, 2018, hold that Colvin's state-based and negligence claims was not subject to dismissal under the 12(b)(6) motion brought by Defendant Department of Corrections, and remand the negligence claims against all defendants back to the Superior Court.

DATED THIS 18th day of January, 2019.


Jeffrey K. Finer

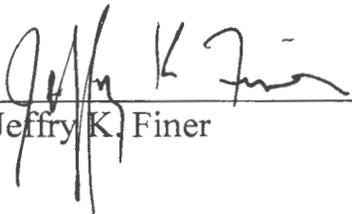
Counsel for Appellant Frederick Colvin

CERTIFICATE OF SERVICE

I, Jeffrey K. Finer, certify that on the 18th day of January, 2019, I caused a true and correct copy of the foregoing *OPENING BRIEF* to be served, via electronic filing on the following:

NAME & ADDRESS	Method of Delivery
Alexander Foster-Brown Assistant Attorney General 800 5 th Ave., Ste 2000 Seattle, WA 98104-3188 alexanderf@atg.wa.gov	<input checked="" type="checkbox"/> CM/ECF System <input type="checkbox"/> Electronic Mail <input type="checkbox"/> USPS postage prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Other _____

Dated this 18th day of January, 2019.



Jeffrey K. Finer