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

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FREDERICK L. COLVIN,

Appellant,

v.

DEPARTMENT OF CORRECTIONS, STACY KULM, KASEY  
NOLAN, TANNER MINK, ERIK BURT, JANE DOE, JOHN DOE,

Appellee.

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**BRIEF OF RESPONDENTS**

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ROBERT W. FERGUSON  
Attorney General

ALEXANDER FOSTER-BROWN  
Assistant Attorney General  
WSBA No. 52149  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 464-7352  
OID No. 91019

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## **I. INTRODUCTION**

On June 22, 2018, the trial court dismissed all of Colvin's claims except two civil rights claims against the Department of Corrections (DOC). He did not appeal that order. Now, Colvin improperly attempts to bootstrap a state law negligence claim for the first time on appeal, never argued before the trial court.

Colvin, an inmate in the custody of the DOC, sued it and several individually named DOC employees. Defendants brought a motion for summary judgment. The trial court dismissed all the claims against the individual defendants and dismissed all but the two civil rights claims against the DOC. Colvin is now attempting to resurrect negligence claims that were dismissed in an order he did not appeal – based on arguments he never made at the trial court.

## **II. COUNTERSTATEMENT OF ISSUES**

1. Should this Court affirm the trial court's July 11, 2018 order dismissing Colvin's remaining two federal civil rights claims against when Colvin failed to appeal the June 22, 2018 order that dismissed all other claims, including any alleged negligence claims?

2. Should this Court preclude Colvin from raising any negligence claims on appeal when he never raised the issue to the trial court, but instead characterized his remaining claims as federal civil rights claims?

### III. COUNTERSTATEMENT OF THE CASE

#### A. Factual Summary

On June 6, 2013, Colvin was found guilty of Assault in the Second Degree – Domestic Violence, after pushing his then girlfriend into traffic on State Route 900 during an argument. The Superior Court of King County sentenced him to serve 80 months. On July 16, 2013, Colvin was transferred to the Washington State Penitentiary and custody of the DOC. CP 21.

When an offender is transferred to the DOC from the county, the county provides DOC with personal identification (i.e., name, date of birth, etc). DOC in turn uses this information to search its database to see if an offender has been assigned a DOC number, which is used for all of the offender's records. CP 21, 44-45.

In December 2013, Colvin noted that \$11 was withdrawn from his inmate banking account for a work release debt. CP 1-13.

After an investigation, DOC determined two offenders had been assigned the same identification number. CP 21. The mistake occurred because both offenders shared the same first name, last name, and middle initial, i.e., Frederick L. Colvin. CP 21-22. To make it more confusing, both offenders also had the exact same date of birth (January 13, 1968), weighed the same, were the same height, and shared the same ethnicity. CP 21-22. As a result, the identification number assigned to Colvin was the same

number previously assigned to the other inmate who shared all these details.  
CP 21-23.

Colvin's middle name, however, is Londale; whereas the other Frederick L. Colvin had the middle name Lamont. Once DOC uncovered the problem, DOC began correcting this issue by assigning a new DOC identification number to Colvin of No. 373927 and deleting the incorrect information from DOC identification No. 928231. CP 55-66.

While the error was being sorted out, Colvin temporarily lost access to his J-Pay 4 tablet. CP 21-28. He was provided a replacement tablet and his account was credited for music he had previously purchased. CP 21-28. Plaintiff also alleges his dental care was delayed one week and that he was delayed in receiving an early release hearing. CP 75:1-9. DOC denied these allegations. CP 14-19.

**B. Procedural Summary**

On May 10, 2018, Respondents moved for summary judgment asserting that dismissal was proper on the following grounds: 1) Colvin's 42 U.S.C. § 1983 claim of "violation of constitutional civil rights" under state law was not a cognizable claim; 2) a 42 U.S.C. § 1983 claim based on alleged negligence of state employees cannot stand, especially when there is a post-deprivation remedy; 3) the individual defendants were entitled to qualified immunity; 4) failure to state a claim based on lack of personal

involvement; and 5) that Colvin's claim was time-barred. CP 55-66. Respondents' motion asked that all of Colvin's claims be dismissed.

On May 31, 2018, Colvin filed his response brief. CP 67-72. Nowhere in Colvin's response brief did he argue that DOC had mischaracterized his claims or that there were there were separate negligence claims that were not subject to the DOC's summary judgment motion. On the contrary, Colvin took the position that he was *not* pursuing state law negligence, but rather he had sufficiently alleged a § 1983 claim against Respondents. He conceded that a claim for negligent property loss "would be subject to dismissal"; instead, his response "alleges losses to liberty interests . . . protected under Section 1983 . . . ." CP 69:6-15.

Further, Colvin insisted that the allegation of DOC negligently giving him a previously assigned DOC number was *not* the issue – rather the alleged deliberate indifference "to *timely correct* his records is the gravamen of his suit . . . ." CP 71:22-72.

Following oral argument on June 22, 2018, the trial court granted DOC's motion for summary judgment in part and denied it in part. CP 130-131. The court dismissed *all* claims against the individual defendants. It also dismissed *all* claims against the DOC except two § 1983 claims alleging delays related to medical/dental treatment and an early release hearing.

CP 130-131. Colvin did not move for reconsideration or file notice of appeal as to the June 22 order.

On June 26, 2018, DOC, the only remaining defendant, moved for reconsideration of the two remaining claims for trial: alleged delays in medical treatment and early release hearings. Colvin characterized both issues as § 1983 claims “under the deliberate indifference standard.” CP 69:16. *See also* CP 70:8. Accordingly, DOC argued that Colvin’s remaining two claims should be dismissed because, under a § 1983 claim, the DOC is not a “person” subject to suit. CP 132-37.

In response, Colvin made no argument that his cause of action had been mischaracterized, and instead was one for negligence. On the contrary, his only arguments were that DOC had waived its § 1983 immunity and had acted with deliberate indifference, e.g., “A person who was deliberately indifferent to a delay in providing an injured plaintiff timely medical care would not have immunity from suit, and if that person acted under color of law, they would be subject to *Section 1983 liability*. So too Washington State.” CP 141:16-19 (emphasis added).

The trial court accepted Colvin’s assertion that the two remaining claims were based on § 1983. Accordingly, it found, “The only remaining Defendant in this action is the Department of Corrections . . . [and it] is not a person subject to liability under 42 U.S.C. § 1983.” CP 151. DOC’s

motion for reconsideration, which was limited to those two remaining claims, was accordingly granted and the action dismissed. CP 150-51; 152. Colvin filed a notice of appeal as to the July 11, 2018 order, dismissing the two § 1983 claims against the DOC. CP 153-54.

#### IV. ARGUMENT

The only matters properly before this Court are those addressed in the trial court's July 11 order, i.e., the dismissal of Colvin's two remaining claims – § 1983 claims for alleged delay of medical/dental care and an early release hearing. *See* CP 153-54.

##### A. **Colvin's Arguments Related to Negligence Claims are Not Properly Before This Court**

Colvin failed to appeal the dismissal of any negligence claims he may have had, and thus they are not properly before this Court. RAP 5.2(a) provides that a notice of appeal must be filed within 30 days after the entry of the order.

DOC moved for summary judgment and to dismiss all of Colvin's claims. CP 56-66. On June 22, the trial court dismissed *all* of the claims against the individual defendants. At the same time, it dismissed *all* the claims against the DOC with the exception of the two § 1983 claims related to alleged delay of medical/dental treatment and delay of an early release hearing. As previously noted, Colvin had characterized both of those claims as § 1983 claims "under the deliberate indifference standard." CP 69:16.

*See also* CP 70:8. Colvin did not appeal the June 22 order that dismissed all other potential claims. CP 130-31.

The DOC filed a motion for reconsideration as to the two remaining claims. Colvin had the opportunity to join with his own motion for reconsideration of the June 22 order, but chose not to do so. Moreover, 30 days passed without Colvin filing a notice of appeal as to the dismissal of all claims except the two § 1983 claims. His failure to do so robs this Court of jurisdiction. Accordingly, any alleged action for negligence is not properly on appeal before this Court.

**B. Colvin Should Be Precluded From Arguing a Negligence Theory for the First Time on Appeal**

Even if Colvin had not failed to timely file notice of appeal, he failed to preserve the issue of negligence for this Court to consider. RAP 2. RAP 2.5(a) provides that a court “may refuse to review any claim of error which was not raised in the trial court.” Washington courts have consistently instructed, “It is the obligation of the parties to draw the trial court’s attention to errors, issues, and theories, or be foreclosed from relying upon them on appeal.” *In re Detention of Audett*, 158 Wn.2d 712, 726, 147 P.3d 982 (2006) (citing Karl B. Teglund, *Washington Practice: Rules Practice RAP 2.5(1)* at 192 (6th ed. 2004)).

In addition to the issue of judicial economy, opposing parties should be afforded an opportunity at the trial level to respond to possible claims of error, “rather than facing newly-asserted errors or new theories and issues for the first time on appeal.” *Audett*, 158 Wn.2d at 727.

The Supreme Court of Washington recently addressed RAP 2.5 in *Wilcox v. Basehore*, 187 Wn.2d 772, 788-89, 389 P.3d 531, 540-41 (2017). In that case, plaintiff (Wilcox) brought an action based on a negligence theory, following a workplace accident where the plaintiff fell 50 feet from a catwalk hatch, landing on the floor below. After voluntarily dismissing defendant Basehore, Wilcox and the remaining defendants (Bartlett and ELR Consulting) filed cross motions for summary judgment that were both denied. ELR Consulting later filed a second motion for summary judgment, which was also denied. At the close of evidence, ELR brought a CR 50 motion for judgment as a matter of law, which was granted. The remaining claims against Bartlett proceeded to trial. At trial, Wilcox objected to jury instructions proposed by Bartlett and ELR.

On appeal, Wilcox assigned error to the objected to jury instructions, but also raised for the first time on appeal an additional argument concerning an indemnity provision. Defendants/appellees objected to the court addressing that issue, as it had not been properly preserved in the

lower court record. The Washington Supreme Court agreed and admonished:

Failure to raise an issue before the trial court generally precludes a party from raising it on appeal. RAP 2.5. While “this rule insulates some errors from review, it encourages parties to make timely objections, gives the trial judge an opportunity to address an issue before it becomes an error on appeal, and promotes the important policies of economy and finality.”

*Wilcox*, 187 Wn.2d at 788, (quoting *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015)).

This Court should similarly decline to consider Colvin’s negligence claim that he failed ever to raise to the trial court. Colvin’s current argument that his action should survive because he used the word “negligence” in his complaint is disingenuous. In his response to DOC’s motion to dismiss on summary judgment, he never argued he had separate state law negligence claims that should survive. Conspicuous by their absence in Colvin’s responsive arguments are any allegations of an alleged duty DOC owed Colvin or its breach of that duty.

He did not appeal the June 22 order that dismissed all the claims except the two § 1983 claims. He did not file his own motion for reconsideration to clarify alleged mischaracterizations of his claims. He did not raise negligence issues when DOC filed its motion for reconsideration. On the contrary, at every turn, he instead repeatedly confirmed DOC’s and

the trial court's understanding that his claims were limited to civil rights matters. He argued that his case "allege[d] losses . . . protected under Section 1983" (CP 69:8-12) and that his "case . . . is among the family of behaviors generically referred to as a 'constitutional tort'." CP 141:3-4.

Not only did Colvin fail to address an alleged mischaracterization of his claims, he actively contributed to the court's understanding that his complaint was simply a civil rights action. Colvin's failure to address the matter left the trial court without the opportunity to apprise the point of law at issue.

Finally, Colvin does not argue or meet any of the exceptions under RAP 2.5(a) that would allow the Court to hear an issue for the first time on appeal. Thus, there is no ground under RAP 2.5(a) for which this Court should allow Colvin to bring for the first time on appeal an issue not brought in the lower court. Accordingly, this Court should preclude him from bringing this negligence issue before the Court now.

## V. CONCLUSION

Colvin's attempt to have this Court address alleged negligence claims fails for two reasons. He failed to file a notice of appeal of the June 22 order that dismissed all claims except two § 1983 claims. Instead, the July 11 order that he has appealed was limited to the two remaining federal civil rights claims.

Further, not only did he never in briefing or argument bring the negligence claims to the trial court's attention, he actively took the position that his claims were based only on § 1983 liability.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of March, 2019.

ROBERT W. FERGUSON  
Attorney General



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ALEXANDER FOSTER-BROWN  
WSBA No. 52149  
Assistant Attorney General  
Attorneys for Respondents

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury in accordance with the laws of the state of Washington that the preceding Brief of Respondents was electronically filed via the Washington State Appellate Courts' Portal on the date below and that parties will be notified of such filing via the same.

DATED this 19 day of March 2019, at Seattle, Washington.

  
\_\_\_\_\_  
KELSEY BAYE  
Legal Assistant

# AGO TORTS SEATTLE

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## Transmittal Information

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