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Division III  
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No. 36347-3

IN THE COURT OF APPEALS OF THE STATE  
OF WASHINGTON DIVISION III

Appeal from Kittitas County Superior Court No. 17-2-00020-8  
The Hon. Blaine Gibson  
Yakima County Superior Court Visiting Judge

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**ROY D. CHEESMAN,**

Plaintiff-Appellant,

vs.

**ELLENSBURG SCHOOL DISTRICT, et al.,**

Defendants-Respondents.

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**BRIEF OF RESPONDENTS**

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## I. INTRODUCTION

Pro se Plaintiff-Appellant Roy D. Cheesman (hereafter Plaintiff) initially filed this action in Kittitas County Superior Court against Ellensburg School District, John Graf, an elementary school principal; Tia Ross, a kindergarten teacher; Nancy Wilbanks, an elementary school counselor, and Ben Mount, the District's transportation director (hereafter the District). Plaintiff brought claims for conspiracy to injure, oppress, threaten and intimidate regarding his civil rights, (2) discrimination or segregation in places of public accommodation under federal statutes,<sup>1</sup> (3) intentional infliction of emotional distress and (4) malicious prosecution under a RCW 9.62.010, a criminal law statute.

The action was removed to the United States District Court for the Eastern District of Washington. On Feb. 13, 2018, the district court granted summary judgment in favor of the District on Plaintiff's federal claims and remanded his state law claims to Kittitas County Superior Court. (CP 287-92.) The district court noted:

Plaintiff was instructed that his response must consist of a memorandum, containing factual assertions and legal authority opposing the summary-judgment motion, a statement of disputed facts as required[d] by Local Rule

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<sup>1</sup> Plaintiff cited 42 U.S.C. § 2000a (Prohibition against discrimination or segregation in places of public accommodation), 42 U.S.C. § 1983 (Civil action for deprivation of rights), 42 U.S.C. § 1985 (Conspiracy to interfere with civil rights) and 18 U.S.C. § 241 (Conspiracy against rights), a criminal statute.

56.1(b) and evidence supporting his claims. ECF No. 15.  
Plaintiff did not file a Statement of Disputed Facts.

(CP 288.)

Plaintiff's remaining state law claims were (1) malicious prosecution and (2) intentional infliction of emotional distress.

On Sept. 14, 2018 the state court granted the District's motion for summary judgment as to Plaintiff's state law claims. The state court also denied Plaintiff's motion for a continuance.

Plaintiff did not submit any evidence at summary judgment. Plaintiff only filed a document titled "Plaintiff's Opposing Defendants Granting Motion for Summary Judgment. Plaintiff's Motion to Adhere Continuance and Demand Jury." (CP 304-62.) The document was not in the form of a declaration and was not signed under oath or under penalty of perjury. Plaintiff stated at p. 2 of the document:

The Plaintiff would like to **adhere to continuance of this complaint** and proceed to the juror because of the defendant's malicious prosecutions and intentionally infliction of emotional distress . . . .

(Emphasis added.) Plaintiff stated at pp. 9-10 of the document:

Plaintiff pray for your Honorable Visiting Judge not to grant summary judgement for the defendants, but to grant permission to **the Plaintiff Motion to adhere Continuance** to Proceed to the Jury for the damages inflicted by the Defendants from violating the Ellensburg School District Mandate Reporter Policy to Malicious

Prosecute and Intentionally Inflicting Emotional Distress to the Plaintiff.

(Emphasis added.) The District's evidence before the trial court consisted of documents attached to the declaration of the District's lawyer: **Exhibit 1** (pp. 5, 9, 10, 38 and 39 from Plaintiff's deposition transcript, CP 265-71), **Exhibit 2** (declaration of Ms. Ross filed in the federal case, CP 272-77), **Exhibit 3** (declaration of Mr. Graf filed in the federal case, CP 279-85), **Exhibit 4** (order granting summary judgment in the federal case, CP 286-92), and **Exhibit 5** (Plaintiff's complaint, CP 293-97).

Plaintiff asserts 12 assignments of error in this appeal.

## **II. STATEMENT OF THE ISSUES**

1. Did Plaintiff fail to establish a genuine issue as to any material fact to prevent judgment as a matter of law in favor of the District?
2. Did the trial court abuse its discretion in denying Plaintiff's motion for a continuance?
3. Is there merit to any of Plaintiff's 12 assignments of error?

## **III. STATEMENT OF THE CASE**

Plaintiff is married and several of his children attended school at the Ellensburg School District. (Depo. of Plaintiff at 5, 9; CP 267-68.) On or about Dec. 7, 2016, Plaintiff's 6-year-old daughter was a student in Tia

Ross' class when Ms. Ross noticed that the child had a black eye. When asked about it, the child said something about hitting a chair but later stated that her father hit her and her sister. (Exh. A to Decl. of Ross, CP 277-78.) The child was questioned by the principal, John Graf. The child told Mr. Graf that her father hit her and her sister. Therefore, Mr. Graf had the school call Child Protective Services (CPS). (Exh. A to Decl. of Graf, CP 284-85.) Law enforcement was called, charges were brought and Plaintiff's daughter was taken away. (Depo. of Plaintiff at 10; CP 269.)

Plaintiff stated that his claims of intentional infliction of emotional distress and malicious prosecution are based upon CPS being called and criminal charges being brought against him. (Depo. of Plaintiff at 38-39; CP 270-71.)

In granting summary judgment in favor of the District, the trial court stated:

There are no disputed issues of material fact and based upon the undisputed facts . . . Defendants' motion for summary judgment is hereby GRANTED and this complaint, and all of the claims set forth therein . . . are DISMISSED with prejudice. The motion to continue is also denied.

(CP 368-69.)

#### **IV. SUMMARY OF THE ARGUMENT**

Plaintiff did not submit any evidence to support his claims and did not submit an affidavit setting forth good cause for a continuance. The trial court properly applied CR 56(c), CR 56(e) and CR 56(f).

Rule 56(c) provides:

The judgment sought shall be rendered forthwith if 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.

Rule 56(e) provides:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Rule 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that, for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

## **V. ARGUMENT**

### **A. PLAINTIFF'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IS WITHOUT MERIT.**

The tort of intentional infliction of emotional distress is also known as the tort of outrage.

The tort of outrage requires the proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress.

*Kloepfel v. Bokor*, 149 Wn.2d 192, 195, 66 P.3d 630 (2003).

[A]ny claim for intentional infliction of emotional distress must be predicated on behavior so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

*Kloepfel*, 149 Wn.2d at 196. (Internal punctuation omitted.)

Here, Plaintiff did not set forth specific facts to allow the trial court to conclude that there was a genuine issue for trial on Plaintiff's outrage claim.

**B. PLAINTIFF'S CLAIM FOR MALICIOUS PROSECUTION IS WITHOUT MERIT.**

Malicious prosecution occurs when people "maliciously and without probable cause therefor, cause or attempt to cause another to be arrested or proceeded against for any crime of which he or she is innocent." RCW 9.62.010. The lack of probable cause must be proved as an essential element of a claim for malicious prosecution. *Olsen v. Fullner*, 29 Wn.App. 676, 678, 630 P.2d 492 (1981). Here, Plaintiff did not set forth specific facts to allow the court to conclude that there was a

genuine issue for trial on Plaintiff's malicious prosecution claim. Plaintiff did not provide any admissible evidence to show that the District lacked probable cause to make a report to CPS.

**C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR A CONTINUANCE.**

The continuance of a motion for summary judgment is governed by CR 56(f), which is quoted in the Summary of the Argument above.

A trial court's denial of a CR 56(f) motion is reviewed for abuse of discretion. *Modumetal, Inc. v. Xtalic Corp.*, 2018 WL 3120836, \*10 (Wn.App. 2018), *rev. den.* 192 Wn.2d 1011, 432 P.3d 793 (2019); *Barkley v. GreenPoint Mortg. Funding, Inc.*, 190 Wn.App. 58, 71, 358 P.3d 1204 (2015), *rev. den.* 184 Wn.2d 1036, 379 P.3d 953 (2016). "A court abuses its discretion when it bases its decision on unreasonable or untenable grounds." *Clarke v. Office of Attorney Gen.*, 133 Wn.App. 767, 777, 138 P.3d 144 (2006), *rev. den.* 160 Wn.2d 1006, 158 P.3d 614 (2007).

A court may deny a CR 56(f) motion for continuance where (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence, (2) the requesting party does not state what evidence would be established through the additional discovery or (3) the desired evidence will not raise a genuine issue of material fact. *Tellevik v. Real*

*Property Known as 31641 West Rutherford Street*, 120 Wn.2d 68, 90, 838 P.2d 111 (1992).

Here, the trial court did not abuse its discretion in denying Plaintiff's motion for a continuance because Plaintiff failed to offer via affidavit a good reason for the continuance of the District's motion for summary judgment.

**D. PLAINTIFF'S 12 ASSIGNMENTS OF ERROR ARE WITHOUT MERIT.**

*Assignment of Error 1* – Plaintiff alleges that the trial court did not understand RCW 26.44.030(1)(a), which provides that if school personnel “has reasonable cause to believe that a child has suffered abuse or neglect . . . shall report such incident, or cause a report to be made, to the proper law enforcement agency . . . .” Plaintiff asserted that it is “arguable on whether the Child Protective Service are a Law Enforcement.” (Plaintiff's Brief at 12.) When child abuse or neglect is suspected an employee of a school district is authorized to make the report to CPS, which is part of the Washington State Department of Children, Youth and Families. RCW 26.44.030(4) provides: “The department, upon receiving a report of an incident of alleged abuse or neglect . . . shall report such incident to the proper law enforcement agency . . . .”

*Assignment of Error 2* – Plaintiff alleges:

Two of the three defendants presenting their personal complaint had given statements for evidence to the cps and the police that are misleading and are not according to the child actual answers to the police that are misleading and are not according to the child actual answers to the police . .

..

(Plaintiff's Brief at 13.) Plaintiff did not submit any evidence to suggest that the District's employees made up the story that Plaintiff's daughter reported that she had her sister were struck by Plaintiff. The District's employees had probable cause to report to CPS. RCW 26.44.030(1)(b)(iii) defines "reasonable cause" to include when "a person . . . receives a credible written or oral report alleging abuse, including sexual contact, or neglect of a child."

*Assignment of Error 3 – Plaintiff alleges:*

The defendants provided their own personal expert statements of complaint to the police and cps that claims involvement of the defendants to the criminal case and dependency cases as witnesses without the actual complaint of the true real victim.

(Plaintiff's Brief at 14.) This assignment of error is simply another way of alleging that the District's employees did not have probable cause to make a report to CPS. Plaintiff did not provide any evidence to suggest that the reports made to CPS by the District's employees were inaccurate.

*Assignment of Error 4 – Plaintiff alleges:*

The defendant's lawyer must provide to the appellant the Ellensburg school district policy to prove if that has no

school policy was violated and the current job statute of the defendants to make sure that no school policy was violated in regard to the report of proceedings.

(Brief at 14.) Plaintiff did not provide any evidence suggesting that the District's employees were prohibited by District policy from reported suspected child abuse or neglect to CPS.

*Assignment of Error 5* – Plaintiff stated:

The appellant would like to appeal, petition and dispute in the arguments of that the damages in economic and noneconomic are because of deprivation of liberty and the violation of due process of law . . . .

(Plaintiff's Brief at 14.) Plaintiff further stated:

The school district and the defendants . . . [were not allowed] . . . just to give away the children's to child protective services entity or in the policy custody with a false and misleading untrue statements of the child willingly complaining of being physically abused by the suspect not consistent to the child statements to the police written reports of the child being questions by the police on whether the child had said to anyone of that the child was hit in the eye by the suspect and the child had said, "no" and "I do not know" and only the continuance of the civil complaint for discovery procedure will give light to the true statements of the child.

(Brief at 15.) This assignment of error is simply another way of alleging that the District's employees did not have probable cause to make a report to CPS.

*Assignment of Error 6* – Plaintiff alleged that the District's lawyer misinformed the trial court about "the true meaning of the RCW 26.44.030

to call the law enforcement . . . .” (Plaintiff’s Brief at 3.) See the District’s comments about Assignments of Error ## 1-3.

*Assignment of Error 7* – Plaintiff alleged: “The continuance of the civil complaint was denied without any due process of law . . . .” (Plaintiff’s Brief at 17.) The trial court did not abuse its discretion in denying Plaintiff’s motion for a continuance.

*Assignment of Error 8* – Plaintiff stated:

The trial court judge was provided by the defendants’ lawyer of a premade judgment order written personally by the defendants’ lawyer and then the judge admitted of adding few more words to the premade judgment written by the defendant lawyers.

(Plaintiff’s Brief at 17.) Plaintiff appears to be ignorant of the fact that a party moving for summary judgment typically submits a proposed order in advance of a summary judgment hearing.

*Assignment of Error 9* – Plaintiff quoted the trial court’s asking “what difference does it make if the school gives the child to CPS or if the CPS calls the police and the police go pick up the child perhaps from the school?” (Plaintiff’s Brief at 5.) Plaintiff argued that “the court must explain . . . any kind of law of what it would not make a difference . . . .” (*Id.*) Plaintiff did not cite any legal authority as to the degree of detail that a trial court must verbalize on the record before granting a motion for summary judgment.

*Assignment of Error 10* – Plaintiff quoted the trial court’s statement: “There’s been ample time to pursue the issues . . . .” (Plaintiff’s Brief at 5.) Plaintiff argued that he “could not file for discovery since the continuance was denied” and “the judge did not provide details of law in discovery for the continuance and for the fact’s finding.” (*Id.*) The trial court did not abuse its discretion in denying Plaintiff’s motion for a continuance.

*Assignment of Error 11* – Plaintiff quoted the trial court:

Please don’t interrupt. It’s up to others, whether it’s the CPS or the police or the prosecutor or whatever, to determine whether or not the child was actually struck by a parent. . . . The school has – there’s no evidence the school has any control over any part of that process once the report has been made. So, there’s no genuine issue of material fact with regard to the summary judgment motion. The teachers in the school . . . had a statutory obligation to report what was said to them. Beyond that . . . they have no control over what happened afterwards.

(Plaintiff’s Brief at 6.) Plaintiff argued that the trial court should have given more detail and “without the premade written order from the defendants’ lawyer that the defendants did not gave false statement to the authorities.” (*Id.*) See the District’s comments about Plaintiff’s Assignments of Error ## 1-3, 5, 8 and 9.

*Assignment of Error 12* – Plaintiff noted that defense counsel had a premade summary judgment order that was presented to the trial court and

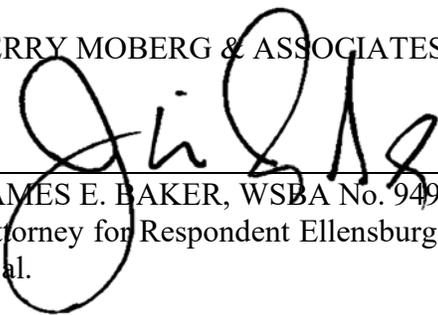
that the trial court added language stating that the motion to continue was also denied. (Plaintiff's Brief at 7.) See the District's comments about Plaintiff's Assignment of Error 8.

## VI. CONCLUSION

For the reasons set forth above, the Court should affirm the trial court's dismissal of Ellensburg School District and the individual Defendants on summary judgment.

RESPECTFULLY SUBMITTED 14th day of May, 2019.

JERRY MOBERG & ASSOCIATES, P.S.



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et al.

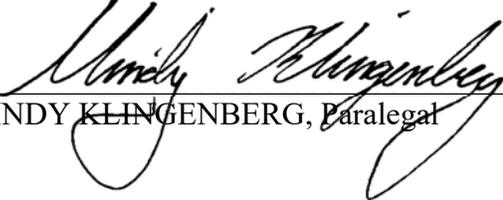
**CERTIFICATE OF SERVICE**

I certify that on this date I mailed a copy of the foregoing by first class United States mail to:

Roy D. Cheesman, Plaintiff  
1708 N. Indiana Drive  
Ellensburg, WA 98926

DATED this 14th day of May, 2019 at Ephrata, WA.

JERRY MOBERG & ASSOCIATES, P.S.

  
MINDY KLINGENBERG, Paralegal

**JERRY MOBERG & ASSOCIATES, P.S.**

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