

NO. 81931-9

THE SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL SEGLAINE
Appellant/petitioner.

vs.

STATE OF WASHINGTON DEPARTMENT OF LABOR AND
INDUSTRIES,
Respondent,

SUPPLEMENTAL
BRIEF OF ~~APPELLANT~~
PETITIONER

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STATE OF WASHINGTON

Jean Schiedler-Brown, WSBA # 7753
Law Offices of Jean Schiedler-Brown &
Associates
Attorneys for Petitioner
606 Post Avenue, Suite 101
Seattle, WA 98104
Telephone (206) 223-1888
Facsimile (206) 622-4911

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I. ASSIGNMENT OF ERRORS

- A. The Court of Appeals erred in dismissing the defendants on summary judgment by interpreting the term “person” in RCW 4.24.510 to include the State, and by failing to require good faith.
 - B. There is no immunity because the government is not a “person” per RCW 4.24.500, and no Appellate court case has addressed the words of the statute, nor the public policy reasons for protection of individuals as opposed to large organizations.
 - C. The Court of Appeals’ interpretation perverts the statutory intent and frustrates the plaintiff’s right to access to the courts.
 - D. If the statute is applied, “good faith” is a requirement in order to prevent voidness for overbreadth and vagueness.
 - E. Proper statutory analysis concludes that there is a statutory requirement of good faith.
 - F. The record contains competent evidence of bad faith so that issue, if reached, should go to the jury.
 - G. Even if the immunity statute is applied to other causes of action, it cannot abrogate all malicious prosecution actions, authorized by the same statute, and by common law.
1. The Court of Appeals erred in rejecting Mr. Segaline’s 42 USC

1983 action against Mr. Croft; Competent evidence and legal analysis support his rights to property and liberty in his electrician's license.

- A. Mr. Croft has no qualified immunity in this matter, because he did not in good faith think his actions were consistent with known constitutional rights.
 - B. The Court of Appeals erred in applying CR 15 to deny the relation back of the amendment that added Mr. Croft as an individual defendant.
 - C. Even if there was no relation back, the Court erred in finding the 42 USC 1983 claim was timely, because the claim was born at the August 22 arrest, less than 3 years from the filing of the Amended complaint on August 3.
2. The Court of Appeals erred in rejecting Plaintiff's damages as not sufficiently foreseeable to support a Negligent Infliction of Emotional distress cause of action.
 3. Because the State has no immunity under RCW 4.24.510, the cause of action of negligent supervision must be remanded for trial based upon evidence of record creating a genuine material issue of fact.
 4. Because the State has no immunity under RCW 4.24.510

regarding section 350, Malicious Prosecution, that cause must be remanded for trial based upon evidence of record creating a genuine issue of material fact.

5. The Court of Appeals erred in upholding the \$10,000 statutory penalty when the immunity statute does not apply, or in not remanding for trial when there was a material issue of fact regarding good faith.

II STATEMENT OF CASE

A. PROCEDURAL FACTUAL ISSUES

On July 3, 2006 plaintiff filed his response opposing the motion for summary judgment by L & I, and first gave notice of the possibility of amending the lawsuit to name Mr. Croft, discovered (per his deposition taken June 9 and transcribed June 25) as responsible for issuing the trespass notice. CP 190. The Court of Appeals held that the statute of limitations expired June 30, 2006, 3 years after the notice of no trespass was served on plaintiff. Plaintiff's amendment was allowed as of August 3 by the Court. Mr. Segaline was arrested on August 22 2003, less than 3 years before the allowed amendment.

B. STATEMENT OF CONTESTED FACTS

The Court of Appeals upheld summary judgment dismissal of most claims by holding that RCW 4.24.510 grants immunity to defendant. It

refused to find a good faith requirement of that statute, and ruled that plaintiff failed to present any evidence sufficient to create a jury question of bad faith.

The Court of Appeals adopted numerous factual characterizations by Appellant L & I. These presumed facts affected its analysis of the legal issues. For instance, it summarily referred to Mr. Segaline's behavior as "threatening"; it interpreted testimony that Mr. Segaline said something about "if I turn up dead" as a "death threat". It found that when Mr. Segaline calmly requested to record a meeting, a witness found it "threatening" because of her (subjective) concern that the issue could create a confrontation.; it found that Mr. Segaline had exhibited "threatening" behavior "many" times.

Appellant documented, however, that L & I employees could recall only 2 times over a period of 11 years (CP 103; 131—132, 141) that they had concerns about Mr. Segaline's behavior. On one occasion, he was on the telephone. The second time, he was frustrated about what he viewed as inefficiency of the staff, but he never threatened anyone, or called anyone names. *Id.* All these "facts" are contested.

Mr. Croft had requested a legal opinion from the attorney general via his Chain of command in the Department of Labor and Industries, multiple times, regarding when members of the public may be excluded

from State Offices. CP 62—4. He knew the common practice for the department would be to “deal with” the incident locally, then to refer it “eventually” to the security coordinator for the department, contact the person of interest and consider the level of threat the person presents. CP 68,69. He determined that Mr. Segaline did not pose a threat. CP 97.

Mr. Croft never received any direction how to make a decision of when to bar a member of the public from a State office. CP 67; CP 419—426; CP 90--91 He admitted that he is not sure that it is ever permissible to use a “trespass notice”, and he was aware of this problem prior to issuing it in June, 2003. CP 91—2. He acted in bad faith.

He read the criminal statute on trespass, and knew a defense to trespass was complying with lawful conditions to remain on the premises. CP 93. On June 23, Mr. Croft wrote a memorandum to his supervisors, in part:

The right of trespass by the department is being explored. If valid, procedures should be established, including a formal trespass warning form or letter.

If Mr. Segaline’s inappropriate behavior continues or escalates, other alternatives should be considered.
CP 335.

In fact, there were no further incidents regarding Mr. Segaline’s behavior. There was no warning letter. No procedures were established. On June 30, when plaintiff came to the Department of L & I to do business

under his license, the “no trespass” notice was handed to him. On August 21, Mr. Segaline purchased a permit at the office, without incident. Staff then consulted Mr. Croft, who instructed that the no trespass policy still was in effect. CP 428. Per Mr. Croft’s direction, Mr. Segaline was arrested on August 22, 2003, when he presented at the counter to purchase an electrical permit.

Mr. Croft knew there was no inappropriate behavior by Mr. Segaline on June 30, when he was given the trespass notice, nor on any date between June 30 and August 22, and nor on August 22, when he was arrested CP 94—6

Mr. Croft admitted responsibility for creating the “no trespass notice”, and providing it to the staff supervisor, Ms. Guthrie, to use. CP 85. L & I admitted in its brief, page 8, that Guthrie re-confirmed with management (i.e., Croft) on August 21 to call 911 if Mr. Segaline came in. (also see CP 428)

Mr. Segaline’s actions were not threats; Mr. Croft admitted that it was not a threat to say that the department is wasting his time, or to say that he will sue the department. CP 83--84.

Ms. Guthrie testified that she understood that all members of the public have a right to be served in that public office. CP 102.

The staff member who gave plaintiff the trespass notice on June

30, said that he “told her “we” (the department) “needed to get an attorney.” CP 152—155. This is not a “threat.” Staff has issued permits several times to Mr. Segaline since 2003 without incident. CP 161.

The arresting officer took the word of Mr. Hively and the Department of L & I that Mr. Segaline was threatening staff; he did not see Mr. Segaline threaten anyone. CP 169, 170.

Mr. Segaline denies ever yelling or conducting himself in a threatening manner. He peacefully came into the department to do business on August 22, and was arrested without warning; CP 176; He had not been warned prior to police being called June 19, or prior to issuance of the “trespass notice.” CP 171—178.

Mr. Segaline was charged with the crime of trespass; the charge was voluntarily dismissed by the City of Wenatchee. CP 426.

Mr. Segaline has suffered economic and emotional damage because his constitution rights were violated. CP 174—178; 216—219.

Dr. Mays found, in his supplemental declaration, the specific diagnosis of Adjustment Reaction with Anxiety for Mr. Segaline’s emotional distress proximally caused by each conduct of the State, and separately, the criminal proceeding. His analysis is quoted in Appellant’s opening brief, Statement of Facts. Also see CP 216-219.

III. ARGUMENT

A. IMMUNITY BASED UPON RCW § 4.24.510

1. **There is no immunity because the government is not a person under that statute, and no appellate court has addressed the plain terms of the statute, nor the public policy reasons for protection of individuals as opposed to large organizations.**

The Appeals Court upheld dismissal of the torts against the State (except part of the intentional infliction of emotional distress claim) under RCW § 4.24.510. RCW § 4.24.510 states in relevant part:

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, . . . is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. . . . Statutory damages [of \$10,000] may be denied if the court finds that the complaint or information was communicated in bad faith.

The Court of Appeals ruled that “person” includes the State, because RCW 1.16.080(1), which applies to the entire Revised Code of Washington, provides “person”. . . “may” be construed to include the State. This is only a general, permissive statute, and is not dispositive.

The Court of Appeals adopted reasoning in *Gontmakher v. City of Bellevue* 120 Wn. App 365 (2004), finding that a City is a person, by noting that related cases have found that a community council and a bank are “persons” under that statute. However, in none of the cases does the court engage in basic statutory analysis. The court in those cases should not have looked at the general statute to determine the intent of the

legislature in the term “person”, but should first have looked to the same statute, RCW § 4.24.500, which provides that the purpose of the statute is to protect “individuals”, and “citizens”. Those terms narrow the meaning of “person”, in the context of the next section. Although the statute has been “applied” to other entities, analyzing the terms of the statute is an issue of first impression, and contrary analyses should be reversed.

Furthermore, the related cases cited by *Gontmahker* involved groups of “citizens” in the one case, and specifically refused to consider the argument that a corporation was not a “person” because the issue was not timely raised, in the other case. Neither related case adequately analyzes this issue, nor forecloses this issue.

The Court of Appeals below also reasoned that there is no policy reason not to include the “State” as a person. There is a clear policy reason to exclude the “State” in light of the explicit terms of the statute, which must be interpreted as a whole so that no part is rendered meaningless, *State v. Delgado* 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Worse, The Court of Appeals’ interpretation broadens the statute so that any time an action against the state involves one agency complaining to another, citizens will be barred from suit.

The legislative history of this statute and statutes of its type (known as anti-SLAPP statutes) is to protect the rights of the individual citizen or small groups against large corporations or big government, and

not to protect state offices or officials. The Court of Appeals ruling subverts the benefits intended by the legislature and frustrates citizens' ability to petition regarding wrongs by the government.

2. Interpreting the statute as done below will not only pervert its intent, but actively frustrate plaintiff's right of access to the courts.

Plaintiff's right of access to the courts will be abridged if the court grants immunity under RCW § 4.24.510. *Hough v. Stockbridge*, 113 Wash.App. 532, 539 -40, 54 P.3d 192 (2002).

See pages 14—18 of the Petition for Review for the full argument regarding the constitutionally abhorrent notion that state offices, by communicating with each other, can immunize themselves against liability. Here, Mr. Segaline exercised his first Amendment rights to expressed his dissatisfaction with a government service. Public policy should exclude the state from being protected by this statute; if the Court determines the State is protected, then there is a compelling Constitutional argument that minimally the state must meet a "good faith" standard to merit immunity.

If the application of RCW § 4.24.510 is so broad that it prevents all lawsuits in which government agencies communicate with each other, the statute will hinder legitimate lawsuits by wronged citizens, denying their constitutional right to access the courts and to a jury trial.

3. If the statute is applied without a requisite showing of good faith, then it would be void for over breadth and vagueness.

See Appellant brief, pp. 21—22 for further analysis regarding overbreadth that limits, Mr. Segaline’s first Amendment Constitutional rights. This issue will not be reached, with correct statutory analysis,

4. Proper statutory analysis concludes that there is a statutory requirement of good faith.

RCW § 4.24.500, expressing the intent for section 510, specifies:

The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies.

The Court of Appeals erred in finding there was no “good faith” requirement. Merely because the repetitious term “good faith” was removed from section 520 does not relieve the “good faith” requirement of section .500.

5. Mr. Segaline cited evidence of bad faith so that issue, if reached, should go to the jury.

Mr. Segaline is entitled to all inferences of the evidence in his favor. He presented evidence of bad faith. First, he never threatened anyone. Mr. Croft knew this, because he admitted that Mr. Segaline was not dangerous CP 94--97, and he held a meeting with him without notifying security. CP 73-4. Although, after the meeting, Mr. Segaline never engaged in any inappropriate behavior, CP 94-6, Mr. Croft issued

the no trespass notice without notice to Mr. Segaline in June, 2003. He further instructed his staff to call 911, in August 2003, all without any cause and without notice to Mr. Segaline. CP 428. told the officers that Mr. Segaline was threatening and harassing staff, CP 169-70, a report in bad faith, since it is undisputed that Mr. Segaline's behavior was appropriate that day. The trespass charge was voluntarily dismissed, prima facie evidence it was brought in bad faith. *Hanson*.

6. Even if the immunity statute is applied to other causes of action, it cannot abrogate all malicious prosecution actions, authorized by the same statute, and by common law.

In ruling the State statutorily immune to the malicious prosecution action, The Court of Appeals eliminated the well-recognized common law cause of action, Malicious Prosecution, and nullified RCW 4.24.350(1) (part of the same statute as the SLAPP provisions of .500 *et seq*), authorizing a malicious prosecution civil action.

The Court of Appeals was confused regarding the elements of the cause of action of Malicious Prosecution, finding it "moot" because the criminal matter had been dismissed (See FN 5 of the opinion). Instead, dismissal is a prerequisite for bringing a malicious prosecution action. *Hanson v. City of Snohomish* 121 Wn.2d 552 (1993.)

Further, the Court of Appeals made no statutory analysis, and did not consider the language of section 350. It ignored the controlling legal

principle that one reads the specific statute (on bringing a malicious prosecution action) over the general (section 510 regarding immunity.) *State v. Collins* 55 Wn.2d 469, 348 P.2d 214 (1960). The statutes cannot be reconciled, since a malicious prosecution is always commenced when a person brings a false complaint to a government agency. The Court of Appeals failed utterly to apply the law correctly on this issue.

The Court of Appeals also relied upon *Dang v. Ehredt* 95 Wn. App. 670, 977 P.2d 29 rev.den. 139 Wn.2d 1012 (1999). The reasoning in that case is irrelevant to our malicious prosecution issue. There was no malicious prosecution claim in that case and therefore no statutory analysis regarding section 510 vs. section 350(1). *Dang* found that if there is immunity, it applies to all of the foundational causes of action, i.e., for negligent investigation and for negligent arrest. The question here is not how to apply existing immunity to factual patterns; the question is which statutory provision controls, where one law grants immunity and another one creates a cause of action, each based upon a report to a law enforcement agency.

B. VIOLATION OF CIVIL RIGHTS

The Court of Appeals erred in rejecting Mr. Segaline's 42 USC 1983 action against Mr. Croft; Competent evidence and legal analysis support his rights to property and liberty in his electrician's license.

The Court of Appeals mis-apprehended the reason for Mr. Segaline's careful analysis of his rights to enter the L & I building, and his property and liberty interest in his license as an electrician. He was not arguing that the state was liable, but rather he was establishing the prongs of the legal elements to demonstrate that Mr. Croft was not entitled to qualified immunity. Plaintiff's opening appellate brief, pages 25 through 38, outline the legal authorities, applying the facts in this case. It is especially important that Mr. Segaline's right to enter the L & I office was greater than a general member of the public, because he was a licensee and invitee, whose livelihood depended upon access. He had statutory rights of due process before his license could be suspended. See Plaintiff's brief.

1. Mr. Croft has no qualified immunity in this matter. He did not in good faith think his actions were consistent with known constitutional rights.

First, Mr. Croft has no qualified immunity because plaintiff's clear rights to property and liberty were violated, without notice or a right to any meaningful hearing. The second prong in rejecting qualified immunity for Mr. Croft is whether Mr. Croft (or whether a reasonable state official) could have in good faith thought that his actions are consistent with the known constitutional rights. The evidence shows that Mr. Croft took action without waiting to hear from the attorney general's opinion that he requested; CP 69; he suspected it was not Constitutionally permissible to

bar Mr. Segaline with a “trespass notice” from the L & I office. CP 82;91—3. He took action despite being aware that he was likely violating Mr. Segaline’s rights, and he knew Mr. Segaline was not dangerous. CP 72-74; 97. He failed to follow the due process set by statute for license revocation, and failed to give any notice.

This case is much like the previously cited *Mission* case, in which the Washington courts rejected the defense of qualified immunity for arbitrary action in denying a building permit, when the licensee had satisfied all of the licensing requirements and approvals. In this case, Mr. Segaline was an invitee and licensee who had the right to come to the state office to conduct his business, a right that could not be taken without due process. Mr. Croft arbitrarily took that right without cause or due process.

There is a material issue of fact that Mr. Croft did not act with a good faith belief that he was not violating a right. His contemporaneous contrary writings, requested opinions, and findings that Mr. Segaline was not dangerous show he was knowingly violating plaintiff’s rights.. He knew the general L & I policy that the office was open to all licensees, per the testimony of his subordinate. He did not act in good faith.

2. The trial court erred in not allowing the relation back of the amended complaint that joined Mr. Croft as an individual party.

The court of Appeals found that Mr. Segaline's amended complaint joining Mr. Croft as an individual defendant, which was filed August 3, was untimely based upon inexcusable neglect because it was about 33 days more than 3 years after the June 30, 2003 issuance of the no trespass notice. However, Plaintiff filed a pleading on July 3, only 3 days after June 30, mentioning an amendment, having just received a June 25 transcription of Mr. Croft's deposition. Is it inexcusable to allow counsel a few days to review hundreds of pages of depositions, as in this case, before deciding which individuals to add as defendants?

Moreover, At pages 23 and 24 of the Petition for Review, plaintiff cites authorities questioning the application of inexcusable neglect when there is no gamesmanship, no prejudice to parties, and when the facts and theories do not change by adding a named defendant who stands in the shoes of and is represented by counsel for the parties that have been litigating all along. The court should resolve this matter consistently with the language of the Civil Rules and allow relation back.

3. Even if there is no relation back, the 42 USC 1983 claim was timely because the claim was born on the August 22 arrest, less than 3 years from the filing of the amended complaint.

The facts of record establishing evidence within the statute of limitations are reviewed at page 16 of Mr. Segaline's reply brief. At pages 21 through 23 of the petition for review, Mr. Segaline has supplemented the federal law, which controls in this matter, that defines when a 42 USC 1983 action accrues. Consistently with the statutory and common law action for malicious prosecution, which accrues, at the earliest, upon arrest, Mr. Segaline's cause of action for deprivation of his constitutional rights involved a continuous series of acts from June 30, when he was given the no trespass notice, and accrued at the August 22 arrest. His damages flowed from the entire pattern of events, and were exacerbated by the arrest and criminal charge. The pattern of events was not ripe until August 22, within 3 years of amending the complaint to add Mr. Croft. The Court of Appeals erred in finding untimeliness as a matter of law.

C. The Court of Appeals erred in rejecting plaintiff's damages as not sufficiently foreseeable to support a NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS cause of action.

The main case in the area of negligent infliction of emotional distress is *Hunsley v. Giard*, 87 Wn.2d 424 (1976). As with any claim sounding in negligence, where a plaintiff brings suit based on negligent infliction of emotional distress the plaintiff's negligence claim must prove

the established concepts of duty, breach, proximate cause, and damage or injury.' *Hunsley* at 434. The facts of this case and how they satisfy the foreseeability of the damages that Mr. Segaline suffered are briefed at pages 40—42 of his opening appellate brief.

The Court of Appeals rejected plaintiff's argument that when a person's constitutional rights are violated, case law has accepted psychological damages as naturally flowing from that violation of rights. Yet, in *Flockhart v. Iowa Beef Processors, Inc.* 192 F.Supp 2d 947 (N.D. Iowa 12/21/2001) a \$1 million in emotional distress damages were upheld in a Civil Rights matters where the plaintiff worried, cried, felt trapped, and upset, and received pastoral counseling but no professional medical counseling. Significant emotional distress damages are allowed if a plaintiff demonstrates with evidence more than a "garden variety" of distress; proof can include observations of others, reports to physicians, and not necessarily testimony of a psychologist. *Ruhling v. Newsday, Inc.* (E.D.N.Y. , 05/13/2008) includes a review of numerous cases in which emotional distress damages were upheld, flowing from violation of rights. It is established through these cases that emotional distress is a foreseeable result of violation of Constitutional Rights.

Washington courts have put it succinctly:

Our courts have long recognized damage is inherent in a discriminatory act. The act in itself carries with it the elements of an assault upon the person, and in such cases the personal indignity inflicted, the feeling of humiliation and disgrace engendered, and the consequent mental suffering, are elements of actual damages.

Negron v. Snoqualmie Valley Hospital 86 Wn. App 579, 936 P.2d 55 (1997).

Mr. Segaline's damages are the result of the violation of his civil rights, and therefore the Court of Appeals erred in ruling that his damages were not foreseeable under these facts and circumstances.

D. Because the state had no immunity from suit under RCW 4.24.510, plaintiff presented evidence creating a material issue of fact as to each element of negligent supervision

Plaintiff's opening appellate brief, pages 45 through 48, analyze this cause of action with case law uncontroverted by the State. If the State has no immunity, then it must defend this case of action.

E. Because the state has no immunity under RCW 4.24.510, regarding section 350, malicious prosecution, that cause must be remanded for trial because there is a genuine issue of material fact as to all elements of that cause.

The elements of malicious prosecution include: (1) prosecution by the defendant; (2) want of probable cause for its institution or continuation; (3) malice or bad faith; (4) proceedings dismissed or abandoned; and (5) injury or damage. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 558, 852 P.2d 295 (1993); *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d

485, 497, 125 P.2d 681 (1942). "Although all elements must be proved, malice and want of probable cause constitute the gist of a malicious prosecution action." *Hanson*, 121 Wn.2d at 558. This case presents an issue of material fact regarding bad faith, or malice, and by the undisputed fact that the prosecution was voluntarily abandoned. See also pages 45-47 of the appellate brief, and pages 18—21 of the Petition for Review.

F. The trial court erred in awarding the statutory penalty of \$10,000 when the statute does not apply, or when there was an issue of fact regarding good faith.

Whether or not the report to the police was in good faith is a factual question and cannot be determined summarily. These facts are previously in this and other briefs cited and analyzed.

If the SLAPP statute applies, and the trial court can properly entertain an award of penalty in this matter, then the issue of good faith must be presented to the jury.

CONCLUSION: The case should be reversed and remanded for trial.

DATED this 2nd day of June, 2009.



Jean Schiedler-Brown
WSBA #7753, for Appellant