

81931-9

Supreme Court No. 81913-9

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL SEGALINE,

Petitioner,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LABOR AND INDUSTRIES, et al.,

Respondents.

**SUPPLEMENTAL BRIEF OF RESPONDENT STATE OF
WASHINGTON, DEPARTMENT OF LABOR AND INDUSTRIES
& ALAN CROFT**

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I. INTRODUCTION

The Washington State Department of Labor and Industries (L&I) issued a no trespass notice to a licensed electrician (Michael Segaline) after agency staff felt threatened by his abusive and disruptive behavior. Subsequently, an L&I employee called the East Wenatchee police to report that Segaline had returned to the building. The police contacted Segaline, asked him to leave, and then arrested him when he indicated his intent to remain. Two years later, Segaline sued L&I under various tort theories and claimed L&I violated his civil rights. On the eve of L&I's summary judgment, Segaline moved to amend his complaint to add a 42 U.S.C. § 1983 claim against Alan Croft, the L&I safety officer who drafted the no trespass notice.

As the court of appeals properly concluded, Segaline's state law claims against L&I fail because the claims arise out of employees contacting the police and RCW 4.24.510 provides immunity from liability for such a communication. Segaline's § 1983 claim against defendant Croft fails because it is barred by the statute of limitations.

II. STATEMENT OF CASE

A. The No Trespass Notice And Arrest

The facts are fairly summarized by the court of appeals. *Segaline v. Dep't of Labor & Indus.*, 144 Wn. App. 312, 182 P.3d 480 (2008). Segaline is an electrical contractor and part owner of Horizon Electric,

Inc., in East Wenatchee. Segaline often went to the L&I building in East Wenatchee to obtain electrical permits where he frequently yelled at agency employees and made threatening and harassing statements. By 2002, employees were afraid of Segaline. CP 36-37; 44-5.

On June 19, 2003, L&I employees David Whittle and Alan Croft met with Segaline and asked him to modify his behavior. Segaline refused, stating he would do business in the same manner as always. CP 52, 377-78. At that meeting, Croft believed Segaline's temper could explode. CP 378-79. Segaline abruptly left the meeting, and Croft followed him to the lobby to ask him to leave. After Segaline ignored him, Croft called 911 and Segaline left as the police arrived. CP 378-79.

The police told Croft that L&I could serve a no trespass notice that would inform Segaline he did not have permission to enter the building. CP 379. A State Trooper who assisted L&I with workplace violence concerns also told Croft that L&I could serve such a no trespass notice to prohibit a person from a public building. CP 379. Croft drafted a notice that Segaline was "no longer permitted, invited, licensed or otherwise privileged to enter or remain" at the L&I building in East Wenatchee, and that the notice could be terminated with the "written approval of David Whittle, Electrical Supervisor". CP 48, 379. This notice did not prevent Segaline from obtaining permits. On occasion, he used an

employee or customer to obtain the permits from L&I. He was also free to mail or fax in permits for approval. CP 460.

An L&I supervisor and the East Wenatchee Police served the notice on June 30, 2003, when Segaline was at the building. CP 37. Segaline objected, but left. CP 469. Segaline complied with the notice for several weeks, but returned on August 21, 2003, and purchased an electrical permit. When L&I gave him a copy of the permit, he was told the rest of the paperwork would be mailed because he was not supposed to be on the premises. CP 46-47. Segaline, however, returned on August 22 and an L&I supervisor called 911. CP 47. The police asked Segaline to leave, but he refused and argued with the officer, who arrested him. CP 55. The police booked Segaline on trespass charges and released him within hours. CP 426. Alan Croft was not present at the time Segaline was arrested, nor did Croft call the police, or anyone else, to arrest Segaline. Croft learned of the arrest after the fact. CP 380.

B. Segaline's Lawsuit

On August 8, 2005, Segaline sued L&I seeking damages arising from his arrest. CP 3-7. After discovery, L&I moved for summary judgment. Among its arguments, L&I asserted immunity from his tort claims under RCW 4.24.510, commonly known as the anti-SLAPP statute ("Strategic Lawsuit Against Public Participation"). CP 16-25.

On August 4, 2006, the court orally dismissed Segaline's claims against L&I. CP 505-06.

On August 3, 2006, however, Segaline moved to amend his complaint to sue Croft under 42 U.S.C. § 1983, claiming Croft violated his constitutional rights. CP 220-21. The court granted Segaline's motion to amend, and allowed the Amended Complaint to relate back to the day Segaline moved to amend—August 3, 2006. CP 500-01. The court refused to relate the claim against Croft back to the date of the original Complaint. Among its reasons, the court found that Segaline had been informed, through interrogatory answers in December 2005, that Croft drafted and designed the no trespass notice. Segaline had confirmed Croft's involvement in issuing the notice when he deposed Croft on June 9, 2006. CP 230, 220. There was no excusable neglect for Segaline's late complaint against Croft. *See* Respondent's Brief (Resp't Br.) at 39-41.

Croft promptly moved for summary judgment. The court concluded that the claim against Croft was barred by the statute of limitations because it had accrued no later than June 2003, when Segaline received the no trespass notice drafted by Croft. The court also concluded that there was no showing that Croft had violated Segaline's constitutional rights, and that Croft was entitled to qualified immunity because there was no violation of any clearly established right. CP 489-91.

At the court of appeals, L&I and Croft argued multiple reasons to affirm. L&I pointed out that Segaline did not have evidence to meet the elements of the torts asserted against the agency (malicious prosecution, negligent supervision, and negligent infliction of emotional distress). Second, L&I had immunity from such claims under RCW 4.24.510 because they arose out of a communication to the police. Third, the § 1983 claim against Croft was (a) time barred; (b) failed as a matter of law because there was no due process violation; and (c) Croft possessed federal qualified immunity to the § 1983 claim. *See generally Resp't Br.* at 11-49.

The court of appeals affirmed, but it only addressed some of the issues. It found that immunity under RCW 4.24.510 justified dismissing the malicious prosecution and negligent supervision claims against L&I. *Segaline*, 144 Wn. App. 326-28. It affirmed dismissal of the negligent infliction of emotional distress because the emotional harm claimed by Segaline was not actionable. *Id.* at 329. Finally, it affirmed dismissal of the § 1983 claim against Croft because the claim accrued, at the latest on June 30, 2003 when Segaline received the no trespass notice, but the complaint against Croft was not made until August 3, 2006, past the three year statute of limitations. *Id.* at 332. The court did not reach the other reasons for affirming, including Croft's qualified immunity and whether Segaline stated a claim for denial of due process. *Id.* at 332, n.11.

III. ISSUES PRESENTED

1. Does the immunity in RCW 4.24.510 apply to Segaline's tort lawsuit against L&I arising from its employees calling the police?

1.1 Is a state agency a "person" for purposes of RCW 4.24.510?

1.2 Where Segaline offered no competent evidence to suggest that L&I's call to the police was not in good faith and where the record shows a good faith reason to call, is there any reason to address Segaline's arguments that RCW 4.24.510 is limited to good faith communications?

1.3 Does the First Amendment require that RCW 4.24.510 immunity depend on a showing of a good faith communication to government?

1.4 Is RCW 4.24.510 immunity inconsistent with the elements of malicious prosecution?

2. Is the § 1983 claim against Croft barred by the statute of limitations?

2.1 Did the § 1983 claim against Croft, which is premised on Croft drafting the no trespass notice that excluded Segaline from the L&I office building, accrue no later than when Segaline received the trespass notice and learned of the exclusion?

2.2 Did the court abuse its discretion by rejecting Segaline's argument that the § 1983 claim against Croft should relate back to the original complaint against L&I?

The Court should note that Segaline's claim for negligent infliction of emotional distress is abandoned because the Petition did not raise any issue that challenged the court of appeals' conclusion that his claimed emotional damages do not state a claim for negligent infliction of emotional harm. *Segaline*, 144 Wn. App. at 329; *see also* RAP 13.7.

A number of issues were *not reached* by the court of appeals but are preserved. For example, L&I and Croft provided additional reasons to support summary judgment on the malicious prosecution and negligent supervision claims, in addition to RCW 4.24.510 immunity.¹ Resp't Br. at 11-33. The court of appeals did not reach those issues. Similarly, the court did not reach Croft's § 1983 qualified immunity. *See Segaline*, 144 Wn. App. at 332, n.11; Resp't Br. at 39-48. If this Court does not affirm the court of appeals, it should remand to allow it to consider these other issues. *See* RAP 13.7(b) (If Supreme Court "reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, the Supreme Court *will either consider and decide those issues or remand* the case to the Court of Appeals to decide those issues.") (emphasis added); *Butzberger v. Foster*, 151 Wn.2d 396, 413, n.7, 89 P.3d 689 (2004) (remanding); *see also* 1994 Drafters Comments (RAP 13.7(b) is amended to eliminate a trap for respondents if court of appeals did not reach issues).²

¹ *See* Resp't Br. at 11-19 (showing agency is not a proper defendant for malicious prosecution; showing that summary judgment record lacked evidence of malice; showing that police acted with probable cause and exercised independent discretion); Resp't Br. at 33-34 (no negligent supervision claim where there is no evidence of tortious action by the supervised employee).

² While the Court "will *either* consider and decide" such issues "*or* remand," a remand is more appropriate in this case. The issues involve well-established legal principles applied to a summary judgment record. These other reasons thus do not meet the criteria in RAP 13.4(b) for this Court's review, and the respondents did not ask the court to hear the issues pursuant to RAP 13.4(d). While Issue No. 6 in the Petition mentions Croft's § 1983 qualified immunity, it simply says it was briefed but not decided.

IV. ARGUMENT

A. Under RCW 4.24.510, L&I Is Immune From Claims Based On The Communication To The Police

RCW 4.24.510 provides immunity from claims based on a communication to the police. RCW 4.24.510 provides, 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. [Emphasis added.]

A person is “immune from civil liability on claims based upon the communication.” This immunity corresponds with the common law principle that liability will not be imposed on a defendant who does nothing more than detail his or her version of the facts to a police officer and ask the officer for assistance, thus leaving it to the officer to determine the appropriate response. *McCord v. Tielsch*, 14 Wn. App. 564, 566-67, 544 P.2d 56 (1975) (citing state cases, national cases, and treatises).

Segaline continues to pursue “negligent supervision and malicious prosecution” claims. Petition for Review at 3. These claims are all based upon L&I’s communication with police. His “negligent supervision” argument merely asserts that the employer is vicariously liable for actions of employees, or that L&I’s negligent supervision allowed Croft to prosecute Segaline maliciously. See Appellant Br. at 44-45; Resp’t Br. at 33-34. Thus, the heart of Segaline’s claim is that L&I staff communicated to the

police, which resulted in his arrest; this communication was either malicious prosecution by L&I through its employees, or negligent supervision by L&I that allowed malicious prosecution.³

1. L&I Is A “Person” For Purposes Of RCW 4.24.510

Segaline argues that L&I is not a “person who communicates” for purposes of the statute. Petition at 11. The language of the statute, case law, legislative purposes, and legislative acquiescence in the case law demonstrate that an employer, including L&I, can be a “person who communicates” for purposes of the statutory immunity.

RCW 1.16.080(1) provides that in all statutes:

The term ‘person’ may be construed to include the United States, *this state*, or any state or territory, or any public or private corporation or limited liability company, as well as an individual. [Emphasis added.]

See generally Liquor Controlboard v. State Personnel Bd., 88 Wn.2d 368, 374, 561 P.2d 195 (1977) (under RCW 1.16.080(1), “person” may include the state or agencies).

In *Gontmakher v. Bellevue*, 120 Wn. App. 365, 85 P.3d 926 (2004), Division One held that a city was a “person” under RCW 4.24.510. The court explained that the “legislature is presumed to know the general definition of ‘person’ under RCW 1.16.080, and that if the legislature

³ The court of appeal’s conclusion dismissing the negligent infliction of emotional damage claim also bars a negligent supervision claim premised on L&I allowing staff to negligently inflict emotional harm. *Segaline*, 144 Wn. App. at 329.

intended to employ a limited definition of ‘person,’ the normal and expected practice would be for it to expressly do so.” *Gontmakher*, 120 Wn. App. 371. Further, RCW 4.24.510 had already been applied to suits against entities such as a community council and a bank, not merely the individual communicator. *Id.* at 370, n.7, (citing *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 384, 46 P.3d 789 (2002)); *see also Dang v. Ehredt*, 95 Wn. App. 670, 683, 977 P.2d 29 (1999), review denied 139 Wn.2d 1012 (1999).

One may presume the Legislature is aware of judicial interpretations. Its decision not to amend RCW 4.24.510 in the five sessions after *Gontmakher* justifies a further conclusion that the Legislature concurs with the judicial interpretation. *See Buchanan v. Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers*, 94 Wn.2d 508, 511, 617 P.2d 1004 (1980).

This established construction of the word “person” in RCW 4.24.510 is also justified when the statute is read in harmony with RCW 4.92.090:

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct *to the same extent as if it were a private person* or corporation. [Emphasis added].

Segaline does not dispute that RCW 4.24.510 provides immunity when a private entity or corporate employer communicates to police about a trespasser. *Right-Price Recreation, supra* (applying immunity to citizen

groups). Applying the statute to L&I is therefore harmonious with RCW 4.92.090, because L&I would be liable “to the same extent as if it were a private person or corporation.”

Moreover, state and local government may have the same need to communicate with government as a private employer. For example, a state or local agency may need to contact law enforcement on such matters as work place safety and should be able to do so without fear of being sued. Violence in the workplace is a serious issue for both private and public employers. Employers are expected to act to prevent third parties from harming employees, whether it is a physical threat or sexual harassment.⁴

Segaline offers three arguments why L&I is not a “person.” First, he relies on quotation from a law review article in the *Right-Price Recreation* opinion. The article generally described anti-SLAPP statutes. *See* 146 Wn.2d at 382 (describing suits “filed against nongovernment individuals or organizations”). *Right-Price*, however, did not analyze or address whether a city or state agency is a “person” under RCW 4.24.510. The quoted passage is dicta, providing general background.

Second, Segaline’s Petition relies on *Skimming v. Boxer*, 119 Wn. App. 748, 758, 82 P.3d 707 (2004), a case involving a communication to a

⁴ *See Minahan v. Western Washington Fair Association*, 117 Wn. App. 881, 73 P.3d 1019 (2003) (employer owes a duty to provide employee a safe place to work which includes duty to make reasonable provision against foreseeable dangers of criminal misconduct to which the employment exposes the employee); *Glasgow v. Georgia Pacific*, 103 Wn.2d 401, 693 P.2d 708 (1985) (employer's failure to correct hostile working environment caused by sexual harassment constituted illegal discrimination).

newspaper. *Skimming*, however, follows the dicta in *Right-Price* with little analysis. Segaline argues that *Skimming* recognizes that RCW 1.16.080(1) does not mandate construing “person” to include state and local government. The fact that RCW 1.16.080(1) is not mandatory merely begs the question. It is not a reason to exclude state and local government from RCW 4.24.510.

Third, Segaline relies on the purpose statements in RCW 4.24.500 (expressing intent to prevent chilling effect that abusive lawsuits have on “citizens” who wish to communicate with their government). Petition at 11. Policy statements in an intent section do not give rise to enforceable rights or duties. *E.g., Judd v. American Tel. & Tel. Co.*, 152 Wn.2d 195, 204, 95 P.3d 337 (2004). Moreover, in contrast to the word “citizens” in the purpose section, RCW 4.24.510 uses the broader word “person” to define the rights it creates. It does not use a word signifying an individual, or words precluding immunity for a corporate entity or government.

Furthermore, the purpose section cited by Segaline is thwarted when an employer, public entity, or private association is sued for a communication to police. If immunity were limited only to suits against the individual who speaks up, then a SLAPP suit need only target the speaker’s employer or group to chill or silence the communication. Yet, the history of the 2002 amendment to the statute recognizes that SLAPP lawsuits include claims against individuals *and organizations*. S.H.B. 2699, Ch. 232, 57th

Leg. Reg. Sess. (Wash. 2002).⁵

L&I is therefore a “person.” It has been sued by Segaline because it communicated to the police through its employees. RCW 4.24.510 provides immunity from liability based that communication.

2. The Summary Judgment Record Did Not Show Any Lack of Good Faith And Therefore The Court Need Not Consider Segaline’s Argument That The Constitution Requires Proof Of A Good Faith Communication

Segaline’s next argument is that RCW 4.24.510 should be construed to require a showing that L&I contacted the police in good faith. He claims he offered evidence that when L&I contacted the police, it “knew” he was not a safety threat. Petition at 13 (citing CP 73-33, 97). His argument fails because no evidence in the record supports his claim that the communication to the police was not in good faith. As the court of appeals concluded: “[A] party’s self-serving statement of conclusions and opinions are insufficient to defeat a summary judgment motion.” *Segaline*, 144 Wn. App. at 325. Instead, “ample evidence . . . supports L&I’s concern that Segaline was abusive and disruptive to its employees and that its employees feared him.” *Id.* at 325-26.

L&I came forward with good faith reasons and Segaline did not raise

⁵ Analogous statutes in other states protect governmental entities. *Bradbury v. Superior Court*, 49 Cal. App. 4th 1108, 1117, 57 Cal. Rptr. 2d 207 (1996) (governmental entities and employees are a “person” under California statute); *accord Schaffer v. City and County of San Francisco*, 168 Cal. App. 4th 992, 85 Cal. Rptr. 3d 880 (2008); *Hunt v. Town of New Llano*, 930 So.2d 251 (2006).

a genuine issue of material fact by baldly arguing bad faith. *See Right-Price*, 146 Wn.2d at 383 (adopting rule under former statute that when defendant offers evidence of good faith communication, burden shifts to Plaintiff to show by clear and convincing evidence that Defendant did not act in good faith). Accordingly, even under the former statute and *Right-Price*, this case does not present the issue of whether the immunity should be denied for lack of good faith.

3. RCW 4.24.510 Does Not Require A Showing Of Good Faith If There Is A Communication To Government About A Matter Of Concern To Government

Even if Segaline showed a genuine issue of fact over L&I's good faith, the statute does not require a showing of good faith and the dispute Segaline alleges does not involve a material fact.

RCW 4.24.510 originally limited immunity to "a person who *in good faith* communicates a complaint" (emphasis added), but the 2002 Legislature eliminated the words "in good faith".⁶ Since then, state and federal courts have all interpreted the statute as granting immunity to persons making the communications, regardless of whether they acted in good or bad faith. *See Gontmakher*, 120 Wn. App. at 372; *Segaline*, 144 Wn. App. at 487; *Bailey v. State*, 147 Wn. App. 251, 191 P.3d 1285 (2008);

⁶ The legislative history for the 2002 amendment provides, in part: "Chapter 232, Laws of 2002 amends Washington law to bring it in line with these court decisions which recognizes that the United States Constitution protects advocacy to government, **regardless of content or motive**, so long as it is designed to have some effect on government decision making." S.H.B. 2699, Ch. 232, 57th Leg. Reg. Sess. (Wash. 2002), § 1 (emphasis added).

Harris v. City of Seattle, 302 F. Supp. 2d 1200, 1202 (2004). In the face of this specific, later amendment, there is no merit to Segaline's argument that the reference to "good faith" in the intent section, RCW 4.24.500, makes "good faith" an additional element to RCW 4.24.510. See *State v. J.P.*, 149 Wn.2d 444, 454, 69 P.3d 318 (2003) (a more specific, later statute controls over early statute).

In response, Segaline cites *Florida Fern Growers Association v. Concerned Citizens of Putnam County*, 616 So.2d 562 (Fla. App. 1993), and argues that if the statute provides "absolute immunity" for contacting government, it impairs a plaintiff's constitutional right of access to the courts. Petition at 16-17. The court of appeals properly declined to reach these arguments because they are not presented by the factual record. *Segaline*, 144 Wn. App. at 324-25. In any event, Segaline's argument should be rejected.

First, the statute does not provide "absolute immunity." The immunity depends on a communication to a government agency regarding a matter of concern to the agency. The immunity requires a showing that the communication had relevance to the government, such as a request to the police for assistance.

Second, the immunity does not impair speech or affect access to the courts. It simply provides immunity from Segaline's malicious prosecution claim because it is based on a communication to police which led to his

arrest for trespass.

Third, the immunity is not applicable to a First Amendment claim under § 1983 because it is a state law defense. It prevents the imposition of liability under state law based on a communication to government.

If the court reaches Segaline's over-breach argument or access to courts arguments, the arguments should be rejected. *See generally Resp't Br.* at 30-31.

4. The Immunity In RCW 4.24.510 Does Not Conflict With The Statutory Action For A Malicious Damages Case

Segaline next argues that without a good faith requirement, the immunity in RCW 4.24.510 conflicts with RCW 4.24.350(1) or abolishes a malicious prosecution tort arising from false reports to the police.

First, there is no statutory conflict. RCW 4.24.350 abrogates a common law element for malicious prosecution where the plaintiff had to prove the proceedings ended on the merits in favor of the plaintiff or were abandoned. *Brin v. Stutzman*, 89 Wn. App. 809, 818-19, 951 P.2d 291, *review denied*, 136 Wn.2d 1004, 966 P.2d 901 (1998). Section 350(1) permits a defendant to assert a counterclaim for malicious prosecution in response to "any action for damages" that was instituted with knowledge of falsity, without probable cause, or maliciously. Segaline's claim, however, is based on an arrest, not a false or malicious civil claim. L&I's

immunity to Segaline's claim does not implicate section 350(1).⁷

Furthermore, a malicious litigation claim under section 350(1) is unlikely to ever involve immunity under RCW 4.24.510. A section 350(1) claim arises when a party alleges that there has been an invalid and malicious *civil action for damages*. *Brin*, 89 Wn.App. at 821. Such a malicious civil action for damages would not be a "communication" to government for purposes of RCW 4.24.510. *See, e.g., Saldivar v. Momah*, 145 Wn. App. 365, 186 P.3d 1117 (2008) (plaintiff who brings a private lawsuit is seeking redress from a court, not communicating to government, and cannot claim protection from liability under anti-SLAPP statute).

Second, there is no conflict with the common law liability for making false and malicious reports to the police. Again, the record does not present this issue because Segaline lacks evidence of a false or malicious report to the police. *Segaline*, 144 Wn. App. at 325. If the issue is addressed, it is answered by the plain language which effectively precludes a malicious prosecution claim based on this communication to police. However, actions for malicious prosecution are not favored in law. *Clark v. Baines*, 150 Wn.2d 905, 911, 84 P.3d 245 (2004). Instead, public

⁷ *See generally Clark v. Baines*, 150 Wn.2d 905, 911, 84 P.3d 245 (2004) ("While actions for malicious prosecution began as a remedy for unjustifiable criminal proceedings, Washington law also recognizes this remedy where a civil suit has been wrongfully initiated.").

policy favors the exposure of crime and reporting to police. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 557, 852 P.2d 295 (1993). Immunity for a communication to the police advances these recognized public policies and is well within the Legislative power to define the boundaries of civil actions.⁸

B. Segaline's § 1983 Claim Against Croft Is Barred By The Statute Of Limitations

1. Any Claim Against Croft Accrued When Croft Acted

The federal standard for accrual of a § 1983 action is when a plaintiff "knows or has reason to know of the injury which is the basis of the action." *Trotter v. Int'l Longshoremen's & Warehousemen's Union*, 704 F.2d 1141, 1143 (9th Cir. 1983); *Cloud v. Summers*, 98 Wn. App. 724, 731, 991 P.2d 1169 (1999). The general three-year limitations period for personal injuries under Washington law applies to § 1983 claims. *Robinson v. City of Seattle*, 119 Wn.2d 34, 85, 830 P.2d 318 (1992).

Segaline claims that Croft unconstitutionally deprived him of his right to remain and do business in a public state office. CP 216-19, 343-41. Under Segaline's own theory, the claim accrued on June 30, 2003, when Segaline was served with the "no trespass" notice and told to leave the premises. CP 469. On that date, Segaline knew, or had reason to

⁸ The public is still protected from false and malicious reports to the police through criminal statutes. RCW 9.62.010 (Malicious Prosecution); RCW 9A.84.040(1) (False Reporting); RCW 9A.76.175 (Making a False or Misleading statement to a public servant).

know of the injury he claims. When Segaline argues that he suffered no damage until his arrest, he ignores the very basis for his § 1983 claim against Croft. Moreover, his argument is contrary to the position he took at the superior court and his deposition testimony. *See* CP 199, ll. 1-19; CP 471 (Segaline Dep. at 76, ll. 17-24). Segaline's claim based on the no trespass notice therefore accrued when Segaline received the notice.

Furthermore, the nature of liability under § 1983 precludes Segaline's argument that his claim against Croft accrued at the arrest on August 22, 2003. To hold a defendant liable under § 1983, the defendant must *personally cause* the deprivation of civil rights. *E.g., Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988). There is no *respondent superior* liability under § 1983. *E.g., Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Croft was not involved in the arrest and did not call the police on August 22. Croft acted on and before June 30, 2003. CP 380.

Segaline also argues that there is a "continuing violation" referring to a doctrine applicable to certain employment claims allowing a plaintiff to recover for earlier acts occurring outside the limitations period. *Antonius v. King Cy.*, 153 Wn.2d 256, 262, 103 P.3d 729 (2004). The doctrine is inapplicable to the claim against Croft. First, Segaline never raised the continuing violation doctrine below and thus this Court need not address it. Second, the record does not show any continuing violation by Croft. His allegedly unconstitutional act was to draft the no trespass notice that

L&I gave to Segaline. Third, Segaline cites no authority applying the continuing violation doctrine to this type of § 1983 claim.

The § 1983 claim Segaline raised against Croft accrued June 30, 2003, more than 3 years before the amended complaint naming Croft. The court of appeals properly affirmed the dismissal of the claim against Croft.

2. There Is No Error In Limiting The Relation Back Of The First Amended Complaint Naming Croft

To avoid the statute of limitations, Segaline argues that his complaint against Croft should relate back to when he sued L&I—August 8, 2005. However, the original Complaint against L&I did not name *any* individual defendant. The original complaint thus failed to state any § 1983 claim. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65-71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) (state agency cannot be named as a defendant and sued under § 1983). Contrary to Segaline's argument, Petition at 24, adding Croft altered the nature of the case. It introduced issues regarding whether Croft's actions violated Segaline's civil rights, whether a civil right is implicated by the no trespass notice, and whether Croft possesses qualified immunity to a § 1983 claim.

A decision to permit relation back of an amended complaint is reviewed for abuse of discretion.⁹ A trial court abuses its discretion when

⁹ *Stansfield v. Douglas County*, 107 Wn. App. 20, 28-29, 26 P.3d 935 (2001), *aff'd*, 146 Wn.2d 116, 43 P.3d 498 (2002); *Herron v. Tribune Pub. Co., Inc.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987). Similarly, “[a] determination of relation back under CR

discretion is exercised on untenable grounds or for untenable reasons. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). The standard for adding a new defendant is stated in *Tellinghuisen v. King Cy. Coun.*, 103 Wn.2d 221, 223, 691 P.2d 575 (1984) (per curiam):

[A]n amendment adding a party will relate back to the date of the original pleading if three conditions are met. First, the added party must have had notice of the original pleading so that he will not be prejudiced by the amendment. CR 15(c)(1). Second, the added party must have had actual or constructive knowledge that, but for a mistake concerning the proper party, the action would have been brought against him. CR 15(c)(2). *Finally, the plaintiff's failure to timely name the correct party cannot have been "due to inexcusable neglect."*

Tellinghuisen, 103 Wn.2d at 223 (emphasis added, citation omitted). If the parties are apparent, or are ascertainable upon reasonable investigation, the failure to name them will be held to be inexcusable. *Haberman v. Pub. Power Supply Sys*, 109 Wn.2d 107, 174, 744 P.2d 1032 (1987), *as amended*, 750 P.2d 254, *appeal dismissed*, 488 U.S. 805 (1988).

In *Stansfield v. Douglas County*, this Court affirmed that adding a new defendant "is not allowed under CR 15(c) 'if the plaintiff's delay is due to inexcusable neglect. . . . *The inexcusable neglect rule must be satisfied in addition to the requirements of the second sentence of CR 15(c).*'" 146 Wn.2d at 122 (emphasis added, citations omitted).

15(c) rests within the discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion." *Foothills Dev. Co. v. Clark County Bd. of County Comm'r*, 46 Wn. App. 369, 374, 730 P.2d 1369 (1986) (footnote omitted).

Washington law and CR 15(c) has always barred adding a new defendant if the failure to name the defendant reflects inexcusable neglect. *Tellinghuisen*, 103 Wn.2d at 223-24.

“[I]nexcusable neglect exists when no reason for the initial failure to name the party appears in the record.” *Stansfield*, 146 Wn.2d at 122 (quoting *S. Hollywood Hills Citizens Ass'n v. King County*, 101 Wn.2d 68, 78, 677 P.2d 114 (1984)). The record showed inexcusable neglect. Since *Will* in 1989, it was clear that a state agency cannot be sued under § 1983. By December 2005, Segaline knew Croft drafted the no trespass notice. Segaline even deposed Croft on June 9, 2006, before the limitations period ran. There is no excuse for failing to add Croft.

Segaline argues that under *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 145 P.3d 1196 (2006), the inexcusable neglect requirement does not apply. His reading of *Gildon* is contrary to *Stansfield* and *Tellinghuisen* and the cases cited therein. *Gildon* merely applies the element, noting that “the inexcusable neglect standard should not be applied to preclude relation back under CR 15(c) where the defendant's actions or misrepresentations mislead the plaintiff as occurred in this case.” *Id.* at 492, n.10 (emphasis added). There is no evidence that L&I or Croft misled Segaline.

V. CONCLUSION

The court of appeals should be affirmed. In the alternative, the Court should remand to allow the court of appeals to consider the other issues raised by L&I, Croft's qualified immunity, and whether Croft's actions violate any constitutional right.

RESPECTFULLY SUBMITTED this 3rd day of June, 2009.

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