

NO. 67450-1-I

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

FRANK LOUIS ZAMFINO,

Appellant/Cross-Respondent

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS, and
KING COUNTY DEPARTMENT OF ADULT AND JUVENILE
DETENTION,

Respondents/Cross-Appellants.

CROSS-APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

I. REPLY ON CROSS-APPEAL1

 A. The Statute of Limitations for False Imprisonment
 Applies to an Allegation That an Inmate’s Sentence was
 Miscalculated1

 B. Appellant Zamfino Did Not Respond to the Issue of
 Proof of Harm by Objective Symptoms to Support a
 Claim for Negligence5

 C. Zamfino Did Not Address the Issue of Nominal Damages
 Not Being Recoverable in a Negligence Case7

 D. The Subjects of Right to Jury Trial and Dismissal of the
 42 U.S.C. § 1983 Claim Are Not Addressed in This
 Reply7

II. CONCLUSION7

TABLE OF AUTHORITIES

Cases

<i>Bellevue School Dist. v. E.S.</i> , 171 Wn.2d 695, 257 P.3d 570 (2011).....	7
<i>Bender v. City of Seattle</i> , 99 Wn.2d 582, 664 P.2d 492 (1983).....	2
<i>Gurno v. Town of LaConner</i> , 65 Wn. App. 218, 828 P.2d 49 (1992).....	6
<i>Housman v. Byrne</i> , 9 Wn.2d 560, 115 P.2d 673 (1941).....	2
<i>Kinegak v. Alaska Dep't of Corrections</i> , 129 P.3d 887 (Alaska 2006)	3, 4
<i>Seely v. Gilbert</i> , 16 Wn.2d 611, 134 P.2d 710 (1943).....	4
<i>Snow-Erlin v. United States</i> , 470 F.3d 804 (9th Cir. 2006), <i>cert denied</i> , 552 U.S. 811 (2007).....	4
<i>Strong v. Terrell</i> , 147 Wn. App. 376, 195 P.3d 977 (2008).....	6
<i>Tufte v. Tacoma</i> , 71 Wn.2d 866, 431 P.2d 183 (1967).....	2

Statutes

42 U.S.C. § 1983.....	7
RCW 4.16.080(2).....	1
RCW 4.16.100(1).....	1

I. REPLY ON CROSS-APPEAL

This brief is a Reply by the State of Washington Department of Corrections (DOC) in support of the three assignments of error in the cross-appeal:

1. The trial court erred in not dismissing the state law claims on the basis of the statute of limitations.
2. The trial court erred in allowing recovery of damages in a negligence case where there was no admissible evidence Zamfino had been harmed presented at the time of summary judgment.
3. The trial court erred in awarding nominal damages for negligence.

Respondent's Brief (Resp't's Br.), at 2-3.

A. **The Statute of Limitations for False Imprisonment Applies to an Allegation That an Inmate's Sentence was Miscalculated**

Appellant Frank Zamfino (Zamfino) addresses the issue of the applicability of the two-year statute of limitations for false imprisonment, RCW 4.16.100(1), in his Reply at pages 3 and 4.

The sole argument presented by Zamfino for why this court should apply the three-year statute of limitations for negligence, RCW 4.16.080(2), to the facts of this case; is that Zamfino alleged "that the state was negligent. . . in computing the length of his sentence and thus would be liable for negligence." Appellant's Reply Brief, at 4. He cites no legal authority for this proposition.

Under Washington precedent, false imprisonment has occurred where the person has been restrained without legal authority. *Bender v. City of Seattle*, 99 Wn.2d 582, 591, 664 P.2d 492 (1983). As to holding an inmate beyond when he should have been held, “If the person arrested is detained or held by the officer for a longer period of time than is required, under the circumstances, without such warrant or authority, he will have a cause of action for false imprisonment. . . .” *Housman v. Byrne*, 9 Wn.2d 560, 561-62, 115 P.2d 673 (1941).

A false imprisonment claim arises from the fact of an incarceration for a longer time than was lawful, even if there was negligence in holding the offender beyond when he should have been held. As an example, where a suspected intoxicated person was continued to be held in custody in jail after the jailers should have known from his diabetic card, the lumps of sugar he carried and calls from his wife, that he was instead having a diabetic reaction, the city was liable for false imprisonment. *Tufte v. Tacoma*, 71 Wn.2d 866, 431 P.2d 183 (1967). Though the arrest and initial confinement were lawful, intentionally continuing to hold the offender once the jailers “should know” that continuing to hold him was “unjustified under the circumstances” is false imprisonment. *Tufte*, 71 Wn.2d at 870. It is not alleged here that DOC did not intend to hold Zamfino in custody, rather the facts alleged are that continuing to hold

him was unjustified under the circumstances where DOC should have known that his sentence had expired.

As pointed out in DOC's Response, the Alaska Supreme Court and the Ninth Circuit Court of Appeals have held that a claim for a negligent miscalculation of a prison sentence resulting in the plaintiff being incarcerated beyond his proper sentence is correctly treated as a claim for false imprisonment, and not as a claim for negligence. Resp't's Br., at 15-18.

Kinegak v. Alaska Dep't of Corrections, 129 P.3d 887, 892-93 (Alaska 2006), ruled that where a plaintiff asserted facts in his complaint that he was unlawfully imprisoned for seven extra days owing to a negligent miscalculation of his sentence, the plaintiff was not allowed to re-characterize his claim as one for negligence in order to avoid Alaska's statutory sovereign immunity defense to false imprisonment. *Kinegak* relied on the original Restatement of Torts in stating that the proper claim is for false imprisonment where "the defendant knew that the victim was imprisoned, without regard to whether the defendant's act was knowing, reckless, or negligent." *Kinegak*, 129 P.3d at 892. *Kinegak* held that "the plaintiff's characterization of his action as one for negligence will not control and that the courts will ignore this label. . ." and that where there "is no wrong claimed in this case that is materially distinct from false

imprisonment,” the plaintiff’s claim is “therefore properly dismissed” on the grounds that Alaska had statutory sovereign immunity for a false imprisonment claim, even though the state would have no immunity for a negligence claim. *Kinegak*, 129 P.3d at 893.

Similarly, in *Snow-Erlin v. United States*, 470 F.3d 804, 808-09 (9th Cir. 2006), *cert denied*, 552 U.S. 811 (2007), the Ninth Circuit Court of Appeals ruled that the allegation that an inmate’s sentence was miscalculated could not be labeled as a claim for negligence, but was instead a claim for false imprisonment, a claim not actionable under the Federal Tort Claims Act. As here, the harm alleged by the plaintiff in *Snow-Erlin* was that he was unjustifiably imprisoned beyond his sentence (311 days); therefore, the gravamen of the plaintiff’s complaint was a claim for false imprisonment, even if it was based on a negligent miscalculation of the prison sentence. *Id.*

Zamfino appears to believe that he has complete discretion in labeling the causes of action he applies to the facts he alleges against DOC. However, case law makes it clear that he cannot avoid a statutory bar to recovery by merely renaming his claim as negligence. *Snow-Erlin, supra; Kinegak, supra; see also Seely v. Gilbert*, 16 Wn.2d 611, 615, 134 P.2d 710 (1943) (cannot re-label assault as conspiracy to avoid statute of

limitations). His claim satisfies the elements of false imprisonment and is, therefore, barred by the statute of limitations for false imprisonment.

B. Appellant Zamfino Did Not Respond to the Issue of Proof of Harm by Objective Symptoms to Support a Claim for Negligence

DOC's second assignment of error was the awarding of damages in a negligence action where there was no proof of harm. Zamfino in his Response did not address the need to establish the element of harm as part of stating a claim for negligence in order to recover any damages. Specifically, he does not address his failure to timely establish objective symptoms to support a claim for negligent infliction of emotional distress. Instead, he states at pages 2 and 3 that he should be entitled to a recovery for loss of income and enjoyment of life, apparently as stand alone causes of action, rather than as elements of damages to be awarded only after the plaintiff has established a proper claim. Regardless, the issue of loss of income was not raised in Zamfino's response to the summary judgment or supported in his untimely declaration. CP at 67-69, 123-25, 136-37. RAP 9.12 (appellate review of summary judgment only includes issues and evidence presented to the trial court).

Mr. Zamfino misses the point. If he wanted to recover for damages of any kind without a showing of physical harm, then he should have brought a timely claim for false imprisonment. Where the initial act

of confinement itself is intentional and lawful, but continuing confinement at some point becomes unlawful, as alleged here, the claim is treated as the intentional tort of false imprisonment. Unlike with a claim for negligent infliction of emotional distress, under a false imprisonment claim damages are allowed even where there is no objective manifestation of harm. *Gurno v. Town of LaConner*, 65 Wn. App. 218, 230, 828 P.2d 49 (1992).

Zamfino chose to assert a claim for negligence rather than bringing a timely claim for false imprisonment. The consequence of that decision was that he needed to prove he was harmed. Specifically, he was required to establish the element of “objective symptomatology” through admissible evidence that his “emotional distress is accompanied by objective symptoms and the emotional distress must be susceptible to medical diagnosis and proved through medical evidence.” *Strong v. Terrell*, 147 Wn. App. 376, 387-88, 195 P.3d 977 (2008).

Thus, even if Zamfino were allowed to characterize his claim against DOC as negligence, his claim fails because he did not provide timely or sufficient admissible evidence establishing that he was harmed; an essential element of any negligence claim.

C. Zamfino Did Not Address the Issue of Nominal Damages Not Being Recoverable in a Negligence Case

Zamfino does not address DOC's third assignment of error, that nominal damages are not recoverable in a negligence case. Therefore, he has conceded that issue. *See Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 711, 257 P.3d 570 (2011).

It was error to award even nominal damages in this case, again, because substantial proven harm is an element of a negligence cause of action, and nominal damages by definition are not supported by substantial proven harm.

D. The Subjects of Right to Jury Trial and Dismissal of the 42 U.S.C. § 1983 Claim Are Not Addressed in This Reply

Zamfino does address the issue of an alleged right to a jury to decide nominal damages at page 1 of his Reply, and addresses the issue of dismissal of the 42 U.S.C. § 1983 action at page 3 of his Reply. These issues are included in Mr. Zamfino's assignments of error and not in the assignments of error by DOC. They are, therefore, not properly addressed in DOC's Reply in support of the cross-appeal. These issues were instead addressed in DOC's Response. Resp't's Br., at 8-9, 23-24.

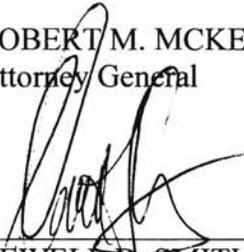
II. CONCLUSION

Mr. Zamfino did not file a claim for false imprisonment within the statute of limitations. This precludes him bringing any late claim for false

imprisonment, even if it is couched in terms of negligence. He is not free to merely re-label his cause of action as negligence to avoid the statute of limitations. Even if he could bring a claim for negligence, he would have needed to establish the element of harm, which in a claim alleging emotional distress must be proved by medically verifiable objective symptoms. It does not appear to be in dispute that it was error to award nominal damages in a negligence action.

RESPECTFULLY SUBMITTED this 26th day of June, 2012.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury in accordance with the laws of the State of Washington that one copy of the Brief of Respondent's Washington State Department of Corrections, was sent via messenger to counsel for Appellant Frank Louis Zamfino at the following address:

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