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A. OVERVIEW OF REPLY BRIEF

This Reply Brief will respond to the issues raised by the Respondent Department of Labor and Industries (L & I) in the order raised for ease of reference. The themes of the reply, however, will be repetitive.

L & I bases its argument upon facts that are disputed in the record, thus defeating its arguments that there is no genuine issue of material fact regarding the summary judgment issues. Further, the majority of references to the record are fallacious, that is, they do not refer to any actual evidence in the record but to summaries found in other, secondary documents, such as the hearsay in a police officer's statement CP 34,35, or quoting the general statement of facts from the prior appeal. The responding brief misstates the facts—i.e., by using non-neutral terms such as “loutish” and “coarse” to describe behavior without reference to the record)—or makes conclusions about disputed facts, or makes assertions that are simply untrue of the evidence in the record. The arguments of L & I therefore have very limited application since the arguments ignore the record in this case.

L & I has chosen to ignore most of the legal authorities cited in Appellant's opening brief, and the brief has not provided the court a commentary upon, nor an analysis of, nor even cited to, many cases and areas of the law that are key to appellant's case and cited in appellant's

brief. In appropriate places, of which there are many, Appellant will point out that authorities cited and rules of law cited are not disputed and are not directly contested by L & I, and that L & I has apparently conceded many important legal issues, including the central issue that Mr. Segaline's rights were violated.

I. L & I ARGUES THAT THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S "CONTINUING VIOLATION" STATUTE OF LIMITATIONS THEORY FOR THE CIVIL RIGHTS CAUSE, BECAUSE THE ACCRUAL DATE OF June 23, 2003 WAS ESTABLISHED IN THE FIRST APPEAL AS THE "LAW OF THE CASE"

A. L & I has failed to address Mr. Segaline's arguments regarding the "law of the case" doctrine.

L & I has cited cases that only generally define the "law of the case" doctrine.

However, L & I did not respond to Mr. Segaline's point that the prior appeals did not rule upon the "continuing violation" statute of limitations theory. If the 3-year statute of limitations and the accrual date was the same issue as analyzing the statute of limitations from a continuing violations theory, then the Supreme Court would have affirmed dismissal of the Civil rights cause of action on that theory also. Instead, the Supreme Court specifically declined to rule upon the issue; it deemed the issue to be a new issue. L & I fails to explain how a refusal to rule can establish a holding that enunciates a principle of law for this case.

L & I has also not cited any case law contrary to that cited in the appellant's brief; holding that a trial court retains authority to rule upon statute of limitations issues until final judgment in an action, and holding that a subsequent appeal present new issues, if identical theories were not decided on a prior appeal. These points are apparently conceded.

B. L & I failed to address appellant's argument that the Appeals court should consider this issue under RAP 2.5 (C)(2).

To prevent the Appeals Court from the undesirable effect of perpetuating erroneous decisions that would work an injustice on parties, RAP 2.5 (c) (2) provides discretion for the court to re-determine issues previously considered on appeal in the same case. *Roberson v. Perez* 156 WN.2d 33 (2005). Although, L & I cited the *Roberson* case in support of its explanation of the "law of the case" doctrine, it neglected to analyze the discussion of RAP 2.5 (c) therein; *Robinson*, specifically ruled that the appellate court should consider an issue if necessary to prevent an opinion that would perpetuate an error. 156 Wn. 2d 42 Per *Robinson*, therefore, there is no "law of the case" prohibition in this case

C. The 42 USC 1983 cause of action is timely per established law.

L & I does not dispute that federal, not State law establishes issues of statutes of limitations for 42 USC 1983 cases.

L & I also does not dispute—and therefore concedes-- that federal law,

cited extensively in the opening brief, regarding 42 USC 1983, holds that If the facts of a case demonstrate that the actions are part of a continuing pattern of deprivation of rights, that culminated with a major act within the statute of limitations, then the 42 USC 1983 case is not time barred.

L & I erroneously claims in its brief that Washington Law limits recognition of the “Continuing violation” theory to medical malpractice and employment discrimination cases. (Respondent’s brief, page 18.) This argument is irrelevant since federal law controls, and it is also an erroneous statement regarding Washington law. The *Callfas v. Dept. of Constr. & Land Use*, 129 Wn. App 579 ,120 P.3d 110 (2005) cited by L & I, was concerned with a land-use statute, and made no holding at all that limits the “continuing violation” theory in general.. The correct legal analysis—receiving no comment from L & I—is that Washington caselaw,cited in the opening brief, consistently and correctly apply federal law and recognize the theory of continuing violations for 42 USC 1983 cases. *Milligan v. Thompson* 90 Wn. App 586, 953 P.2d 112 (1998).

D. L & I argues there is no evidence in the record establishing a continuing course of conduct by Mr. Croft.

L & I relies upon arguing “facts” to defeat the “continuing violation” theory. The facts argued are that Mr. Croft was not present when the police arrested Mr. Segaline, and that he learned of the actual arrest the following day. However, true to its pattern in this appeal, L & I has not

addressed the facts upon which Mr. Segaline relies for the theory, to wit:

Mr. Alan Croft continued to actively pursued the pattern of depriving Mr. Segaline of his access to the L & I permit desk by confirming to Ms. Guthrie on August 21 2003 that the trespass ‘notice’ should be enforced. CP 408; 416. Ms. Guthrie e-mailed to staff that “management” had directed to enforce the “no trespass” notice. After dismissal of the criminal charges, well into October 2003, Mr. Croft branded Mr. Segaline as a law breaker, e-mailing to L & I staff, that Mr. Segaline could enter the premises as long as he did not break “another” law.CP 422.

Opening brief, page 13.

It was not necessary that Mr. Croft personally call the police in August for there to be a continuing violation, but that he set in motion and continued to direct that series of events that deprived Mr. Segaline of his civil rights by telling staff to call the police in August 2003.

II. L & I ARGUES THAT THE TRIAL COURT PROPERLY DISMISSED MR. SEGALINE’S NEGLIGENT SUPERVISION CAUSE.

A. L&I confuses the prior holding of this court that for purposes of Negligent infliction of emotional distress, [NIED] injury was not foreseeable; that holding is irrelevant to other actions sounding in negligence, and must be confined to its facts.

This argument is a plain misstatement of the law for the remaining causes of action. The injury required to be sustained for an NIED case is specifically that objective symptoms of a diagnosis must be caused by the breach of duty; this “objective symptomology” is an additional element not required of other types of negligence cases. (*Opinion, Segaline v.*

Dept. Labor and Industries, prior appeal, at CP 253.) further, the holding in the prior appeal was:

The chance is slight that a person of ordinary sensibilities who had engaged in numerous heated verbal confrontations with L&I staff would develop objective symptoms of emotional distress from being served a no trespass notice and removed from the L & I property. (Footnote omitted) And the chance that any such harm would be grave is even less.

Thus, regardless of L & I's duty to Segaline, we hold that as a matter of law any emotional distress resulting from L & I's conduct to protect its employees was not reasonably foreseeable. Therefore, the trial court did not err when it granted summary judgment to L & I on *this* claim. (emphasis added)

CP at 254-5

. This ruling must be confined to the record before the court in the prior appeal, since the court in that appeal had ruled that the State was immune to being sued for the events occurring after the police were called, under the anti-SLAPP statute RCW 4.24.510. Thus, the court had disregarded facts regarding the arrest and prosecution of Mr. Segaline. (That holding was reversed by the Supreme Court of the State of Washington, (CP 260-284)); Now in this appeal, all of the facts including the arrest, prosecution, dismissal of prosecution, and the further attempts by L & I to find a reason to exclude Mr. Segaline from the department, are part of the factual basis for his remaining claims.

Mr. Segaline's general damages for the negligent supervision of L & I, and violation of his civil rights, and malicious prosecution, include emotional distress, the humiliation of being deprived of his civil rights, being publicly charged with a crime, being deprived of his liberty, and appearing in court. These events constitute sufficient interference with the person to establish damages supporting a claim for malicious prosecution. *Banks v. Nordstrom, Inc.* 57 Wn. App 251, 787 P.2d 953 (1990).

Civil Rights violations in the State of Washington do not require either expert testimony nor proof that the humiliation and emotional distress are foreseeable. *Negron v. Snoqualmie Valley Hosp* 88 Wn. App 579, 936 P.2d 55 (1997). The federal law in the 9th Circuit regarding the requirements for a 42 USC 1983 civil rights case similarly allow the proof of loss of personal reputation, humiliation, and emotional distress damages based upon testimony alone. *Zhang v. American Gem Seafoods, Inc.* 339 F. 3d 1020 (9th Circ. 2003). The *Zhang* court also pointed out, at 1040, that this standard is consistent with U. S. Supreme Court rulings.

Since the Negligence Supervision case is a derivative case that establishes liability for the actions of its employees, the damages standard is the same as for the underlying torts.

B. L & I has not disputed that it has vicarious liability for its employees, and nor has it disputed *Oja & Assoc. v. Park Towers* 89

Wn.2d 72, 569 P.2d 1141, (1977) which holds that an employer can be liable for its employees even if they are personally dismissed from the case based upon statute of limitations. .

If the court accepts the argument in the brief of L & I, that there is no action for Negligent supervision, it still must find that L & I may be vicariously liable to Mr. Segaline based on the actions of Mr. Croft;

Further, under the *Oja* case, even if the statute of limitations for the 1883 case against Mr. Croft has expired, L & I can be liable to Mr. Segaline based upon the underlying facts on a Negligent Supervision theory. L & I concedes this analysis with silence.

C. L & I erroneously analyzes the case law it cites in its brief to conclude that there is no action for negligent supervision of an employee acting within the scope of its duties.

The court must reject the errant reading of the case cited by L & I, , *Niece v. Elmview Group Home* 79 Wn. App 660, 904 P.2d 784 (1995), (purportedly that one must allege an employee acted outside the scope of employment for a negligent supervision case); the case did not hold this. That case reversed and remanded the dismissal of a Negligent Supervision claim because there was a genuine issue of material fact whether or not a Nursing Home properly supervised an employee who committed an intentional tort against a resident. But further, that case cites with approval the general case law that negligent supervision applies to employees within the scope of their duty, the application to acts outside of the employment duties being limited to whether the employer reasonably should have known of that conduct. *Id.* at 667. Here, by admitting that

Mr. Croft acted within his duties, L & I relieved Mr. Segaline of proving that it reasonably should have known of any actions outside his duties..

The court should also reject the argument by L & I that the negligent supervision claim is redundant because L & I has accepted vicarious liability for the acts of its employees. The case of *Gilliam v. DSHS* 89 Wn. App 569, 950 P.2d 20 (1998), cited by L & I, upheld the dismissal of the negligent supervision case in that circumstance, because it was redundant to vicarious liability of the employer. That case however did not hold that negligent supervision is always a redundant claim. Here, it would be error to dismiss Mr. Segaline's alternative theory of negligent supervision, because it is the only negligence theory—and not duplicated--regarding the acts of Mr. Croft, and because, under *Otis*, negligent supervision survives a statute of limitations decision regarding personal liability, i.e., for Mr. Croft and the 1983 claim.

D.L & I claims that there is no evidence of negligence in this matter, but cites irrelevant law and fails to address the points in the opening brief.

L & I has cited to RCW 49.60, the law against discrimination, in its responding brief, claiming that statute creates a countervailing duty to protect L & I employees. It then admits this is an irrelevant argument since there is no allegation that Mr. Segaline was targeting L & I employees because any protected category. This argument also is irrelevant to the question of whether there is evidence of negligence.

L & I did not contest any of the authorities cited in the opening brief that establish the duty of L & I to allow licensees access to, and provide a forum for engaging in his business. It did not deny that it had violated rules and processes established under State licensing laws and RCW Chapter 19.28. Violation of a statute or regulation is evidence of negligence. *Gilliam* at 585.

The opening brief also detailed the Constitutional law establishing a clear duty to Mr. Segaline based upon his Constitutional rights to due process prior to deprivation of property and liberty, and in a speech-neutral way; none of these authorities have been contested, in fact, L & I concedes in its brief that under *Green* Mr. Segaline's rights were violated. L & I also has not denied that it has a duty to shield Mr. Segaline from the tort of its employees if it knew or should have known of its employee's acts. Here, Mr. Croft kept his superiors advised of his acts and of his questions, and that is evidence that L & I knew or should have known that its duties to Mr. Segaline were being breached.

Mr. Croft testified in his deposition, that he asked for supervisory direction whether he could exclude Mr. Segaline from the office:

Q Has an opinion been requested?

A. Yes. Multiple times.

Q. Starting in what year?

A. After – Oh, it’s here. It would have been in 2003.

Q. Do you when in 2003 an opinion was first requested?

A. It would have been shortly after the meeting with Mr. Segaline. . CP 43.

Q. Did you ever receive any direction regarding how to make the decision of when to bar a member of the public fro an office, State office?

A. No. CP 47.

Other than the *Niece* and *Gilliam* cases, which are erroneously argued and do not prove the points as stated by L & I, the many authorities cited in the opening brief have not been contested or distinguished by L & I in its brief.

L & I does not deny that it breached specific duties in the licensing and procedural law, i.e., that it did not provide a notice by certified mail under the licensing statues and an appealable decisional forum; that Mr. Segaline’s license is a property right, or that he has specific rights to process. There is no analysis under legal standards defined in the opeining brief that the acts of L & I provided justifiable and adequate process. Thus, there is a genuine issue of material fact regarding negligence and negligent supervision.

III L & I ARGUES THAT MR. SEGALINE HAS FAILED TO ESTABLISH THE ELEMENTS OF MALICIOUS PROSECUTION.

The parties agree that the only disputed elements of malicious prosecution are probable cause and malice. (Brief of Respondents, at 25).

A. Contrary to L & I’s argument, There is a genuine issue of material fact regarding “Want of probable cause”

1. Criminal case dismissal is prima facie lack of probable cause.

L & I does not dispute that a dismissal or termination of the criminal proceeding establishes a prima facie case of want of probable cause.

Pallett v. Thompkins, 10 Wash. 2d 697, 699-700, 118 P.2d 190 (1941).:

The defendant, can rebut with evidence to show probable cause, in which event the plaintiff must come forward affirmatively with evidence.

Peasley v. Puget Sound Tug & Barge 13 Wn.2d 485, 125 P.2d 681 (1942).

Here, defendant L & I has not provided evidence to show probable cause; it has made the unsupported argument that probable cause existed based upon the “no trespass” notice and based upon his “disruptive behavior and refusal to leave as directed by L & I staff.” (L & I brief, page 25)

2.The “no trespass” notice is not automatic probable cause

L & I has not cited any authorities to contest the careful analysis presented by Mr. Segaline that the existence of the “no trespass” notice does not create probable cause. It ignores, and by omission, must be presumed to have conceded this point.

L & I proceeds with its argument as if the ‘no trespass ‘ notice was a valid court order, yet it ignores the cases cited in the opening brief that directly hold that the character of a “trespass notice” is not the same as a court order..

Here, since Mr. Segaline was arrested pursuant to a “no trespass” notice issued in violation of his rights, that notice serves absolutely no function in evidencing probable cause.

Notably, L & I concedes that, (for purposes of the civil rights claim, which will be addressed later)

Mr. Segaline’s right that was violated was not clearly established until 2010 with *Green*.
Page 34, first sentence, first paragraph, Respondent’s Brief.

State v. Green 157 Wn. App 833 (2010) held that a “no trespass” notice that fails either procedurally or substantively is insufficient to overcome the defense of lawful entry in a criminal trespass proceeding. Having conceded that *Green* is conclusive authority, L & I’s unsubstantiated claim that probable cause was established for Mr. Segaline’s arrest by the illegal “no trespass” notice must be rejected as a matter of law.

3. “Facts” cited by L & I to establish probable cause at the time of arrest are contested, untrue, and insufficient.

L & I relies heavily in its “probable cause” argument upon the declaration of the arresting officers, Daniel Dieringer, CP 34-36. However, while that statement may shield the East Wenatchee Police department from liability for malicious prosecution, it does not shield L & I because it is relying upon the self-serving hearsay assertions of L & I staff, which were malicious and false. Officer Dieringer testified he was “told by L & I

staff” that Mr. Segaline was “harassing them in a threatening manner” CP 34. On August 22, 2003, he was advised “a person was causing a disturbance in the lobby and was refusing to leave.” He “confirmed” that “Segaline was not allowed in the office as he had been engaging in threatening and/or harassment of employees.” CP 36.

Further, the statement by Officer Dieringer confirms that Officer Schultz escorted Mr. Segaline out of the building without incident. CP 35. It verifies that, outside the building, Mr. Segaline asserted (correctly!) to officer Schultz that he had a right to enter the building, and that the existing “no trespass” notice was not a valid exercise of authority to exclude him from this place of business. CP 36. The officer’s impressions of Mr. Segaline were obviously colored by the false and malicious statements of L & I employees. (See CP 36). These hearsay allegations are directly contested by evidence in the record; Mr. Segalini never made any physical threats, never had a weapon, and never came to the L & I office for any purpose but to purchase electrical permits, or to respond to an invitation for a meeting from L & I officials, or to try to contest the unlawful exclusion from the office..

Moreover, the summary claims by L & I that Mr. Segaline was threatening and disruptive are directly contradicted by detailed admissible evidence in the record. This evidence, cited to in the opening brief, has

not received comment by L & I, because L & I cannot explain it away.

To provide some examples: The L & I assertion that Mr. Segaline was argumentative on the day he was arrested is misleading at best, since both Ms. Guthrie and Mr. Croft admitted in deposition that he was not. (see excerpts below). Also, L & I agents have confirmed that Mr. Segaline, who entered the office of L & I on June 30 (when he was given the “notice of trespass”), August 21 (to purchase an electrical permit) and August 22 (when he was arrested) did not engage in any inappropriate behavior. CP 74—6; CP 136,117,118.

According to Mr. Croft, in his deposition:

Q (By Ms. Schiedler-Brown) And based upon the reports that you have received and information from any Labor and Industries Staff, do you know of anything that Mr. Segaline did on June 30, 2003, before being handed the No Trespass Notice that would have not been lawful or in compliance with conditions for remaining on the premises?

(Objection omitted)

A. No.

Q. (By Ms. Schiedler-Brown, Continuing) And on August 22, are you aware of any conduct on the part of Mr. Segaline that would have violated conditions for remaining on the premises of the Department of Labor & Industries prior to the time that the police were called to remove him?

(Objection omitted)

A. And I would say yes, based upon the issuance of the Trespass Notice previously.

Q. (By Ms. Schiedler-Brown, continuing) Given that you would say yes based upon the Trespass Notice, I'm asking for specific conduct of Mr. Segaline on that day. Did he do or say anything on August 22, 2003, that other than being there –

A. M.-hmm.

Q. –that violated the law or that violated a condition for remaining on the premises other than the fact that the no Trespass notice had been issued?

(Objection omitted)

A. No.

. . .

Q. The question is did you hear of any conduct by Mr. Segaline had had occurred on August 21st, 2003, when he came into the department of Labor and Industries and obtained a permit that would have been inappropriate to allow him to stay in that office?

(Objection omitted)

A. Other than, oh, violating the Trespass Order (sic), no.

CP 76—78

Jeanne Guthrie, L & I supervisor, also testified in her deposition

that Mr. Segaline did nothing on August 21 or 22 that was

inappropriate.

Q. Did you remain present the entire time that Mr. Segaline was in the Labor and Industries Office on August 21 after you realized that he was there?

A. Did I remain there?

Q. Did you remain...

A. Yes, I was there.

. . .

Q. Do you remember how long Mr. Segaline stayed in the office?

A. It was a very short time because we did not process the permit then.

Q. By "very short time" how long do you mean?

A. Less than 5 minutes.

Q. Did Mr. Segaline raise his voice that day?

A. I don't recall that he did.

Q. Do you remember anything else that Mr. Segaline said that day, August 21?

A. No.

CP 113.

Ms. Guthrie also testified on personal knowledge regarding August 22 when Mr. Segaline was arrested, according to her deposition:

Q. How long was it from the time that you heard Mr. Hively tell Mr. Segaline that he needed to leave and the police were called until the police actually arrived?

A. They're not very far away, so it was probably three or four minutes.

Q. during that period of time was anybody talking?

A. I don't recall.

. . .

Q. Do you remember if either party was raising their voices that day?

A. No. I don't think so.

Ms. Guthrie's testimony in her deposition, in contrast to the hyperbole of her declaration, (cited by L & I), contradicted the implication that Mr. Segaline had repeatedly been threatening and disruptive. First, she testified about Mr. Segaline's history:

Q. From 1992, after March 1992 until, let's say, February of 2003, did you receive any complaints from any staff members regarding concerns regarding Mr. Segaline's conduct?

A. Not that I recall.

Ms. Guthrie then described the first instance of concerning contact with

Mr. Segaline, a telephone call on June 9, 2003, that was transferred to her from her staff person, Ms. Hawkins. CP 84. Her general description of the conversation was:

A. The first one would probably be 6/9/2003.

Q. Okay. What happened that day?

A. I received a call from Mr. Segaline and he was complaining about his—about a bogus CD account, which was a contractor deposition account—

Q. Yes.

A. —and said he was gonna bring in a tape recorder and start legal proceedings; a lot of people would be behind bars, and he said something to the effect, of I wind up dead, and he just kind of trailed off, so I didn't get down what he said. And he talked about holding people accountable, and it — and he said, if it costs you your job, so be it.

Then it — I thought — I didn't know if he was still on there because I was making notes, and so I asked, you know, I said are you still there, and he didn't answer so I assumed he hung up so I hung up the phone.

CP 84-85

It is also disputed whether there was a contemporaneous claim by any L & I staff that they felt threatened by Mr. Seglaine's actions. Ms. Jeanne Guthrie, L & I supervisor, testified in her deposition regarding the conversation between Ms. Hawkins and Mr. Segaline on June 9, 2003:

Q. As her supervisor, did you find out whether she felt threatened?

A. I believe I did.

Q. What did you find out?

A. I don't know. I'd have to — I guess one way to—if I can find the incident report here.

Q. I understand you could read the incident report, but I guess I 'm asking as you sit here today, do you have a

memory ?

A. Of exactly what happened three years ago, no.

...
Q. Are you able to remember any more than is in your written notes?

A. No, Everything that I think I need to remember is – is written down somewhere in this file.

CP 88-89

There are no documents identified in the file and no notes by Ms. Guthrie that report that Ms. Hawkins felt threatened by her telephone conversation with Mr. Segaline.

Ms. Guthrie then testified in her deposition that she met with Mr. Segaline for about 3 or 4 minutes on June 10, 2003. There was a 2 + foot waist high counter between them. CP 91-92. Mr. Segaline had come to inform Mr. Whittle that he intended to tape record a meeting planned for June 19. Ms. Guthrie felt “uncomfortable” but could not point to any threatening behavior:

Q. My question is, other than knowing that there might be a difference of opinion about whether to record or not record between Mr. Segaline and the other people in your office, was there anything else that was said or done that made you expect there could be a confrontation?

A. No. (CP 96)

...
Q. On June 10, did his face get red?

A. (witness peruses the exhibit) I don't believe so.

Q. On June 10th did he raise his voice?

A. (witness peruses the exhibit) No.

Q. On June the 10th did you argue with him?

A. (witness peruses the exhibit) No.

Q. On June 10th did he leave of his own accord?

A. Yes.

Q. After about five minutes?

A. Probably something like that.

Q. When was the next time that you had contact with Mr. Segaline?

A. I believe it was June 13. (CP 99)

...

Q. What happened then with Mr. Segaline?

A. Well, I tried to explain to him too, and Jackie tried to explain and –what happened that that permit was already paid for, he wanted to get three more permits and so, said fine and –and—but he added on the –the money that was for the permit that had already been paid for out of the –out of the CD account; and he said that we had to take his money, that we couldn't refuse it, and that if I needed to I could get an attorney. (CP 100)

...

Q. How much of the time was he raising his voice during that one half hour?

A. Pretty much the whole time.

Q. How much did he raise his voice?

A. I don't know how to answer that.

Q. Was he screaming in your face?

A. He wasn't screaming. But he was talking very loudly and it was very disruptive and we have other customers in the lobby, trying to wait on them and we have people, our employees, that are on the phone, and it was just very disruptive to the whole office. (CP 101)

...

Q. Did he use any profanity?

A. Not that I recall.

Q. Did he call you any names?

A. No.

...

Q. Now, when you say he was waving his hands, was he waving them across the counter at you?

A.. No, it was like the –we have a clock on the wall and I've got to get to work, I've got men out there and I'm losing business.

CP 104-105.

- Q. Let me clarify; when he was paying for the permits, and that was during the half-hour meeting, for how much of the time was his voice loud, in the loud voice that you were describing?
- A. Well, off and on the whole time because the staff were, you know, trying to process those permits.

CP 107-108

Ms. Guthrie observed when Ms. Hawkins gave him the trespass notice on June 30. CP 106. She described the events that day as lasting 5 minutes, and the conduct of Ms. Hawkins and Mr. Segaline:

- A. She pushed the trespass notice over the counter, and he pushed it away.
- Q. What did Mr. Segaline say to Ms. Hawkins?
- A. That he had a right to be here and – and he could come anytime he wanted to and – and that he could record if he wanted to.
- . . .
- Q. What was Mr. Segaline's tone of voice?
- A. Well, when he was saying that – talking about he could come in anytime he wanted to, it was in his loud voice again, and – similar to the time when he tried to pay for the permits.

CP 107.

- Q. Other than the times we have discussed in this deposition, are there any other times that you had contact with Mr. Segaline where you felt that you had any concerns about those contacts?
- A. No.

These few meetings are the sum total of the “threats and harassment”

claimed by L & I, and it is clear that they consist of one telephone call and

one meeting that Mr. Segaline had regarding the handling of his permit payments, and otherwise, they were incidents precipitated by the department of L & I trying to deliver a “no trespass notice” and refusing to serve Mr. Segaline based upon that notice.

Likewise, Ms. Alice Hawkins testified in her deposition that Mr. Segaline had purchased permits from her since 1991 without incident, until 2003, when there were only 2 incidents of concern. CP 125. Those incidents included a day in June when he was upset and came into the office to tell her that he had a right to come into the office. CP 126. she told him to leave and he did; this contact took about 2 minutes. CP 129.-130. The other incident was June 30, when she gave him the “no trespass” notice. CP 130 *et seq.* Ms. Hawkins has issued several permits to Mr. Segaline without any incident after 2003. CP 141.

In summary, the conclusions by L & I that there were legitimate safety concerns that required the issuance of the trespass notice, and the argument by L & I that the process for issuing the trespass notice was valid, are all disputed, material issues of fact and they are issues of credibility. The testimony by staff is inconsistent and does not prove ultimate facts asserted by L & I. A trial is necessary to resolve these issues. The issue of full and fair disclosure must go to trial.

There was no full and fair disclosure. L & I employees falsely told the officers that Mr. Segaline had been harassing and threatening staff; they falsely said that this behavior occurred on the day of arrest, August 22. There was no disclosure that L & I peacefully sold a permit to Mr. Segaline the day before the arrest, or that Mr. Segaline had never made an actual threat. There was no disclosure that the only contentious issuance of a permit included a dispute about the CD account more than 9 weeks prior to the arrest. Upon learning some of those facts, the prosecutor dismissed the charges. CP 422. There is a genuine issue of fact whether there was a lack of probable cause.

B. There is a genuine issue of material fact as to Malice.

Dismissal of the action and lack of probable cause may create facts adequate to infer malice.. *Peasley v. Puget Sound Tug & Barge Co*, 13 Wn.2d 485 (1942) . It is Evidence of malice if the prosecution is for improper motives, or in reckless disregard of the accused's rights.*Id* at 502

1. L & I had an improper motive and ganed an advantage by excluding an unwanted customer.

L & I “proves” its claim that there is no malice without any citations to the evidentiary record, by asserting without support that there is no evidence of malice and no advantage to be gained by L & I employees by ejecting Mr. Segaline. It has avoided addressing the

evidence of malice cited in the opening brief. There is specific, additional evidence of malice in this record, i.e.:

Mr. Croft's memorandum to staff, dated October 22, 2003:

The attorney prosecuting for the city just called and stated that the city moved to dismiss the case against Mr. Segaline today. Apparently this was based on the defense that he was permitted within the service location for the emergency permit the day before he was arrested and that he thought that he was then allowed to be within the service location as usual.

. . . unless the AG's office has additional input or is willing to pursue a protection order, I do not believe we can keep Mr. Segaline from entering and remaining in the service location unless he violates an additional law. Any suggestions or input would be appreciated.

CP 227.

In a separate e-mail, Mr. Croft reported to staff and his boss:

At this time it appears that Mr. Segaline can come to the service location as long as he is not violating a law. I know this is not the information that you, Lou, or I would want.

CP 226.

That L & I staff did not like Mr. Segaline and had actual malice against him, is evident by these e-mails. Also, L & I clearly felt that it had gained an advantage by having Mr. Segaline taken away—no one had to listen to his libertarian views about his right to be present in the L & I office and his right to sue them if they violate his rights (which they interpret as “threats”). There is a genuine issue of material fact that by the

trespass action, the staff would gain the advantage of excluding a person they did not like, if he was prosecuted for a crime. The responding brief in no way contests or addresses this argument; it is a contested ultimate fact that must be reserved for trial.

2. Malice was evidenced by reckless disregard of plaintiff's rights

L & I also did not contest in its brief either that malice was evidenced by the reckless disregard for Mr. Segaline's rights, or that his rights were disregarded. In fact, L & I concedes that Mr. Segaline's rights were violated, and bases its liability argument on whether or not that right was "clearly established" in 2003. (See respondent's brief, page 34)

The facts of record, show that Mr. Croft knew he was not dangerous, CP 94—97; CP 73—4. and knew the "no trespass" notice was bogus, since he asked for direction from his supervisors on that subject.

In his deposition, furthermore, Mr. Croft admitted that the conduct of Mr. Segaline was not a safety hazard:

Q. (Ms. Schiedler-Brown, continuing) Whether or not someone would take it as intimidation, as a safety officer would the fact that an individual told a state employee they were wasting their time and they should sue them for that and they plan to sue them for that, is that adequate to consider that the person is enough of a threat to remove them from a state office?

(Objection, omitted)

A. Not in that one context, no. CP 63,64

Moreover, L & I has not explained why, if it had no malice against Mr. Segaline, it mischaracterized Mr. Segaline's conduct on the day of his arrest, falsely, as threatening and harassing staff, CP 169-70. Further, there is no explanation why Mr. Croft continued in October, 2003, after the criminal charges had been dismissed in September, to try to find some way to issue another "notice" against Mr. Segaline, CP 419, or why, despite the fact that charges were dismissed, he characterized plaintiff to the staff as if Mr. Segaline had been found guilty (i.e. "as long as he *does not break another law*. . . CP 422)

On September 8, 2003, Mr. Croft received an e-mail from Sergeant Patti Reed, his safety officer stating:

I do not believe that L & I has the legal grounds to permanently bar someone from entering a public facility to conduct business (such as purchasing a permit, etc.)
[describes past experience with obtaining protection orders]

The current situation in Region 5 that Alan is dealing with is quite a bit different. It does not fit either of the criteria that I have described.

CP 417.

The affirmative action of continuing a prosecution is a basis to infer malice. *Peterson v. Littlejohn* 56 Wn. App 1, 781 P.2d 1329 (1989). Croft's conduct shows malice, in that he learned that he had no basis for the prosecution in September but he continued to pursue it. Further, he

did not disclose to the prosecutor the content of Sgt. Reed's e-mail.

IV. L & I CLAIMS THAT A PROCEDURAL DUE PROCESS CLAIM IS NEWLY RAISED BY PLAINTIFF, A CLEARLY ERRONEOUS CLAIM IRRELEVANT TO THIS APPEAL.

It is clear that the facts supporting the violation of civil rights has always been based in a major part upon the denial of due process; this subject was briefed in detail in the first appeal, although it was not reached because of the ruling upon the statute of limitations. L & I has defended this case without objecting to any deficiencies of the complaint to this date, and without claiming it did not understand the allegations. It is difficult to respond further to this point—a point argued without any citation to authorities. L & I brought no cross-appeal in this matter. This argument should be rejected as erroneous and irrelevant to this appeal.

V. L & I DEFENDS THE CIVIL RIGHTS CLAIM ON THE BASIS THAT MR. CROFT HAD QUALIFIED IMMUNITY. IT ADMITS THAT MR. SEGALINE'S RIGHTS WERE VIOLATED, BUT CLAIMS THAT IN 2003 THESE RIGHTS WERE NOT CLEARLY ESTABLISHED.

L & I admits that Mr. Segaline's rights were violated, but avers, "The plaintiff has the burden of demonstrating the existence of a clearly established right based upon pre-existing case law." (respondent's brief, at 33.) L & I has admitted that the case of *State v. Green* 157 Wn.App 833, 239 P.3d 1130 (2010) is a holding evidencing that this right is clearly established, but argues that case is the first articulation when the right has been clearly established. It is necessary to refer to the *Green* case and

other authorities cited by plaintiff to determine whether it is a case of first impression, or a case that is consistent with clearly established rights.

Mr. Segaline's property and due process rights are established by State law, RCW Chapt. 19.28. (licensing laws) and RCW Chapt. 34.05, (Admin. Procedures Act.). All of these provisions existed prior to 2003 and Mr. Croft is charged with administering these laws.

Mr. Segaline has a property and liberty interest if L & I refuses to serve him and specifically if it withholds the right to purchase a permit. *Mission Springs v. City of Spokane* 134 Wn. 2d 947, 954 P.2d 250 (1998). These rights and standards existed prior to 2003.

The elements of due process minimally are notice and an opportunity to be heard in a meaningful time and in a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983 (1972). There is a general liberty interest to be in any public place, per the holding in *Chicago v. Morales*, 527 U.S. 41 (1999). These landmark cases preceded 2003 by many years. The Supreme Court analyzed the Constitutional rights of individuals to enter various forums in *Perry Education Association v. Perry Local Educator's Association*, 460 U.S. 37, 103 S.Ct. 948 (1983). Other U.S. Supreme Court authority supports a general

due process right for citizens to use government offices that are specifically established for their use. In *Goss v. Lopez* 419 U.S. 565 (1975) students were suspended for 10 days without due process. The court declared:

**Having chosen to extend the right to an education to people of appellee's class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred. *Id* at 574—
citations omitted—**

The U.S. Supreme Court's pronouncements establishing the property and due process rights of occupational licensees were determined in the 1950's. In *Schwartz v. Board of Bar Examiners* 353 U.S. 232, 238-39 (1957), the U.S. Supreme Court held:

A State cannot exclude a person from the practice of [any] occupation in a manner or for reasons that contravene the Due Process or Equal Protection clause of the Fourteenth Amendment.

Mr. Segaline attached to his opening brief, the case of *Wayfield v. Town of Tisbury* 925 F. Supp. 880 (D. Mass. 05/21/1996), which applies the prior U.S. Supreme court cases to an almost identical situation regarding a citizen's right to enter a library after being given a 'notice' not to return. L & I has not chosen to cite contrary authority or to contest the validity of any of these authorities. .

The rights upon which the *Green* court commented, therefore, were clearly established by federal and state case law prior to 2003. The *Green* court's reasoning was punctuated with citations to, *inter alia*, *Bang D. Nguyen v. Dept of Health Med. Quality Assurance Comm'n* 144 Wn.2d 516, 29 P.3d 689 (2001), a licensing case articulating clearly established rights that had been pronounced prior to 2003. The *Green* court also stated that it followed an almost indistinguishable 2002 Washington State Supreme court case, *City of Bremerton v. Widell* 146 Wn. 2d 561, 51 P.3d 733 (2002).

The L & I staff, moreover, knew in fact that Mr. Segaline had a right to service from its office. Jeanne Guthrie testified in her deposition:

Q. What I'm asking you is, in your classes that you have received from the Department of Labor and Industries, in the coursework, have you been taught whether or not individuals have a right to be served in a State office?

A. As far as I know, all individuals have a right to be served. CP 86

Finally, Mr. Croft admitted that he knew that the "no trespass" notice was likely violating Mr. Segaline's rights, when he issued it on June 30.

He testified in his deposition:

Q. What are you confused of? I'm not understanding.

A. When to use a Trespass order and what form or if I can or not.

Q. So you're not sure under which circumstances you can issue a No Trespass Notice to this day?

A. Or if we can.

Q. Or if you can at all?

A. Correct.

Q. Because part of your questions were whether or not that would be a possible remedy, given that this is a public office, an office open to the public; is that correct?

A. After becoming aware of the controversy around that, yes.

Q. And you were aware of that controversy on June 19th when you heard officers discussing that issue?

A. Correct. CP 73

L & I has not borne the burden of proving as a matter of law that it has no qualified immunity.

VI. L & I 'S ARGUMENT REGARDING THE NEW AMENDMENTS TO THE anti SLAPP STATUTE ARE NOT RELEVANT AND NOT ACCURATE.

RCW 4.24.525 has been added since the original *Segaline* decision; the new section relates to processes protecting free speech and public petition. The statute interpreted in the prior *Segaline* appeal has not been changed. The claims of L & I are erroneous regarding this statute, irrelevant to this appeal, and irrelevant to this case.

CONCLUSION: All causes of action should be remanded for a full trial.

Respectfully submitted this 13th day of June, 2012.



Jean Schiedler-Brown, WSBA # 7753

For Michael Segalinè, Appellant

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON DEPARTMENT OF
LABOR AND INDUSTRIES,

Respondent,

vs.

MICHAEL SEGLAINE

Appellant.

APPEALS COURT NUMBER
429454-II

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the following documents:
Reply Brief of Appellant; Motion of Appellant for Permission to File Overlength Brief,
Declaration of counsel,
And this certificate of service

To be delivered to the attorney general at his address of record, to wit:
71741 Cleanwater Dr. S.W., Third floor, TORTS
Olympia, WA
By legal messenger, for delivery on June 15 2012.

DATED this 14th day of March, 2012



Jean Schiedler-Brown, WSBA #7753
Attorney for Plaintiff/Appellant