

NO. 42945-4-II

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

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MICHAEL SEGALINE,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF LABOR AND  
INDUSTRIES, AND ALAN CROFT,

Respondents.

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**BRIEF OF RESPONDENTS**

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ROBERT M. MCKENNA  
Attorney General

PATRICIA D. TODD  
WSBA No. 38074  
Assistant Attorney General  
Office of the Attorney General  
7141 Cleanwater Dr SW  
PO Box 40126  
Olympia, WA 98504  
Telephone (360) 586-6300  
Fax (360) 586-6655

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**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. RESTATEMENT OF THE ISSUES.....2

III. RESTATEMENT OF THE CASE.....4

A. Procedural History .....4

B. Restatement Of The Facts.....7

IV. STANDARD OF REVIEW.....11

V. ARGUMENT .....14

A. The Trial Court Properly Dismissed Mr. Segaline’s Civil Rights Claim Against Alan Croft As Untimely Because The Statute Of Limitations Expired.....14

1. The Trial Court Properly Denied The “Continuing Violation” Claim Based On The Law Of The Case Doctrine Establishing June 30, 2003, As The Accrual Date For The Statute Of Limitations .....15

2. There Is No Legal Or Factual Basis To Support A “Continuing Violation” Tolling of the Statute of Limitations.....18

B. The Trial Court Properly Dismissed Mr. Segaline’s Negligent Supervision Claim For Failure To Establish The Essential Elements Of The Claim.....20

1. No Breach Occurred Based Upon The Lack Of Foreseeability Of Injury .....20

2. No Cause Of Action Can Be Maintained For Negligent Supervision Because The Employees Acted Within The Scope Of Employment; Likewise, No Cause Of Action Can Be Maintained Under Respondeat Superior Because There Is No Evidence Of Negligence.....21

C.	The Trial Court Properly Dismissed Mr. Segaline’s Malicious Prosecution Claim Because He Failed To Establish The Essential Elements Of The Claim .....	24
1.	The Malicious Prosecution Claim Fails Based Upon The Presence Of Probable Cause .....	25
2.	The Malicious Prosecution Claim Fails Based Upon The Lack Of Malice.....	28
D.	The Claim Of A Procedural Due Process Violation Is Not Properly Raised For The First Time On Appeal.....	31
1.	Qualified Immunity Applies When Government Officials Are Performing Discretionary Functions And Their Conduct Does Not Violate Clearly Established Constitutional Rights.....	32
2.	Mr. Segaline Failed His Burden To Establish A Clearly Established Right Therefore No Liability Accrues.....	33
E.	The Newly Amended Anti-SLAPP Statute Expanded The Law To Protect Any “Action Involving Public Participation And Petition” .....	34
VI.	ATTORNEYS FEES AND EXPENSES .....	35
VII.	CONCLUSION .....	36

## TABLE OF AUTHORITIES

### Cases

<i>Al Shielee v. Hill</i> , 47 Wn.2d 362, 287 P.2d 479 (1955).....	22, 23
<i>Allen v. State</i> , 118 Wn.2d 753, 826 P.2d 200 (1992).....	11
<i>Altshuler v. City of Seattle, Mun. Corp.</i> , 63 Wn. App. 389, 819 P.2d 393 (1991).....	33
<i>Anderson v. Creighton</i> , 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).....	34
<i>Atherton Condo. Ass'n v. Blume Dev. Co.</i> , 115 Wn.2d 506, 799 P.2d 250 (1990).....	11
<i>Beck v. Ohio</i> , 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964).....	27
<i>Benjamin v. Wash. State Bar Ass'n</i> , 138 Wn.2d 506, 980 P.2d 742 (1999).....	33
<i>Bosteder v. City of Renton</i> , 155 Wn. 2d 18, 117 P.3d 316 (2005).....	32
<i>Callfas v. Dep't of Constr. &amp; Land Use</i> , 129 Wn. App. 579, 120 P.3d 110 (2005).....	18
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).....	12, 13
<i>Citoli v. City of Seattle</i> , 115 Wn. App. 459, 61 P.3d 1165 (2002).....	33
<i>Foothills Dev. Co. v. Clark County Bd. Of County Comm'rs</i> , 46 Wn. App. 369, 730 P.2d 1369 (1986).....	13
<i>Gilliam v. Dep't of Soc. &amp; Health Servs.</i> , 89 Wn. App. 569, 950 P.2d 20 (1988).....	22

<i>Kommavongsa v. Haskell</i> , 149 Wn.2d 288, 67 P.3d 1068 (2003).....	13
<i>LaPlante v. State</i> , 85 Wn.2d 154, 531 P.2d 299 (1975).....	12
<i>Milligan v. Thompson</i> , 90 Wn. App. 586, 953 P.2d 112 (1998).....	18
<i>Niece v. Elmview Group Home</i> , 131 Wn.2d 39, 929 P.2d 420 (1997).....	22
<i>Orin v. Barclay</i> , 272 F.3d 1207 (9th Cir. 2001), <i>cert. denied</i> , 536 U.S. 958, 122 S. Ct. 2661, 153 L. Ed. 2d 836 (2002).....	27
<i>Peasely v. Puget Sound Tug &amp; Barge Co.</i> , 13 Wn.2d 485, 125 P.2d 681 (1942).....	24, 25, 28, 29
<i>Peters v. Union Gapp Irr. Dist.</i> , 98 Wn. 412, 167 P. 1085 (1917).....	15
<i>RK Ventures, Inc. v. City of Seattle</i> , 307 F.3d 1045 (9th Cir. 2002) .....	14
<i>Robel v. Roundup Corp.</i> , 148 Wn.2d 35, 59 P.3d 611 (2002).....	21
<i>Roberson v. Perez</i> , 156 Wn.2d 33, 123 P.3d 844 (2005).....	15, 16
<i>Robinson v. City of Seattle</i> , 119 Wn.2d 34, 830 P.2d 318 (1992), <i>cert. denied</i> , 506 U.S. 1028, 113 S. Ct. 676, 121 L. Ed. 2d 598 (1992).....	14, 32, 33
<i>Schooley v. Pinch's Deli Market, Inc.</i> , 134 Wn.2d 468, 951 P.2d 749 (1998).....	21
<i>Segaline v. Dep't of Labor &amp; Indust.</i> , 144 Wn. App. 312, 182 P.3d 408 (2008).....	passim

<i>Segaline v. Dep't of Labor &amp; Indust.</i> , 169 Wn.2d 467, 479, 238 P.3d 1107 (2010).....	passim
<i>Sintra, Inc. v. City of Seattle</i> , 119 Wn.2d 1, 829 P.2d 765 (1992).....	34
<i>Southwick v. Seattle Police Officer John Doe Nos. 1-5</i> , 145 Wn. App. 292, 186 P.3d 1089 (2008).....	14
<i>State v Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	15
<i>State v. Bellows</i> , 72 Wn.2d 264, 432 P.2d 654 (1967).....	25
<i>State v. Green</i> , 157 Wn. App. 833, 239 P.3d 1130 (2010).....	32
<i>T. W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n</i> , 809 F.2d 626 (9th Cir. 1987) .....	12
<i>Unisys Corp. v. Senn</i> , 99 Wn. App. 391, 994 P.2d 244 (2000).....	14
<i>Washington v. Boeing Co.</i> , 105 Wn. App. 1, 19 P.3d 1041 (2000).....	20
<i>Watson v. Emard</i> , 165 Wn. App. 691, 267 P.3d 1048 (2011).....	14
<i>Weyerhaeuser Co. v. Aetna Cas. &amp; Sur. Co.</i> , 123 Wn.2d 891, 874 P.2d 142 (1994).....	11
<i>White v. State</i> , 131 Wn.2d 1, 929 P.2d 396 (1997).....	11
<i>Young v. Key Pharm., Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989), <i>review denied</i> , 118 Wn.2d 1023 (1992):.....	12, 13

**Statutes**

42 U.S.C. § 1983.....	passim
RCW 4.16.005 .....	14
RCW 4.16.080(2).....	14
RCW 4.24.510 .....	5
RCW 4.24.525 .....	passim
RCW 49.60 .....	24
RCW 49.60.010 .....	24
RCW 9A.52.070.....	26
RCW 9A.52.080.....	26

**Rules**

CR 56(e).....	13
RAP 18.1.....	35

## I. INTRODUCTION

The case has previously been reviewed by this Court and the Washington State Supreme Court. The original trial court granted summary judgment to Defendants on Mr. Segaline's claims for a 42 U.S.C. § 1983 violation, intentional infliction of emotional distress, negligent supervision, and malicious prosecution based on the statute of limitations and anti-SLAPP (strategic lawsuit against public participation) immunity (RCW 4.24.525). This Court affirmed the trial court's ruling on both grounds as well as lack of foreseeability of injury. The State Supreme Court affirmed part of this Court's ruling regarding the untimeliness of the § 1983 claim but reversed on the claims that had been dismissed based on anti-SLAPP immunity, holding that a government agency is not a "person" under the immunity provisions of the anti-SLAPP statute.

On remand, Plaintiff abandoned the intentional infliction of emotional distress claim and attempted to proceed to reassert his time barred § 1983 civil rights claim by arguing a continuing violation theory. The trial court again dismissed his § 1983 claim based on the statute of limitations. The state was granted summary judgment on claims of negligent supervision and malicious prosecution on the merits, because Mr. Segaline failed to offer sufficient evidence to establish those claims.

This Court should affirm the decision below because, (1) Mr. Segaline's civil rights claims are time barred under the law of the case doctrine pursuant to the State Supreme Court's ruling, (2) Mr. Segaline failed to establish the elements of the claim for negligent supervision, and (3) Mr. Segaline failed to establish the elements of malicious prosecution.

## **II. RESTATEMENT OF THE ISSUES**

A. Whether the trial court properly dismissed Mr. Segaline's civil rights claim against Alan Croft as untimely because the statute of limitations expired.

1. Whether the trial court properly rejected the "continuing violation" argument as barred by the law of the case doctrine due to the State Supreme Court's decision which established June 30, 2003, as the accrual date for the statute of limitations.

2. Whether there is a legal or factual basis to support a "continuing violation" doctrine to Mr. Segaline's § 1983 claim.

3. Whether defendant Alan Croft is entitled to qualified immunity on Mr. Segaline's § 1983 civil rights claim.

B. Whether the trial court properly dismissed his negligent supervision claim based on this Court's prior determination that the injury of emotional distress Mr. Segaline complained of was not foreseeable.

1. Whether the trial court appropriately determined lack of a breach based upon the lack of foreseeability of injury.

2. Whether a cause of action for negligent supervision is unavailable when the employees acted within the scope of their employment, and employer liability already exists under respondeat superior.

C. Whether the trial court properly dismissed Mr. Segaline's malicious prosecution claim because he failed to establish the essential elements of the claim:

1. The absence of probable cause existed for the arrest and;

2. Evidence of malice on the part of Labor & Industries (L&I)

and its employees.

D. Whether Mr. Segaline can raise a procedural due process violation in connection with the no trespass notice, when it was not raised below.

1. Whether qualified immunity applies when government officials are performing discretionary functions and their conduct does not violate clearly established rights.

2. Whether Mr. Segaline failed his burden to establish a clearly established right.

E. Whether Mr. Segaline's claim could theoretically survive under the amended anti-SLAPP statute's expanded definition to protect any "action involving public participation and petition."

### III. RESTATEMENT OF THE CASE

#### A. Procedural History

Plaintiff/Appellant, Mr. Segaline, an electrical contractor, alleged the following claims against L&I at the trial court level: § 1983 civil rights, intentional infliction of emotional distress, malicious prosecution, and negligent supervision. Mr. Segaline alleges the basis for his § 1983 claim is L&I issuing a no trespass notice to him prohibiting his presence at the L&I building. CP at 5.

Mr. Segaline filed his original complaint naming L&I as sole defendant on August 8, 2005. CP at 3-7. In December 2005, Mr. Segaline received interrogatory answers from L&I stating that L&I employee, Alan Croft, had drafted the no trespass notice. *Segaline v. Dep't of Labor & Indust.*, 144 Wn. App. 312, 331, 182 P.3d 408 (2008). On June 9, 2006, Mr. Segaline deposed Mr. Croft who confirmed he created the no trespass notice. *Segaline*, 144 Wn. App. at 312. On August 3, 2006, Mr. Segaline filed an amended complaint to add L&I employee Mr. Croft as a defendant under 42 U.S.C. § 1983. CP at 166-68.

The Thurston County Superior Court dismissed all claims finding the § 1983 claim untimely against Mr. Croft and granting anti-SLAPP immunity for the remainder of the claims. *Segaline*, 144 Wn. App. at 312.

This Court affirmed the trial court. *Segaline*, 144 Wn. App. at 312. This Court held that state agencies are “persons” under the civil immunity statute RCW 4.24.510. *Segaline*, 144 Wn. App. at 323. Therefore, L&I was immune from the state law claims based on anti-SLAPP immunity. *Id.*, 144 Wn. App. at 323. Further, this Court concluded that the § 1983 claim against the L&I employee accrued at the very latest when police served the “no trespass notice.” *Id.* at 331. This Court also found that the immunity statute merited the dismissal of the negligent supervision and malicious prosecution claims. *Id.* at 326-27.

The State Supreme Court affirmed the untimeliness of the § 1983 claim against Mr. Croft finding no relation back to the filing of the original complaint. *Segaline v. Dep’t of Labor & Indust.*, 169 Wn.2d 467, 479, 238 P.3d 1107 (2010). This ruling was the law of the case when Mr. Segaline tried to reassert his § 1983 claims on remand.

The State Supreme Court reversed this Court’s decision upholding the application of anti-SLAPP immunity for L&I, holding that L&I is not a “person” under RCW 4.24.510 and that state agencies are not “persons” under the civil immunity statute RCW 4.24.510. Accordingly, the

remaining claims that had been dismissed based on anti-SLAPP immunity were reversed and remanded.<sup>1</sup> *Segaline*, 169 Wn.2d at 474-75.

On remand, the trial court again dismissed the § 1983 claim based upon the State Supreme Court's ruling of untimeliness as "the law of this case and the final word on the issue of timeliness." CP at 426, 429. The trial court reasoned that it was "too late for [Mr. Segaline] to raise the continuing violation theory." CP at 426, 429. Mr. Segaline conceded insufficient facts existed to support a claim of intentional infliction of emotional distress and abandoned that claim. CP at 345. The trial court again dismissed the remaining three claims: (1) § 1983 civil rights claim, (2) negligent supervision, and (3) malicious prosecution. The trial court found that the law of the case doctrine precluded Mr. Segaline from resurrecting his civil rights claims. The trial court then found that Mr. Segaline failed to meet the essential elements of the negligent supervision and malicious prosecution claims. CP at 423-24. These are the three issues now before this Court.

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<sup>1</sup> Mr. Segaline did not seek review of his negligent infliction of emotional distress claim in his motion for discretionary review to the State Supreme Court, so that claim is now abandoned.

**B. Restatement Of The Facts**

Mr. Segaline,<sup>2</sup> is a contractor who, in association with his company, Horizon Electric, Inc., routinely seeks electrical permits from L&I. CP at 16.

In the summer of 2003, a dispute arose at the East Wenatchee L&I building between five L&I employees and Mr. Segaline, whose behavior toward the employees and two law enforcement officers devolved from civil to loutish.

Unfortunately, Mr. Segaline directed this offensive behavior toward the five L&I employees, including yelling, shouting, threats of firing, and threats of litigation. *Segaline*, 144 Wn. App. at 318-19.

Ms. Alice Hawkins, L&I customer specialist, became afraid Mr. Segaline would physically harm her in fall 2002. CP at 16-17.

Ms. Jeanne Guthrie, L&I field service coordinator and supervisor, was subjected to Mr. Segaline's coarse behavior in 2003 on June 9, 10, 13, and August 21; plus, she fielded safety concerns from her staff regarding Mr. Segaline. CP at 24-25.

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<sup>2</sup> In July 2006, Mr. Segaline's psychologist described Mr. Segaline as displaying "rigidity of his personality" and having a "somewhat righteous approach to life" where he "places an emphasis on everything being 'right or wrong.'" In September 2004, Mr. Segaline was also admitted to Eastern State Hospital after a suicide attempt with a shotgun. CP at 159, 161, 360, 362.

Ms. Jaqueline Sanchez, L&I employee, encountered Mr. Segaline's yelling and argumentative behavior and sought her supervisor, Ms. Guthrie's, intervention on June 13, 2003. CP at 25.

Mr. David Whittle, the L&I supervisor for the electrical program in Wenatchee, and Mr. Alan Croft, the Regional Safety and Health Coordinator for Region 5,<sup>3</sup> scheduled a meeting with Mr. Segaline. Mr. Whittle and Mr. Croft attempted to resolve the L&I employees health and safety concerns with Mr. Segaline on June 19, 2003; yet, Mr. Segaline refused to cooperate, demanded to speak with Ms. Guthrie, refused to leave, and only left as the police arrived. CP at 31-32.

On June 19, 2003, Mr. Croft became concerned that Mr. Segaline "was getting out of control" and he called 911. CP at 216-17.

Mr. Segaline disputes these interpretations of his behavior. Mr. Segaline goes as far as to admit he "raised" and "elevated his voice" on occasion, but denies any yelling. Appellant's Brief (Appellant's Br.) at 5. Mr. Segaline characterizes his interactions with L&I employees as "very civil." CP at 454. Despite Mr. Segaline's contentions, this dispute culminated in the employees fearing for their safety and their co-workers' safety.

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<sup>3</sup> Region 5 includes L&I offices in East Wenatchee, Kennewick, Moses Lake, Okanogan, Walla Walla, and Yakima.

The L&I employees' concerns rose to the level where they sought protection from Mr. Segaline and issued him a no trespass notice on June 30, 2003. CP at 17. Mr. Croft then contacted the Washington State Patrol (WSP) Trooper assigned to assist L&I with workplace violence issues. CP at 218. The Trooper explained, "that L&I can serve a no trespass notice on people prohibiting them from entering public buildings and that he, himself had enforced such notices." CP at 218.

Mr. Croft then drafted the no trespass notice. CP at 218. The trespass notice required written approval of Mr. Whittle to allow Mr. Segaline to return. CP at 218. Mr. Croft did not serve the no trespass notice upon Mr. Segaline. CP at 218. Ms. Hawkins served the no trespass notice on Mr. Segaline on June 30, 2003. CP at 17. Also on June 30, 2003, East Wenatchee Police Officer Virnig served the no trespass notice written by Mr. Croft on Mr. Segaline. CP at 34.

On August 21, 2003, Mr. Segaline returned to the L&I building under the auspices of having oral permission from Mr. Dixon, an L&I electrical inspector. CP at 26. Mr. Segaline again yelled and threatened L&I employees as he attempted to purchase a permit. CP at 27. Mr. Dixon denied providing Mr. Segaline permission to be in the L&I building and simultaneously conducted a cursory permit transaction. CP at 27.

On August 22, 2003, undeterred by the no trespass notice, Mr. Segaline again returned to the L&I building, began causing a disturbance in the lobby and refused to leave. CP at 35. Ms. Guthrie then called 911. CP at 27. East Wenatchee Police Officers Dieringer and Schulz responded to the 911 call that Mr. Segaline was causing a disturbance in the lobby and refused to leave. CP at 34-35. Officer Dieringer observed L&I employees looked fearful of Mr. Segaline. CP at 35. Mr. Segaline argued with officers, refused to leave, and professed he “could enter the building any time he wanted to.” CP at 35. The L&I employees positioned themselves behind doors and walls to get as far away from Mr. Segaline as they could while still remaining at work. CP at 35.

Officer Shulz afforded Mr. Segaline the opportunity to leave. CP at 35. Officer Dieringer even spoke with Mr. Segaline’s attorney on the phone to see if his attorney could facilitate a solution that did not result in Mr. Segaline being arrested. CP at 35. However, despite all common sense, Mr. Segaline chose not to leave the L&I building, admitted he would return to the L&I building, and chose to argue with the responding police officers. CP at 35-36. Officer Dieringer became “very concerned about [Mr.] Segaline returning to the L&I office with a weapon and

harming people as he did not appear to be fully rational.” CP at 36.  
The officers arrested Mr. Segaline for trespassing. CP at 36.

Mr. Croft was not present on August 22, 2003, when Mr. Segaline was arrested, and Mr. Croft did not ask for Mr. Segaline to be arrested. CP at 219.

#### IV. STANDARD OF REVIEW

It is an axiom that summary judgment is appropriate where the evidence, viewed in the light most favorable to the nonmoving party, demonstrates there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR at 56; *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). An issue of material fact is one upon which the outcome of the litigation depends. *Atherton Condo. Ass’n v. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990).

The standard for appellate review of the granting of a summary judgment is de novo. *Allen v. State*, 118 Wn.2d 753, 757, 826 P.2d 200 (1992).

To defeat summary judgment, a nonmoving plaintiff must come forward with specific, admissible evidence to sufficiently rebut the moving party’s contentions and support all necessary elements of the asserted claims. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

In this case, L&I directly challenged Mr. Segaline's ability to come forward with any material evidence in support of his claims.

The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), *review denied*, 118 Wn.2d 1023 (1992) (citing *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975)). A moving defendant may meet this initial burden by pointing out to the court that there is an absence of evidence to support the plaintiff's case. *Young*, 112 Wn.2d at 225. This may be done with or without supporting declarations.

If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," then the trial court should grant the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *see also T. W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-32 (9th Cir. 1987). In *Celotex*, the United States Supreme Court explained this result:

In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning

an initial element of the non-moving party's case necessarily renders all other facts immaterial.

*Cleotex*, 477 U.S. at 322-23.

*Young* expressly adopted the *Celotex* reasoning and procedure. *Young*, 112 Wn.2d at 225-26. CR 56(e) states that the response, “by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” *Id.*, 112 Wn.2d at 225-26

Therefore, as it pertains to this case, the State Supreme Court in *Young* requires that, whether or not any particular issue is “backed” by declaration submitted by the moving party, the plaintiff had the burden of affirmatively establishing in response to the motion that there is an issue of material fact as to each element of each cause of action asserted in the Amended Complaint. Mr. Segaline could not meet this burden and the motion was properly granted by the trial court.

Further, the standard of review under a decision made pursuant to CR 15(c) in determining whether the amended complaint relates back to the amended complaint is abuse of discretion. *Kommavongsa v. Haskell*, 149 Wn.2d 288, 295, 67 P.3d 1068 (2003); *Foothills Dev. Co. v. Clark County Bd. Of County Comm’rs*, 46 Wn. App. 369, 375, 730 P.2d 1369 (1986). Here again, based on the abuse of discretion

standard, Mr. Segaline has not met his burden that the motion was improperly denied by the trial court.

## V. ARGUMENT

### A. The Trial Court Properly Dismissed Mr. Segaline's Civil Rights Claim Against Alan Croft As Untimely Because The Statute Of Limitations Expired

The State Supreme Court held that the trial court and this Court properly applied the statute of limitations in dismissing the claim against Mr. Croft. *Segaline*, 169 Wn.2d at 479. The statute of limitations bars claims that are not brought within the applicable time period. RCW 4.16.005; *see, e.g., Watson v. Emard*, 165 Wn. App. 691, 701, 267 P.3d 1048 (2011) (citing *Segaline*, 169 Wn.2d at 467); *Unisys Corp. v. Senn*, 99 Wn. App. 391, 397-98, 994 P.2d 244 (2000). The general statute of limitations for tort actions is three years. RCW 4.16.080(2). The appropriate limitation period for a 42 U.S.C. § 1983 action is the state's statute of limitations for personal injury cases. The statute of limitations for § 1983 actions in Washington is thus three years. *Robinson v. City of Seattle*, 119 Wn.2d 34, 86, 830 P.2d 318 (1992), *cert. denied*, 506 U.S. 1028, 113 S. Ct. 676, 121 L. Ed. 2d 598 (1992); *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1058 (9th Cir. 2002); *Southwick v. Seattle Police Officer John Doe Nos. 1-5*, 145 Wn. App. 292, 297, 186 P.3d 1089 (2008).

Here, the trial court previously dismissed Mr. Segaline's § 1983 claim as being time barred as a matter of law. This Court affirmed the dismissal of the § 1983 claim pursuant to the statute of limitations in *Segaline*, 144 Wn. App. at 312. In *Segaline*, 169 Wn.2d at 479, the State Supreme Court affirmed dismissal of the § 1983 claim pursuant to the statute of limitations as a matter of law.

**1. The Trial Court Properly Denied The “Continuing Violation” Claim Based On The Law Of The Case Doctrine Establishing June 30, 2003, As The Accrual Date For The Statute Of Limitations**

Notwithstanding the rulings of this Court and the State Supreme Court, Mr. Segaline asserted on remand his civil rights claims were not barred by the statute of limitations. This is a straightforward application of the law of the case doctrine. “In 1917, this Court declared the law of the case doctrine to be ‘so well established that the assembling of the cases is unnecessary.’ ” *State v Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998) (quoting in n.2, *Peters v. Union Gapp Irr. Dist.*, 98 Wn. 412, 413, 167 P. 1085 (1917)). The law of the case doctrine “stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.” *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005) (internal citations omitted). The purpose of the doctrine is “to promote

finality and efficiency in the judicial process.” *Roberson*, 156 Wn.2d at 41.

In this case, the trial court properly applied the law of the case doctrine. The State Supreme Court established the law of the case when it affirmed this Court’s holding that the statute of limitations barred Mr. Segaline’s 42 U.S.C. § 1983 claim against Mr. Croft based on an accrual date of June 30, 2003. *Segaline*, 169 Wn.2d at 467. The State Supreme Court reasoned that “[t]he trial court did not abuse its discretion when it found the delay unexcusable.” *Id.* at 479. The court explained that Mr. Segaline “fails to explain why, after Croft verbally confirmed that he designed and drafted the notice, [Mr.] Segaline did not seek then to amend the complaint.” *Id.* at 478.

Here, the law of the case doctrine established the accrual date for the § 1983 claim. The statute of limitations accrual date began when Mr. Segaline knew, or had reason to know, that his alleged interests and rights were infringed, which was on June 30, 2003, the date he received the no trespass notice. *Id.* at 478. The State Supreme Court found “[t]he Court of Appeals used the correct accrual date for [Mr.] Segaline’s 42 U.S.C. § 1983 claim.” *Id.* at 476 (internal citations omitted).

The facts are well established. The accrual date is June 30, 2003. *Id.* at 475. Mr. Segaline filed his original complaint on August 8, 2005.

CP at 3-7. On December 5, 2005, he received interrogatories from L&I stating that L&I employee, Alan Croft, had drafted the no trespass notice. *Segaline*, 169 Wn.2d at 478. On June 9, 2006, Mr. Segaline deposed Mr. Croft who confirmed he created the no trespass notice. *Id.* On August 3, 2006, Mr. Segaline filed an amended complaint to add L&I employee Mr. Croft because he drafted the no trespass notice. *Id.* at 477; CP at 166-68. Mr. Segaline had until June 30, 2006, to timely amend his complaint. He failed to do so; instead, he waited until August 3, 2006, to amend it.

The appellate decisions properly determined the accrual date as the date Mr. Segaline knew, or should have known, his rights were infringed upon and not upon his subsequent arrest date. Based on the accrual date, Mr. Segaline's § 1983 claim is barred by the statute of limitations. *Segaline*, 169 Wn.2d at 477.

Under the law of the case doctrine, the trial court was required to apply the prior appellate holdings. Therefore, the trial court properly dismissed the claim as untimely despite Mr. Segaline's "continuing violation" claim. The trial court also ruled commensurate with the law of the case doctrine's purpose of promoting efficiency and finality.

Nonetheless, Mr. Segaline asks this Court to disregard and change the law of the case by considering a "continuing violation" theory based on the same set of facts. This Court and the State Supreme Court

previously and properly held that Mr. Segaline's § 1983 claim against Mr. Croft was barred by the statute of limitations as a matter of law. These rulings are controlling. Mr. Segaline's claim was and remains barred by the statute of limitations. The trial court thus properly declined Mr. Segaline's invitation to resurrect his § 1983 claim on remand.

**2. There Is No Legal Or Factual Basis To Support A “Continuing Violation” Tolling of the Statute of Limitations**

Washington law recognizes a “continuing violation” doctrine in two limited contexts, medical malpractice and employment discrimination. *Callfas v. Dep't of Constr. & Land Use*, 129 Wn. App. 579, 596, 120 P.3d 110 (2005). Further, the “continuing violation” doctrine requires an ongoing practice. *Milligan v. Thompson*, 90 Wn. App. 586, 953 P.2d 112 (1998). It generally requires each act constituting an actionable wrong. *Milligan*, 90 Wn. App. at 586.

Even if the law of the case doctrine allowed Mr. Segaline to breathe life back into his claim based on a “continuing violation” doctrine, there is no evidentiary support. First, this dispute is neither a medical malpractice claim nor an employment discrimination claim. It is a civil rights claim, under 42 U.S.C. § 1983, that is based on the issuance of a no trespass notice. Secondly, there is no evidence in the record constituting a continuing course of conduct by Mr. Croft. The event that

triggered Mr. Segaline's alleged violation of his civil rights by Mr. Croft occurred on a single date, June 30, 2003, also the accrual date. Lastly, the record indicates that Mr. Croft had no contact with Mr. Segaline after June 19, 2003. Mr. Croft did not serve the no trespass notice, nor was he present when Mr. Segaline's own decisions led to his arrest. There is no continuing course of conduct by Mr. Croft to establish a continuing violation.

Among the numerous liberties Mr. Segaline has taken with the record, the most egregious relates to his argument that Mr. Croft was part of a "continuing violation" when Mr. Segaline repeatedly misstates that "Mr. Croft directed staff to have [him] arrested for applying for a permit to which he was entitled, at the L&I office." Appellant's Br. at 31, 49. The record is clearly contrary to these assertions.

This Court has already noted: "[a]lthough [Mr.] Croft 'drafted and designed' the 'no trespass' notice, **he was not present when the police arrested Segaline.**" *Segaline*, 144 Wn. App. at 332 (emphasis added).

Further, “Croft did not learn of [Mr.] Segaline’s arrest until after it had occurred.” *Segaline*, 144 Wn. App. at 332.<sup>4</sup> There is no factual or legal basis for this Court to consider a “continuing violation” based on the lack of conduct by Mr. Croft.

**B. The Trial Court Properly Dismissed Mr. Segaline’s Negligent Supervision Claim For Failure To Establish The Essential Elements Of The Claim**

**1. No Breach Occurred Based Upon The Lack Of Foreseeability Of Injury**

Just as the trial court properly dismissed the civil rights claim as untimely based upon the law of the case doctrine, the trial court also properly dismissed the negligent supervision case based upon this Court’s prior decision that the injury was not foreseeable. All negligence claims require that a plaintiff establish duty, breach, causation, and damages. *Washington v. Boeing Co.*, 105 Wn. App. 1, 17, 19 P.3d 1041 (2000). Whether a breach occurred is determined, in part, by whether the conduct was foreseeable. *Segaline*, 144 Wn. App. at 327. Foreseeability can be determined as a matter of law where reasonable minds cannot differ.

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<sup>4</sup> Yet, Appellant’s Brief inaccurately recites these facts when he states, “[h]ere, the facts show that Mr. Croft knew that the no trespass notice was not valid, but he ordered Mr. Segaline to be arrested anyway . . . .” Appellant’s Br. at 37. Clearly, Mr. Segaline’s version is in contrast to the facts. In short, Mr. Croft was not present when Mr. Segaline was arrested, nor does he have the power to “order” the arrest of someone.

*Segaline*, 144 Wn. App. at 329 (citing *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 475, 951 P.2d 749 (1998)).

This Court held that Mr. Segaline's injury was not foreseeable. *Segaline*, 144 Wn. App. at 329. Further, if the injury was not foreseeable then no breach of duty can occur. *Id.* This Court reasoned that,

The chance is slight that a person of ordinary sensibilities would have 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.

*Segaline*, 144 Wn. App. at 329 (internal citations omitted).

The trial court correctly applied this Court's holding and this Court's ruling when it again dismissed the claim of negligent supervision and intentional infliction of emotional distress based upon lack of foreseeability of injury.

**2. No Cause Of Action Can Be Maintained For Negligent Supervision Because The Employees Acted Within The Scope Of Employment; Likewise, No Cause Of Action Can Be Maintained Under Respondeat Superior Because There Is No Evidence Of Negligence**

A cause of action for negligent supervision requires a plaintiff to show that an employee acted outside the scope of his or her employment.<sup>5</sup>

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<sup>5</sup> The vicarious liability of an employer arises from actions taken by an employee within the scope of employment (as occurred here). Sometimes, vicarious liability can be defeated by an employer when the employees conduct was criminal and outside the scope of employment (not alleged here). *Robel v. Roundup Corp.*, 148 Wn.2d 35, 52-53, 59 P.3d 611 (2002).

*Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997). A claim against an employer for negligent supervision of an employee is only possible when an employee has committed an intentional wrongful act. *Gilliam v. Dep't of Soc. & Health Servs.*, 89 Wn. App. 569, 950 P.2d 20 (1988). In the circumstance where the employer stipulates that the employee is acting within the scope of employment a cause of action for negligent supervision is redundant. *Gilliam*, 89 Wn. App. at 585. The correct cause of action is vicarious liability or respondeat superior. *Id.*

In cases in which an employer is liable under respondeat superior for acts of its employees, a negligent supervision claim is improper because the employer will be liable only if there has been any negligence on the part of the employee. *Al Shielee v. Hill*, 47 Wn.2d 362, 287 P.2d 479 (1955). Further, if there is no negligence, then the supervision of the employee is irrelevant. *Al Shielee*, 47 Wn.2d at 362. In *Al Shielee*, the elevator operator's competency was not part of the analysis because "[n]egligence is not synonymous with competency and experience, nor with incompetency and inexperience." *Id.* at 365. The court found that because there was no evidence of negligence by the elevator operator in performing his duties, there was no merit in the negligent training/supervision claim. *Id.* at 366.

In *Al Shielee*, the appellant also averred a claim in the alternative that even if respondeat superior did not apply then the competency of the elevator operator was material under a theory of negligent selecting and retaining. *Al Shielee*, 47 Wn.2d at 362. In a nutshell, if an employee did not do anything wrong, the fact that the employee had the best or the worst training possible is only prejudicial, but not relevant.

The court also denied this claim relying upon “announced principles” that “[l]iability to a third person for the act of an employee, if any must be predicated upon the wrongful act or omission of the employee at the time of the infliction of the injury complained of, or at least upon an act or omission which in the case of an experienced or competent person would have been wrongful.” *Id.* at 366 (internal citations omitted).

Here, Mr. Segaline’s claims for negligent supervision fail as a matter of law. L&I’s employees were acting within the course and scope of employment in all of the actions taken regarding Mr. Segaline. This makes the negligent supervision claim redundant and irrelevant.

Likewise, Mr. Segaline’s claim under respondeat superior also fails because there is no evidence of negligence on the part of the L&I employees. They acted properly. The evidence is L&I staff attempted to resolve the dispute through phone calls and a meeting; however, Mr. Segaline refused to cooperate. CP at 32, 217.

If anything, Mr. Croft had a duty to protect L&I employees from a hostile work environment and harassment in the work place by Mr. Segaline under the purpose behind the labor regulations in RCW 49.60.

In this case, Mr. Segaline was viewed as a harasser. Mr. Croft, as the employer, had the duty to protect the welfare and health of the L&I employees. RCW 49.60.010. Mr. Croft prudently issued the no trespass notice to protect his employees. He acted as an objectively reasonable employee in the same or similar circumstances.<sup>6</sup> A claim for respondeat superior fails as a matter of law because there is no evidence Mr. Croft acted negligently.

**C. The Trial Court Properly Dismissed Mr. Segaline's Malicious Prosecution Claim Because He Failed To Establish The Essential Elements Of The Claim**

Actions for malicious prosecution are disfavored in the law, namely because “. . . the citizen who acts in good faith shall not be subjected to damages merely because the accused is not convicted.” *Peasely v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 497, 125 P.2d 681 (1942). The essential elements of malicious prosecution require plaintiff to prove: (1) the prosecution was instituted by the

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<sup>6</sup> Certainly, if Mr. Segaline's offensive conduct was based on the sex, race, religion, etc. of the L&I employees he harassed, the duty to take preventative measures could not be open to debate. *See* Chapter 49.60 RCW.

defendant, (2) there was no probable cause, (3) the defendant acted with malice, (4) the proceedings concluded in favor of the plaintiff or were abandoned, and (5) that the plaintiff suffered damages. *Peasely*, 13 Wn.2d at 497 (internal citations omitted). In addition, the existence of probable cause is a complete defense to malicious prosecution. *Id.* Here, the missing proof relates to probable cause and malice, and the absence of each serves as an independent basis to affirm the trial court's ruling.

**1. The Malicious Prosecution Claim Fails Based Upon The Presence Of Probable Cause**

Probable cause requires a defendant to make a full and fair disclosure, in good faith, of all material facts. *Peasely*, 13 Wn.2d at 497. The standard for probable cause is less than the standard for beyond a reasonable doubt. *See State v. Bellows*, 72 Wn.2d 264, 266, 432 P.2d 654 (1967).

In this case, probable cause for Mr. Segaline's arrest on August 23, existed based not only on his violation of the prior "No Trespass Notice," but also based upon his disruptive behavior and repeated refusal to leave as directed by L&I staff and law enforcement. In Appellant's Brief, at pages 35-36, Mr. Segaline argues that the failure to disclose to the police that Mr. Segaline was allowed to come into the L&I Office the day before, contrary to the "No Trespass Notice" was material to the issue of

probable cause for his arrest. However, this ignores the fact that on the date of his arrest he was loud and disruptive. CP at 35. As a result, he was repeatedly directed to leave by staff. Eventually, the police were summoned. Law enforcement also repeatedly asked him to leave and contacted his lawyer to try and see if she could persuade him to leave the L&I office. Mr. Segaline defiantly refused. The police officer who arrested him stated that he “was very concerned about [Mr.] Segaline returning to the L&I office with a weapon and harming people as he did not appear to be rationale.” CP at 36. Based on these facts alone, probable cause existed to arrest Mr. Segaline based on his repeated refusal to leave the L&I office as directed because of his disruptive and threatening behavior.

Generally, criminal trespass occurs when a person enters or remains unlawfully in or on the premises of another. RCW 9A.52.070. It is classified as first degree when the premises are a building, and in every other case it is classified as second degree. RCW 9A.52.070, .080. First degree is a gross misdemeanor and second degree is a misdemeanor. RCW 9A.52.070, .080. Arrest for criminal trespass in the second degree arises when the individual causes a disturbance, refuses to leave, and law enforcement can no longer protect the premises. *Orin v. Barclay*,

272 F.3d 1207 (9th Cir. 2001), *cert. denied*, 536 U.S. 958, 122 S. Ct. 2661, 153 L. Ed. 2d 836 (2002).

In *Orin*, a protestor caused a disturbance at a college campus by violating the peaceful demonstration conditions established by the college. *Orin*, 272 F.3d at 1211. The protestor refused to abide by the conditions, remained when asked to leave, and law enforcement arrested the protestor for trespassing and failure to disperse. *Id.* In *Orin*, the college security officers asked the protestor multiple times to leave “because they ‘could no longer control the situation and the situation was turning physical.’ ” *Id.* at 1212. Law enforcement arrived, asked the protestors including Orin to leave, Orin refused to leave by stating he “was not going anywhere,” and Orin was arrested for trespassing. *Id.* at 1213. Despite the myriad of issues of constitutionality and qualified immunity, the court held that the police officers had probable cause to arrest the demonstrator, Mr. Orin. *Id.* at 1218. The court reasoned that “[a] police officer has probable cause to effect an arrest if ‘at the moment the arrest was made . . . the facts and circumstances within [his] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing’ that the suspect had violated a criminal law.” *Orin*, 272 F.3d at 1218 (quoting *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964)).

Here, Mr. Segaline was arrested for trespassing, presumably criminal trespass in the second degree, because Mr. Segaline remained on the premises. Just like in *Orin*, officers had probable cause for the arrest when Mr. Segaline caused a disturbance, Mr. Segaline refused to leave, officers believed Mr. Segaline was prohibited from the building, and the officers could no longer protect the L&I employees. The officer had probable cause to arrest Mr. Segaline because the officer acted as a prudent man in believing that Mr. Segaline was trespassing.

**2. The Malicious Prosecution Claim Fails Based Upon The Lack Of Malice**

Even if a lack of probable cause has been established, malice still must be proven for a malicious prosecution claim to be valid. *Peasley*, 13 Wn.2d at 497. Malice requires improper or wrongful motives. *Id.* at 500. Examples of wrongful motives include: without believing in plaintiff's guilt, being motivated by hostility or ill will, or seeking to obtain a private advantage. *Id.* at 500-02. Malice also can include reckless disregard. *Id.* at 500. The form of malice by seeking private advantage may include attempting to "surreptitiously" obtain property. *Id.* at 502-03. Malice may also include being motivated by ill will or hostility, as in *Peasley* when defendant was "prompted by feelings of

‘bitterness, animosity, or vindictiveness towards the appellant.’ ” *Peasley*, 13 Wn.2d at 503 (internal citations omitted).

Here, there is no evidence of malice on behalf of L&I. There is no conceivable private advantage gained by having Mr. Segaline arrested. L&I had no private advantage to gain by preventing Mr. Segaline from the building. Further, there is no evidence that L&I employees were motivated by hostility or ill will. There is no evidence of bitterness, animosity, or vindictiveness by any L&I employee. In fact, L&I employees accommodated Mr. Segaline as best they could, even as he violated the no trespass notice the day prior to his arrest seeking an emergency electrical permit. CP at 26-27. The L&I employees sought to balance the need for emergency electrical permits and enforcement of the no trespass notice. This is evidence of goodwill and reasonableness on the part of L&I and its employees.

Mr. Segaline fails to establish evidence of malice. The L&I employees’ actions and motivations were based on the need to provide a safe and non-disruptive workplace. Further, the evidence established L&I’s repeated efforts to try to resolve the conflict through phone calls, in-person meetings, and law enforcement intervention prior to the arrest.

Finally, there is every indication that L&I believed in Mr. Segaline’s guilt. Just because Mr. Segaline was not prosecuted does

not mean that L&I employees did not believe in his guilt. Mr. Segaline got into several heated verbal exchanges with L&I employees, to the point they feared him and felt threatened in their place of employment. CP at 16-17 (Hawkins), 25 (Guthrie/Sanchez), 32 (Whittle), 217 (Croft). As a result, he received the no trespass notice from L&I and law enforcement. CP at 17 (Hawkins), 34 (Officer Dieringer).

Mr. Segaline chose to return to L&I despite the no trespass notice, knowing it could only be rescinded by written approval. CP at 27. L&I employees verified the no trespass order remained valid when Mr. Segaline returned. CP at 27, 35. L&I employees called law enforcement for assistance when Mr. Segaline became disruptive and threatening. CP at 27, 35. L&I communicated all facts they had to law enforcement demonstrating a good faith full disclosure of all material facts. CP at 34-35.

There simply is no evidence that L&I withheld any material information from law enforcement or had any malice toward Mr. Segaline. Reasonable minds cannot dispute there is no evidence of malice in the record on behalf of L&I; therefore, the claim for malicious prosecution fails. Consequently, the trial court appropriately dismissed the claim for lacking the essential elements.

**D. The Claim Of A Procedural Due Process Violation Is Not Properly Raised For The First Time On Appeal**

Mr. Segaline's allegation of a procedural due process violation is raised for the first time on appeal. It was not plead in the complaint, amended complaint, motion for leave to amend the complaint, nor on summary judgment.<sup>7</sup> It is not properly before this Court on any theory.

Regardless of whether procedural due process was provided, the civil rights § 1983 claim against Mr. Croft is still untimely based on the expiration of the statute of limitations. Mr. Segaline goes into great detail of how he believes Mr. Croft violated his procedural due process rights. However, the fact remains, Mr. Segaline failed to timely amend his complaint to name Mr. Croft as a defendant resulting in the statute of limitations expiring. All complaints against Mr. Croft are time barred.

The remaining claims for negligent supervision and malicious prosecution were dismissed for failure to state essential elements of each of the claims. Whether procedural due process occurred is immaterial to those fatal flaws.

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<sup>7</sup> On summary judgment Mr. Segaline asserts L&I's actions constituted a constructive revocation or suspension of his electrical license in violation of the Administrative Procedures Act in arguing that L&I breached a duty to him. CP at 346. There is no evidence Mr. Segaline's license was ever revoked or suspended.

**1. Qualified Immunity Applies When Government Officials Are Performing Discretionary Functions And Their Conduct Does Not Violate Clearly Established Constitutional Rights**

Further, Mr. Segaline relies upon the *Green* case in his argument that all of his claims should survive based on the lack of procedural due process. *State v. Green*, 157 Wn. App. 833, 239 P.3d 1130 (2010); Appellant's Br. at 24. However, the *Green* decision came out in September 2010 while the accrual date for Mr. Segaline's alleged causes of action is June 30, 2003. *Green*, 157 Wn. App. at 833. Not only is applying *Green* inapplicable, the appellate decisions have held that Mr. Croft is entitled to qualified immunity.

Qualified immunity applies when government officials are performing discretionary functions and their conduct does not violate clearly established constitutional rights that would be known by a reasonable person. *Bosteder v. City of Renton*, 155 Wn. 2d 18, 117 P.3d 316 (2005). Qualified immunity is narrowly tailored to apply to the government officials in their personal capacity. *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992), *cert. denied*, 506 U.S. 1028, 113 S. Ct. 676, 121 L. Ed. 2d 598 (1992). The unlawfulness of the conduct at issue must be clearly established by

pre-existing case law. *Citoli v. City of Seattle*, 115 Wn. App. 459, 61 P.3d 1165 (2002).

**2. Mr. Segaline Failed His Burden To Establish A Clearly Established Right Therefore No Liability Accrues**

No liability accrues if the right plaintiff alleged was violated was not “clearly established” or if the official could have believed that his conduct was lawful. *Benjamin v. Wash. State Bar Ass’n*, 138 Wn.2d 506, 980 P.2d 742 (1999); *Altshuler v. City of Seattle, Mun. Corp.*, 63 Wn. App. 389, 819 P.2d 393 (1991). Therefore, this requires the government officer to be aware of the clearly established right at the time of deprivation.

The Plaintiff has the burden of demonstrating the existence of a clearly established right based on pre-existing case law. *Robinson*, 119 Wn.2d at 34. The Supreme Court demands that:

[P]redictability is required: ‘The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in light of pre-existing law the unlawfulness must be apparent.’

*Robinson*, 119 Wn.2d at 66, (emphasis added) (citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523

(1987)). *See also Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992).

Here, Mr. Segaline's alleged right that was violated was not clearly established until 2010 with *Green*. Mr. Segaline alleges L&I violated his right to due process based on the issuance of the no trespass notice. Appellant's Br. at 24-25. Mr. Segaline cannot revive the trial court's proper dismissal of his claims by asserting his procedural due process rights were violated because that right was not "clearly established" in 2003, and L&I employees reasonably believed their conduct was lawful. Further, Mr. Segaline has the burden of citing to this Court closely analogous and pre-existing case law that would put a reasonable public official on notice that his conduct violated the constitution. Mr. Segaline failed that burden by relying upon *Green* and failing to prove facts that show the right was "clearly established" at the time the alleged violations occurred.

**E. The Newly Amended Anti-SLAPP Statute Expanded The Law To Protect Any "Action Involving Public Participation And Petition"**

As an aside, if Mr. Segaline were to bring his claims today he still could not prevail because the Legislature subsequently broadened the anti-SLAPP statute to include "any" oral or written statement made or submitted in any "governmental proceeding authorized by law."

RCW 4.24.525(2). After *Segaline*, 169 Wn.2d at 467, was briefed and argued, the Legislature passed SSB 6395 adding a new section to the anti-SLAPP statute. The State Supreme Court did not review this new law as part of its decision.

This new section expanded the application of the law beyond First Amendment rights, to protect any “action involving public participation and petition.” RCW 4.24.525(2). This much broader definition protects the entire public process, which likely includes the actions that L&I took regarding Mr. Segaline. In short, the government is now entitled to anti-SLAPP immunity due to the statutory amendment.

## **VI. ATTORNEYS FEES AND EXPENSES**

Defendants/Respondents respectfully request attorneys’ fees and expenses pursuant to RAP 18.1.

## VII. CONCLUSION

This Court should affirm the trial court's granting of summary judgment dismissing all of Mr. Segaline's claims against the defendants/respondents.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of May, 2012.

ROBERT M. MCKENNA  
Attorney General



PATRICIA D. TODD  
Assistant Attorney General  
WSBA No. 38074  
Attorney General's Office  
1741 Cleanwater Dr SW  
PO Box 40126  
Olympia, WA 98504  
Phone (360) 586-6300  
Fax (360) 586-6655

NO. 42945-4-II

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

MICHAEL SEGALINE,

Appellant,

v.

STATE OF WASHINGTON, et al.,

Respondents.

NO. 42945-4-II

(Thurston County Cause No. 05-2-0554-  
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STATE OF WASHINGTON

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DIVISION II

I, Amanda Chandler-Easley, hereby certify that on May 15, 2012, I

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RESPONDENTS' BRIEF

on the attorney for Appellant, as set forth below:

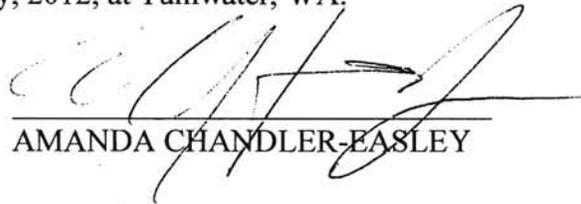
Attorneys for Plaintiff:

Jean Schiedler-Brown  
606 Post Ave Ste 101  
Seattle, WA 98104

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 15th day of May, 2012, at Tumwater, WA.



AMANDA CHANDLER-EASLEY