

No. 46532-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

VERNON PAUL VANCE,

Plaintiff/Appellant,

v.

PIERCE COUNTY, a governmental subdivision of the State of
Washington; PIERCE COUNTY SHERIFF'S DEPARTMENT, a
subdivision of the State of Washington, et ux., et al.,

Defendants/Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE JERRY COSTELLO

REPLY BRIEF OF APPELLANT

DAVIES PEARSON, P.C.

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I. ARGUMENT

This Court should reverse the trial court's decision to grant the summary judgment motions of Pierce County and the Washington State Patrol (WSP) and the Washington State Department of Corrections (DOC) (WSP and DOC are referred to collectively as the "State Defendants"). The trial court erred in concluding that these defendants enjoyed immunity and were insulated from Vance's claims by the statute of limitations. The additional grounds for summary judgment identified by the defendants, many of which are presented for the first time on appeal in violation of RAP 2.5(a) and 9.12, do not provide an alternative basis for affirming summary judgment.

A. The defendants were not entitled to immunity.

None of the conduct of Pierce County, WSP, or DOC at issue qualifies for immunity under RCW 4.24.550, quasi-judicial immunity, or prosecutorial immunity¹.

- i. The defendants' publications of information about Vance did not fall within the scope of RCW 4.24.550 because he was not convicted of a qualifying offense.

Neither Pierce County nor the State Defendants offer an alternative construction of RCW 4.24.550 or argue that it is ambiguous.² Pierce

¹ Prosecutorial immunity is a defense presented by Pierce County only. *See* Brief of Resp. Pierce County at 21-23; *See Also* Brief of Resp. WSP and DOC *generally*.

County simply offers the conclusion that the statute applies.³ Specifically, Pierce County asserts that “RCW 4.24.550 authorizes local and State agencies to disseminate information to the public regarding sex kidnap offenders” and then jumps to the conclusion that “all Pierce County defendants enjoy immunity” under the statute.⁴ It offers no response to Vance’s contention that there is no immunity for the release of information about someone not convicted of a qualifying offense.⁵

The State Defendants only offer the argument that Vance’s proffered construction renders the immunity provision superfluous.⁶ However, this argument misunderstands RCW 4.24.550. RCW 4.24.550 sets forth specific information that may be shared regarding sex and kidnap offenders, depending upon their classification. *See* RCW 4.24.550(3). It also provides broader authority to disclose information about a qualifying offender that is “relevant and necessary.” *See* RCW 4.24.550(1).

Under the construction asserted by Vance, the immunity provision provides protection for public officials where they disclose incorrect information or information beyond what is “relevant and necessary.” It

² *See* Brief of Resp. Pierce County at 18; Brief of Resp. DOC and WSP at 38-40.

³ *See* Brief of Resp. Pierce County at 18.

⁴ *Id.*

⁵ *See Id.*

⁶ Brief of Resp. DOC and WSP at 38-40.

does not provide immunity for the disclosure of information about a person not convicted of a qualifying offense.

This construction is consistent with case law interpreting RCW 4.24.550. In *State v. Ward*, the Washington State Supreme Court discussed the limitations imposed by the “relevant and necessary” standard of RCW 4.24.550 on warnings that law enforcement may issue regarding a sex offender. 123 Wn.2d 488, 869 P.2d 1062 (1994). The Court linked the relevance and necessity of disclosure to the offender’s dangerousness, noting that the nature of the information disclosed and the geographic scope of disclosure must be connected to the danger posed by the offender. *Id.* at 502-04. For example, the Court stated that “the geographic scope of dissemination must rationally relate to the threat posed by the registered offender.” *Id.* at 503. Recognizing deference to law enforcement, the Court stated that “[a]s the Legislature indicated ... we leave to the appropriate agencies the specific decisions of whether, what, and where to disclose [warnings about an offender].” *Id.* at 504.

The limitations discussed in *Ward* highlight the role of the immunity provision within RCW 4.24.550. The immunity provision of RCW 4.24.550 provides protection for a public official who errs in applying the “relevant and necessary” standard when disclosing information about a qualifying offender. The construction offered by Vance, that the grant of

immunity does not extend to a person not convicted of a qualifying offense, is consistent with the language of the statute and does not render the immunity provision superfluous.

- ii. The defendants were not entitled to quasi-judicial immunity because their conduct was not judicial in nature.

The defendants' claim of quasi-judicial immunity is based upon a faulty premise: that imposition of the registration requirement is a judicial function.⁷ The registration requirement is imposed by statute, not judicial function. Because the defendants' conduct is non-judicial in nature, they were not entitled to quasi-judicial immunity.

The defendants have failed to make the requisite showing to qualify for quasi-judicial immunity. They must show that (1) they were performing a function that is analogous to a judge, (2) policy considerations favor immunity, and (3) sufficient procedural safeguards exist to ensure that the officials reach the correct decision. *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 106-09, 829 P.2d 746 (1992).

First, the registration requirement is imposed by statute and is not analogous to judicial action. Multiple courts in Washington have recognized that the registration requirement arises from statute, not the act

⁷ See Brief of Resp. Pierce County at 15 (discussing the imposition of the duty to register); Brief of Resp. WSP and DOC at 36 (characterizing DOC's conduct as "notifying an offender of a registration requirement."). Notably, DOC's conduct was not simply notifying Vance that the requirement existed; DOC instructed him to register. See Brief of Resp. WSP and DOC at 11.

of a sentencing court. In *State v. Acheson*, this Court reasoned that “because the duty to register is an independent statutory duty, it is not terminated by the cessation of juvenile court jurisdiction at age 21.” 75 Wn. App. 151, 156, 877 P.2d 217 (1994). Two years later, Division Three reached the same conclusion. In *State v. Munds*, it concluded that “the duty to register as a sex offender arises pursuant to legislative mandate, rather than by order of the sentencing court.” *State v. Munds*, 83 Wn. App. 489, 922 P.2d 215, 217 (1996). The defendants’ action in wrongfully imposing the registration requirement is, therefore, not analogous to a judge’s function.

The State Defendants’ argument that the provisions of RCW 10.01.200 or RCW 9.94A.704(11) support the claim that their conduct is judicial in nature is unpersuasive. RCW 10.01.200 requires courts to notify defendants charged with a qualifying offense of the registration requirement in writing, through guilty plea and judgment and sentence forms.

However, the Court’s decision in *Taggart v. State* establishes that not every parallel between judicial and non-judicial action forms the basis for quasi-judicial immunity. Quasi-judicial immunity only extends to “those functions ... that are an integral part of a judicial or quasi-judicial proceeding.” 118 Wn.2d 195, 213, 822 P.2d 243 (1992). Functions

comparable to judicial action involve hearings held to resolve a controversy, the application of objective standards, binding determinations of individual rights, action historically performed by courts, and safeguards to protect against errors. *See Id.* at 206 (listing factors to consider). In contrast, administrative functions such as providing notice, even though they may at times be performed by a court, do not form the basis for extending the reach of quasi-judicial immunity. *See Id.* at 213 (holding that quasi-judicial immunity does not extend to administrative actions.).

RCW 9.94A.704(11) is similarly unhelpful to the defendants' aspirations for quasi-judicial immunity. It states that DOC is performing a quasi-judicial function "setting, modifying, and enforcing conditions of community custody" However, as addressed *supra*, the registration requirement is imposed by statute, not as a part of the community custody requirements set by DOC. Accordingly, the defendants' conduct in unlawfully imposing the registration requirement is not analogous to judicial conduct.

The defendants have also failed to identify viable policy reasons for granting immunity or adequate safeguards, elements two and three of the test from *Lutheran Day Care*. 119 Wn.2d at 106. The provisions of Chapter 9A.44 RCW provide neither a policy justification nor a

procedural safeguard. RCW 9A.44.140 does provide immunity for a public official in removing or failing to remove an offender from the registry in the timeframes set forth in RCW 9A.44.140. However, it does not provide a policy justification related to someone who was improperly required to register in the first place. Chapter 9A.44 RCW also does not provide any procedural safeguard to Vance. The framework of petitioning for relief under RCW 9A.44.142 is inapplicable to Vance because it focuses on rehabilitation and was not available to Vance for fifteen years, as an out-of-state convict. *See* RCW 9A.44.142(c).

The *In re Enright* decision is also inapplicable to Vance. Whereas the public officials in *Enright* made a discretionary assessment of risk in setting a sex offender's classification, the defendants here made an assumption⁸ regarding Vance's conviction based on incomplete information. 131 Wn. App. 706, 716, 128 P.3d 1266 (2006). There is no evidence in the record suggesting that any of the defendants engaged in any discretionary assessment of risk regarding Vance or any comparability analysis regarding his conviction.⁹ *See CP generally*. The discretionary decision regarding the offender's likelihood of reoffending made in

⁸ *See* Brief of Resp. Pierce County at 7 (stating that "Mr. Adams assumed that the victim was 15 years of age....").

⁹ As Pierce County now contends, despite its admission that Mr. Adams assumed that the victim was a minor. Brief of Resp. Pierce County at 7.

Enright warrants quasi-judicial immunity because it resembles a court function. 131 Wn. App. at 716. The imposition of the registration requirement occurs by operation of statute not by judicial action. Accordingly, the defendants do not enjoy quasi-judicial immunity.

Even if the imposition of the registration requirement could qualify for quasi-immunity, the defendants' conduct here is broader. The defendants have not contended that their publication of information about Vance and arrest and prosecution of Vance fall within the scope of quasi-judicial immunity, nor could they.¹⁰ This conduct forms the basis for Vance's defamation, invasion of privacy, false arrest, and malicious prosecution claims. CP at 72-74, 77.

iii. Pierce County is not protected by prosecutorial immunity in its role as a complaining witness.

Pierce County's assertion of prosecutorial immunity is without merit. Prosecutorial immunity only protects a prosecutor when he or she is acting as an advocate. *Kalina v. Fletcher*, 522 U.S. 118, 126, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997). It does not extend to other conduct, including that of a complaining witness. *Id.* at 129-131. The declaration of probable cause makes it clear that Prosecutor Jessica Giner was relying upon the report of the Pierce County Sherriff's Department in bringing charges against

¹⁰ See Briefs Resp. Pierce County and WSP and DOC *generally*.

Vance. CP at 366. Pierce County is not entitled to immunity for its role as a complaining witness.

B. Vance's claims are not barred by the statute of limitations.

The trial court erred in ruling that most of Vance's claims were barred by the statute of limitations. The trial court did not specify which claims were barred. *See* RP at 26 (stating that the "Statute of Limitations applies in this instance to most claims."). However, it appears that the ruling does not extend to Vance's defamation, invasion of privacy, false arrest, and malicious prosecution against Pierce County.¹¹ Therefore, the trial court's dismissal based on the statute of limitations could have included Vance's claims for negligence; negligent hiring, retention, and supervision; gross negligence and deliberate indifference; outrage; and negligent infliction of emotional distress. It also could have included Vance's claims for defamation and invasion of privacy against WSP and DOC. Dismissal of these claims was improper because (i) causes of action accrued against WSP within the limitations period; (ii) the statutes of limitations should have been equitably tolled; and (iii) the concert of tortious activity committed by the defendants was subject to the continuing tort doctrine.

¹¹ Pierce County conceded that there was a genuine issue of material fact as to the accrual of the defamation and invasion of privacy claims. CP at 609. And Pierce County concedes on appeal that Vance's claims for false arrest and malicious prosecution were timely. *See* Brief of Resp. Pierce County at 23-23.

- i. There is a genuine issue of material fact regarding whether Vance's defamation and invasion of privacy claims against the Washington State Patrol accrued within the limitations period.

Summary judgment is not warranted on Vance's defamation and invasion of privacy claims against WSP because there are genuine issues of material fact as to whether WSP published information on or around December 27, 2011, which is within the statute of limitations that reached back to September 13, 2011¹². WSP entered information it received from local law enforcement agencies regarding registered sex and kidnap offenders into a database, which was available to the public. CP at 2-3. On December 27, 2011, WSP received updated information from Pierce County regarding Vance's registration status. CP at 3. Given WSP's process, it appears that it entered the information into its database, making it available to the public. *See* CP at 2-3. WSP also appears to have published additional information into its database on April 23, 2012 and Vance continues to be listed as a former registered kidnap offender. CP at 5, 6.

Attempting to heighten the showing that Vance must make to survive summary judgment, the State Defendants misconstrue *LaMon v. City of Westport*.¹³ In *LaMon v. City of Westport*, the court affirmed summary

¹² WSP was served on September 13, 2013. CP at 121.

¹³ *See* Brief of Resp. DOC and WSP at 26.

judgment against the plaintiffs on their defamation claim based on its conclusion that there was no publication. 44 Wn. App. 664, 668-669, 723 P.2d 470 (1986). The defamatory statements were contained in a file at a library, which could not be accessed unless requested from the library staff. *Id.* at 668. The court concluded that the record did not support an inference of publication where the defendant “introduced evidence to show that it was unlikely that anyone read the file.” *Id.* at 668-69. This evidence made “it incumbent upon the [plaintiffs] to assert something more than ... inference.” *Id.* at 669.

In contrast, WSP has not produced any relevant evidence diminishing the inference that information made available to the public was accessed. Becky Miner’s testimony does not address the timeframe at issue. *See CP* at 173. WSP has failed to refute the inference that the defamatory statements it made available to the public were accessed. *See Restatement (Second) of Torts § 577, comment m (1977)* (stating that “if the circumstances indicated that communication to a third party would be likely, a publication may properly be held to have occurred.”).

WSP presents a new defense on appeal in violation of RAP 2.5(a) and 9.12. RAP 9.12 restricts the scope of this Court’s review of an order granting summary judgment to the “evidence and issues called to the attention of the trial court.” WSP’s argument that the information it

published was truthful was not incorporated into its summary judgment motion. *See* CP at 111-33. Therefore, the argument should be excluded from this Court's consideration.

Even if this Court was to consider this argument, it is unpersuasive. While it may be true that Vance was required to register, WSP's publication of information created the false impression that Vance was convicted of a qualifying offense. *See e.g. Corey v. Pierce County*, 154 Wn. App. 752, 761-62, 225 P.3d 367 (2010).

- ii. The statute of limitations for Vance's claims should have been equitably tolled because Vance was subjected to extraordinary circumstances, he acted diligently considering those circumstances, and tolling the statute will not unduly prejudice the defendants.

Equitable tolling is warranted because the defendants threatened Vance and mislead him regarding his options for relief, he acted diligently in light of the defendants' conduct, and tolling would cause no due prejudice.

1. This Court should not exclude Vance's statements regarding the defendants' threats and deception because his deposition testimony does not directly contradict his declaration.

The State Defendants oppose Vance's request for equitable tolling, in part, by asking this Court to disregard the evidence of threats and deception based on their claim that Vance's declaration contradicts his deposition testimony. However, this argument calls for the misapplication

of a narrow rule. “When a party has given clear answers to unambiguous deposition questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.” *Taylor v. Bell*, 340 P.3d 951¹⁴, 964 (2014). “This rule is a narrow one”: “[t]he self-serving affidavit must directly contradict the affiant’s unambiguous sworn testimony previously given.” *Id.*

Here, Vance’s declaration does not directly contradict his deposition testimony. In making their argument, the State Defendants misstate the nature of Vance’s deposition testimony. When asked during his March 18, 2014 deposition whether the DOC or WSP prevented him from filing a petition in superior court to challenge the registration requirement, Vance said no. CP at 208 ll. 40:19-22; 212 44:3-6. In their responsive brief, the State Defendants misconstrue Vance’s testimony: broadening the language from “prevented” to “interfered,” claiming that Vance testified that no one “interfered” with his ability to challenge his registration. *See* Brief of DOC and WSP at 29.

Vance’s testimony that he was not prevented from filing a petition for relief from the registration requirement in superior court does not directly contradict his declaration. The conduct of the defendants, in threatening

¹⁴ The Washington Appellate Reports citation is not yet available.

and misleading Vance¹⁵, effectively discouraged but did not prevent Vance from filing a claim for relief in superior court. The State Defendants' argument also ignores Vance's prior deposition testimony. During his first deposition on September 12, 2013, Vance testified about the threats of arrest and incarceration. CP at 307:8-14.

2. *The defendants' conduct, in discouraging Vance from seeking relief, created extraordinary circumstances warranting equitable tolling.*

A plaintiff need not show that he or she is prevented from pursuing an action to establish the extraordinary circumstances justifying equitable tolling. In *Thompson v. Wilson* and *State v. Littlefair*, courts applied equitable tolling even though neither plaintiff was prevented from filing an action. *See Thompson v. Wilson*, 142 Wn. App. 803, 814, 175 P.3d 1149 (2008); *See Also State v. Littlefair* 112 Wn. App. 749, 51 P.3d 116 (2002). Vance, like in plaintiffs in *Thompson* and *Littlefair*, was deterred from seeking relief.

3. *Considering the defendants' conduct, Vance pursued his rights diligently.*

¹⁵ In his declaration, Vance stated that he was told that he "should not 'rock the boat' in regards to his registration requirement." CP at 456. He stated that he was threatened with incarceration by DOC and Pierce County. CP at 456. He was also misled regarding his avenue from relief. CP at 458-59. For example, Craig Adams told Vance that his "only recourse would be to seek relief from the duty to register as a sex offender in Thurston County...." CP at 459.

The defendants oppose equitable tolling on the basis that Vance could have sought relief either pursuant to Chapter 9A.44 RCW or as provided for in the *In re Meyer*.¹⁶ However, this argument fails to consider the context of Vance's situation and the undeniable impact of the defendants' threats. Vance was subject to the authority of the defendants and told that he would be sent to prison if he rocked the boat. CP at 169, 456. Vance was not operating at arm's-length from the defendants; he was subject to their direction. Considering this context, he acted diligently in his efforts to work with the defendants to get the registration requirement removed. *See* CP at 458-461; 498-500.

Moreover, the avenues for relief identified by the defendants were unavailable to Vance. For example, in *In re Meyer* the Court provided an avenue for a registered offender to challenge his or her classification, not the imposition of the registration requirement. 142 Wn.2d 606, 624, 16 P.3d 563 (2001). In a footnote, the Court noted that under RCW 9.44.140 “[a]n adult offender may petition the superior court to be relieved of the duty to register, **but only after he or she has spent 10 consecutive years in the community without being convicted of any new offense.**” *Id.* at

¹⁶ Brief of Resp DOC and WSP at 31-33.

624, fn. 2 (emphasis added)¹⁷. In contrast to the State Defendants argument¹⁸ that Vance could have filed a petition to be relieved of the duty to register pursuant to the former version of 9A.44.140, the Court in *Meyer* confirmed that he would not qualify until at least ten years after his release. Similarly, Pierce County's argument¹⁹ that Vance failed to exercise diligence because he did not petition a Colorado court is unpersuasive. Colorado did not impose the registration requirement. *See* CP at 308:11-14.

4. *The defendants have not identified any undue prejudice.*

Attempting to establish undue prejudice, the defendants are only able to offer irrelevant evidence pre-dating Vance's conviction²⁰ or vague claim of prejudice based on the loss of memories of unidentified witnesses²¹. The defendants' inability to identify any specific, relevant evidence that could be lost highlights the absence of undue prejudice. Therefore, this Court should equitably toll the statute of limitations on Vance's claims.

¹⁷ In *In re Detention of Enright*, the court cites this footnote from *Meyer*. 131 Wn. App. 706, 713-14, 128 P.3d 1266 (2006). *Enright* also concerns a challenge to the classification level, not the imposition of the registration requirement. *Id.*

¹⁸ Brief of Resp. DOC and WSP at 31.

¹⁹ Brief of Resp. Pierce County at 29.

²⁰ *See* Brief of Resp. WSP and DOC at 34.

²¹ *See* Brief of Resp. Pierce County at 30.

- iii. Alternatively, this Court should conclude that Vance's claims have not lapsed because of the continuing tort doctrine.

The State Defendants offer no opposition to Vance's continuing tort doctrine argument.²² Pierce County argues that the doctrine should only be available for torts that are abatable.²³ Here, Pierce County's argument supports the application of the continuing torts doctrine because the defendants' conduct was reasonably abatable. The defendants could have removed the registration requirement and the information they published about him.

C. The State Defendant's failure of evidence arguments are brought in violation of RAP 2.5(a) and 9.12.

WSP and DOC argue for the first time in their response on appeal that Vance failed to establish a triable issue of fact as to his claims.²⁴ Before the trial court, WSP and DOC moved for summary judgment solely on an assertion of immunity, quasi-judicial and under RCW 4.24.550(7), and the argument that Vance's claims were barred by the statute of limitations. CP at 111-33²⁵. They did not allege the absence of a triable issue of fact generally with respect to any of Vance's claims. Accordingly, WSP and

²² See Brief of Resp. WSP and DOC *generally*.

²³ See Brief of Resp. Pierce County at 31-33.

²⁴ Compare Brief of Resp. WSP and DOC 40-47 and CP at 111-33.

²⁵ For example, a summary of the basis for WSP and DOC's motion for summary judgment lists only these three issues. CP at 112.

DOC's arguments to this effect should be excluded from this Court's consideration under RAP 2.5(a) and 9.12.

D. The alternative grounds offered by Pierce County in support of its motion for summary judgment on Vance's false arrest and malicious prosecution claims are without merit.

Offering no citation to the record, Pierce County argues that Vance failed to assign error to supposed rulings that Vance was not arrested and his malicious prosecution claim "failed as a matter of law."²⁶ However, no such rulings were made or are reflected the record. *See* CP and RP *generally*. The trial court granted Pierce County's motion solely based upon immunity and the statute of limitations. *See* RP at 26. The additional grounds asserted by Pierce County are without merit.

- i. Given that Pierce County did not enjoy immunity, summary judgment was not proper on Vance's claim for false arrest.

Pierce County opposes Vance's claim for false arrest on two additional grounds. First, it argues that Vance was not arrested.²⁷ Second, it argues, for the first time on appeal, that action by the prosecutor is a superseding, intervening cause.²⁸ Both of these arguments are unpersuasive.

1. *Pierce County's argument that Vance was not arrested ignores the fact that he was handcuffed and spent time in jail.*

²⁶ Brief of Resp. Pierce County at 33, 36.

²⁷ Brief of Resp. Pierce County at 33-35.

²⁸ Brief of Resp. Pierce County at 35-36.

In arguing that Vance was not arrested, Pierce County focuses solely upon the argument that a summons does not constitute an arrest.²⁹ While that may be true, Vance was not only summoned to court; he was “arrested, handcuffed, and taken into custody” and spent time in jail. CP at 317; 461. This is an arrest.

2. *Pierce County’s argument that the prosecutor was a superseding, intervening cause is presented in violation of RAP 2.5(a) 9.12 and is unpersuasive.*

In violation of RAP 2.5(a) and 9.12, Pierce County argues that for the first time on appeal that the prosecutor was a superseding, intervening cause for Vance’s false arrest claim.³⁰ This argument should be excluded from the Court’s consideration. Even if it is not, it is unpersuasive. A prosecutor may constitute a superseding, intervening cause only when he or she is fully informed.³¹ Here, the record establishes a genuine issue of material fact regarding whether Prosecutor Jessica Giner was fully informed. Vance was arrested on February 12, 2012. CP at 315-16. Two months later, on April 13, 2012, Ms. Giner sent an email stating that “I have now received the prior conviction records that the PCSD has on file for the defendant, and reviewed all of the documents.” CP at 393. From

²⁹See Brief of Resp. Pierce County at 33-35.

³⁰ Compare Brief of Resp. Pierce County at 35-36 and CP at 266-91.

³¹ See Brief of Resp. Pierce County at 35 (quoting *Youker v. Douglas County*, 162 Wn. App. 448, 447)

this email, it appears that Ms. Giner was not provided with the record from the Pierce County Sherriff's Department until approximately two months after Vance was arrested.

More importantly, the record indicates that GayLynn Wilke did not make a full disclosure to Ms. Giner. On May 14, 2008, Ms. Wilke sent an email indicating that she "believe[d] he may have been registered in error." CP at 255. It appears that she did not communicate this belief to Ms. Giner. Compare CP at 255 and 393. According to Ms. Giner, "Gaylynn [Wilke] had indicated that she had staffed this with offender Craig [Adams], and that the PCSD had determined that, based upon the age of the kidnapping victim, defendant was required to register in WA State." CP at 393. Ms. Giner's email suggests that she was never informed of Ms. Wilke's belief or the basis thereof.

- ii. The alternative grounds identified by Pierce County for summary judgment on Vance's malicious prosecution claim are also without merit.

This Court should reject Pierce County's attempt to justify summary judgment on Vance's malicious prosecution claim on additional grounds. Pierce County argues that (i) probable cause existed, (ii) the prosecution

was voluntarily dismissed, and (iii) and there is no evidence of malice.³²

Each of these arguments raises genuine issues of material fact.

1. *There is a genuine issue of material fact as to whether probable cause existed based on Pierce County's failure to make a full disclosure to the Prosecutor.*

The failure to make a full disclosure to a prosecutor constitutes a basis for denying summary judgment. “[I]f any issue of fact exists as to whether a malicious prosecution defendant fully and truthfully communicated all the material facts and circumstances [to the prosecutor], then the issue of fact must be submitted to a jury with proper instructions as to what constitutes probable cause, and the jury determines the issue.” *Youker v. Douglas Cnty.*, 162 Wn. App. 448, 463, 258 P.3d 60 (2011). As addressed *supra*, there is an issue of fact as to whether Pierce County fully and truthfully communicated all of the material facts and circumstances to Ms. Giner. It does not appear that Ms. Giner had been provided the Pierce County Sheriff's Department's files or Ms. Wilke's belief, or the basis thereof, prior to charging Vance. Compare CP at 255 and 393.

2. *The charges against Vance have been abandoned.*

A claim for malicious prosecution requires the plaintiff to show that “the proceeding was terminated on the merits in favor of the plaintiff or was abandoned” *Bender v. City of Seattle*, 99 Wn.2d 582, 593, 664

³² Brief of Resp. Pierce County at 36-41.

P.2d 492 (1983). Here, Vance has made a sufficient showing to survive summary judgment on this issue either based on Pierce County's abandonment of the charges against him or equitable estoppel.

Pierce County abandoned the charges against Vance. While the prosecution by Vance was dismissed without prejudice, it was dismissed because "defendant does not have a duty to register as a sex offender in Washington State" CP at 360-61. The determination is reflected in the email correspondence of Ms. Giner. See CP 397, 399. It was also confirmed through Pierce County's removal of Vance from the registry. CP at 185. This evidence provides a sufficient basis to conclude that the charges against Vance were abandoned. Moreover, the statute of limitation has expired on these charges. According to charging documents, Vance failed to register between December 19, 2011 and February 2, 2012. CP 364, 366-67. Under RCW 9A.04.080(1)(h), the three-year statute of limitations lapsed on February 2, 2015.

Alternatively, Pierce County should be equitably estopped from further prosecution of Vance for failing to register. Equitable estoppel requires: "(1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement or act; and (3) injury to such other party arising from permitting the first party to contradict or repudiate such admission,

statement, or act.” *Concerned Land Owners of Union Hill v. King Cnty.*, 64 Wn. App. 768, 777, 827 P.2d 1017 (1992). Here, the elements of equitable estoppel are present. Pierce County admitted that Vance never had a duty to register, before and during this litigation. *See e.g.* at CP 35: 9-10; 360-61. Vance reasonably relied on this admission in bringing the instant action. CP at 50:17-19. If Pierce County was now allowed to prosecute Vance for failing to register, he would suffer injury. Accordingly, this Court should conclude that Pierce County abandoned the charges against Vance or, alternatively, is equitably estopped from charging him in the future.

3. *Pierce County’s argument that there is no evidence of malice is not supported by the record.*

In arguing that summary judgment should be affirmed on Vance’s claim for malicious prosecution based on a lack of evidence of malice, Pierce County offers a one-sided characterization of the facts contrary to the record and standard for summary judgment. In determining whether a genuine issue of material fact exists, courts should consider “the facts and reasonable inferences from those facts in the light most favorable to the nonmoving party.” *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083, (2012). Here, Pierce County’s argument regarding malice is contrary to the record. As a point of clarification, Vance does not contend

that Prosecutor Jessica Giner acted with malice. She was able to use the information possessed by Craig Adams and Gay Lynn Wilke to promptly determine that Vance had no duty to register. *See* CP at 391-399.

Pierce County emphasizes that “Ms. Ko recited procedural details of the underlying conviction that were not part of the court documents previously provided to Pierce County.”³³ This is a red herring. Prior to receiving the “procedural details,” Ms. Giner had already concluded that Vance should not have been required to register. *See* CP at 391-97. Prior to receiving Ms. Ko’s April 13, 2012 email at 6:25 p.m., on April 13, 2012 at 3:17 p.m., Ms. Giner wrote “I don’t think that the court records support the conclusion that the victim was a minor.” CP at 397. There is no evidence in the record supporting Pierce County’s contention that Ms. Ko’s email had any influence on Ms. Giner; instead, Ms. Giner states that her agreement with Ms. Ko is based on review of the court-filed paperwork. CP at 398.

Pierce County’s assertion that “[n]either Ms. Jackson or Mr. Adams had ever been provided with the charging documents or plea paperwork” is also contradicted by the record.³⁴ Vance sent his conviction records, including his plea paperwork, to Craig Adams on October 25, 2008. CP at

³³ Brief of Resp. Pierce County at 39 (citing CP at 393). It appears that Pierce County intended to cite CP at 398 rather than 393.

³⁴ Brief of Resp. Pierce County at 39.

459-60. They were received on October 27, 2008. *See* CP at 494. Evidence of malice is reflected in the absence of probable cause and Pierce County's reckless disregard for Vance's rights.³⁵

E. Pierce County's additional arguments regarding Vance's negligence claims should also be rejected.

Washington has recognized negligent investigation claims³⁶ and Pierce County's negligence is broader than its failure to investigate. Pierce County's argument that DOC's duty supplants Pierce County's duty is neither supported by the law or the facts. Pierce County had the authority to and did unilaterally remove Vance's registration requirement. CP at 175, 185.

II. CONCLUSION

Accordingly, Vance respectfully requests that this Court reverse the trial court's decision to grant summary judgment in favor of Pierce County, WSP, and DOC.

RESPECTFULLY SUBMITTED this 19th day of February, 2015.

DAVIES PEARSON, P.C.

/s/ Trevor D. Osborne

Trevor D. Osborne, WSBA No. 42249

Benjamin T. Zielinski, WSBA No. 43670

Attorneys for the Appellant

³⁵ *See* Opening Brief of Appellant at 47-48.

³⁶ *See e.g.* Rodriguez v. Perez, 99 Wn. App. 439, 994 P.2d 874 (2000).

DAVIES PEARSON PC

February 19, 2015 - 3:34 PM

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NO. 46532-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON AT TACOMA

Pierce County Superior Court Cause No. 12-2-15285-9

VERNON PAUL VANCE,

Plaintiff/Appellant,

vs.

PIERCE COUNTY, a governmental subdivision of the State of
Washington; PIERCE COUNTY SHERIFF'S DEPARTMENT, a
subdivision of the State of Washington, et ux., et al.,

Defendants/Respondents.

**DECLARATION OF SERVICE
REGARDING
PLAINTIFF/APPELLANT'S REPLY BRIEF**

Trevor D. Osborne, WSBA #42249
Benjamin T. Zielinski, WSBA #43670
DAVIES PEARSON, P.C.
920 Fawcett Avenue
Tacoma, WA 98402
253-620-1500

DECLARATION OF SERVICE

On this date, I, Jody M. Waterman, legal assistant to Trevor D. Osborne, counsel for Appellant/Plaintiff Vernon Paul Vance, filed via JIS with the Clerk of the Washington Court of Appeals, Division II, PLAINTIFF/APPELLANT'S VERNON PAUL VANCE'S REPLY BRIEF.

I further declare that on this date I also emailed and did place in an envelope in the U.S. Mail, postage prepaid, said documents to the parties listed below as follows:

**Michelle Luna-Green
Pierce County Prosecutor / Civil
955 Tacoma Ave. South, Suite 301
Tacoma, WA 98402**

**Eric C. Miller
Assistant Attorney General
Torts Division
7141 Cleanwater Drive SW
P.O. Box 40126
Olympia, WA 98504**

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

DATED this 19th day of February, 2015.

DAVIES PEARSON, P.C.

/s/ Jody M. Waterman

Jody M. Waterman

Legal Assistant to Trevor D. Osborne

DAVIES PEARSON PC

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