

NO. 46532-9-II

**COURT OF APPEALS, DIVISION II
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

BRIEF OF RESPONDENT PIERCE COUNTY

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I. INTRODUCTION

Plaintiff Vernon Vance came to Washington State over 16 years ago under an Interstate Compact Agreement with the State of Colorado arranged through Department of Corrections (DOC). Through no fault of the State of Washington, or Pierce County, all of the conviction records sent to Washington flagged that Vance committed the crime of Kidnapping in the First Degree - of a minor. As a result under Washington law, Vance was required to register as a kidnap offender and did so for 14 years. Vance never petitioned a Superior Court for relief from the duty to register or sought any relief on the Interstate Compact Agreement or courts in Colorado. Now after spending almost a decade and a half in Washington, Vance sues the State and Pierce County, claiming that they erred in requiring him to register. Because the trial court's dismissal of all claims was valid, defendant Pierce County asks this court to affirm the dismissal.

II. STATEMENT OF THE ISSUES

- (A) Does Pierce County enjoy immunity from suit?
(Appellant's Assignment of Error No. 1)
 - 1. Does Pierce County enjoy absolute immunity where the determination of whether to have someone register as a sex/kidnap offender is quasi-judicial in nature?

2. Are all Pierce County Defendants entitled to discretionary immunity from each and every one of the plaintiff's claims, where RCW 4.24.500(7) provides that agencies and its official are "immune from civil liability" for the release of kidnap/sex offender information?
3. Is the claim of malicious prosecution subject to prosecutorial immunity barring all claims against Pierce County for the prosecution of defendant?
 - (B) Does Vance's lack of diligence in failing to file a request for any form of relief for over 10 years bar this action under the statute of limitations where Vance has failed to show that equitable tolling excuses his delay or that the continuing torts doctrine applies here? (Appellants Assignment of Error No. 2)
 - (C) Should this court dismiss the false arrest claim where plaintiff was not placed under arrest but rather summonsed into court?
 - (D) Does plaintiff's action for malicious prosecution fail where probable cause initially existed for the plaintiff's prosecution, prosecution was voluntarily dismissed, and there is no showing of malice?
 - (E) May defendant bring a separate claim of negligence for his arrest and prosecution where the law in Washington does not recognize a cause of action for negligent investigation?
 - (F) Does Pierce County owe a duty to plaintiff where plaintiff made the request to come to Washington under the Interstate Compact Agreement (ICA) and the registration was set as a term of the agreement and probation and where any terms of the ICA could only be modified by the state's compact administrator?
 - (G) Should all claims against Wilke, Shaw, and Wright be dismissed with prejudice either because of the stipulation or the court's ruling?

III. STATEMENT OF THE CASE

A. FACTS

1. Interstate Compact Agreement & Kidnapping Offense

In late 1997, plaintiff Vernon Vance sought a transfer to Washington State from the Colorado State Department of Corrections (DOC). CP 135. According to the pre-transfer investigation request sent by the State of Colorado, Vance was convicted of Agg. Robbery, 2nd Degree Burglary and 1st Degree Kidnapping (Age 15 - Bank Hostage). CP 142. In the presentence report provided to DOC, the plaintiff took 15 year old Larry from his home and "took him into the garage, and told him to get in the trunk of [James Sower's] car." CP 159. Plaintiff Vance admitted in a statement made in the presentence report that he entered the Sower residence, made the family lay on the floor, and then took the "family car and son for safe passage to Ignacio." CP 160. Plaintiff admitted in his deposition to making that statement. CP 195-96, 259.

William Frank (Frank) was a (DOC) Community Corrections Officer (CCO) and was the CCO assigned to investigate an Interstate Transfer request submitted by the Colorado State Department of Corrections on behalf of Offender Vernon Vance. CP 134-135. On February 26, 1998, Frank met with Vance as part of the intake process. *Id.* As part of intake Frank reviewed all 19 documents Colorado provided as

part of Vance's transfer. CP 138-167. Included in the file were the following documents:

a. *Judgment of Conviction Sentence: Order to the Sheriff* regarding the crimes of Aggravated Robbery, Second Degree Burglary, and First Degree Kidnapping.

b. Colorado Interstate Compact Administration Pre-Transfer Investigation Request, dated 10/30/97, listing "Agg Robbery," "2nd Degree Burglary," and "1st Degree Kidnapping."

c. Presentence Report Colorado District Court Nos. 87cr185/89cr37, indicated that offender Vernon pleaded guilty to Aggravated Robbery and 2nd Degree Burglary on 3/29/89.

d. Pre-Release Plan listed Vernon's crimes as "2nd Degree B," "1st Deg. Kidn.," and Aggravated Robbery: The offense summary in this document read: "entered the home of the Pine Valley Bank President and **took his 15 year old son hostage**"

e. *Diagnostic Summary*, dated 6/13/89 under Criminal History Summary states "Vernon...ordered the victim, his wife and son to lay on the floor...he then took **15 year old victim, as a hostage**, put him in the trunk of the family car...."

f. *Presentence Report*, Colorado District Court No. 88cr58, indicated that "Vance **kidnapping a 15 year old boy**, put him in the trunk of a car and drove him to a remote area and abandoned the car."

g. Also included in the file were two victim's statements from the mother and the **15 year old son**.

CP 138-167, *emphasis added*.

Based on these documents provided by the transferring state and the notations that the victim of the kidnapping offense was 15 years old,

CCO Frank advised Vance that he had a duty to register.¹ CP 136-137. That same day, the plaintiff signed an interstate compact agreement (ICA) with the Washington DOC and included in that was a notification of registration requirements. CP 136-37, 168-169. The plaintiff admits that he never challenged the conditions of the ICA, and admits that he never moved a Washington court to lift his registration requirement. CP 293, 313.

The plaintiff agreed with Frank about the registration requirement. CP 308. Frank had previously noted, in December of 1997, that the plaintiff would "HAVE TO REGISTER WITH THE P.C. SHERIFF'S OFFICE WHEN HE ARRIVES DUE TO KIDNAPPING CHARGE AND THE AGE OF HIS VICTIM." CP 359 (emphasis added).

As required by the ICA, the plaintiff visited the Pierce County Sherriff's Department (PCSD), where he signed a Washington State Patrol kidnapping-offender registration form. CP 219. The form advised him that he could petition the Thurston County Superior Court to seek relief from the duty to register. *Id.*

The plaintiff claims he has felt threatened with incarceration "from

¹ Offenders convicted of kidnapping where the victim was a minor and not the child of the offender must register in Washington. *See* Laws of 1997, ch. 113, §3, RCW 9A.44.130 (current version); *See Also* Laws of 1997, ch. 113, §3 (requiring registration requirement of an offender paroled from another state who had a qualifying kidnapping offense); RCW 9A.44.130(3)(a)(v)(current version).

the moment [plaintiff] got to Washington." CP 307.

In May of 2008, Vance signed a document acknowledging a change in the registration requirements and that if he wanted to seek relief he would need to petition the superior court in Thurston County. CP 215, 243.

On May 14, 2008, the plaintiff went to the PCSD to tell them about his change of address. He claims that when he contested his registration requirement, Andrea Shaw, an office assistant for PCSD, "called two other uniformed officers to assist her with the registration process," and he allegedly noticed officers surrounding him. CP 310, 356-357. Ms. Shaw insisted that if "[plaintiff] failed to register, he would be arrested and prosecuted for failing to register." CP 357. He signed another registration form that day, and claims that he did so "under duress." CP 356-357.

2. Registration Investigation

On October 23, 2008, plaintiff "found the public notice of his status as a registered sex offender on the internet." CP 48, CP 347-348. Two days after the plaintiff discovered that he was a documented kidnap offender on the internet, he sent a letter to Craig Adams, a deputy prosecuting attorney and legal advisor to the PCSD. CP 244. The plaintiff claimed that this letter was "the final attempt seeking Administrative relief to have [plaintiff] removed from any List,

Categorization, or Classification as a registered sex offender/kidnapping (RSO)." *Id.*

Based on Vance's inquiry, on November 17, 2008, Craig Adams informed La Plata County District Attorney that Pierce County had "been advised on an Interstate compact that Vance must register due to the kidnapping charge and the age of his victim," and requested further information. CP 407-408, 415-416. In December of 2008, Mr. Adams received documents from the La Plata County District Attorney's office: (1) Copy of Defendant's Affidavit for Arrest Warrant, (2) Copy of Defendant's Presentence Report, and (3) Copy of Defendant's Judgment and Sentence. CP 407-408, 414. From these documents, it appeared that Mr. Vance had in fact been convicted of kidnapping in the first degree, and that the victim was 15 year old Larry Sower. CP 407-408. Nearly one year passed; Mr. Adams sent a letter to La Plata County District Attorney, reiterating his belief that the plaintiff had kidnapped Larry Sower. CP 409. He expressed concern, however, that the Presentence Report suggested that the plaintiff had actually seized James Sower. *Id.* He still indicated to this attorney that from his review of current documents it appeared "that the victim was the 15 year old son, Larry Sower." *Id.* Having never heard from La Plata County D.A. again, Mr. Adams assumed that the victim was in fact 15 years of age, as indicated on the

presentence report, and that registration was required in Washington. CP 408, ¶5.

Gay Lynn Jackson, PCSD Sex Offender Registration Specialist, also made inquiry into whether Vance had a duty to register and contacted DOC to investigate further. CP 373-74. She was provided with a Judgment and Sentence Case No. 88CR 58, for First Degree Kidnapping, a presentence report indicating the age of the victim as 15, and a community release form stating age of victim 15. CP 439-440. There were no charging documents or plea paperwork provided. *Id.*

On December 19, 2011, Deputy Daniel Hudson reported that the plaintiff again failed to verify his address. CP 402-406. Deputy Hudson's indicated that the PCSD contacted the above address "numerous times with negative results." *Id.*

3. Prosecution and dismissal

Jessica Giner was a deputy prosecuting attorney for Pierce County. CP 294, 373-74. On February 7, 2012, she certified that somewhere between December 19, 2011, and February 2, 2012, the plaintiff committed the crime of failing to register as a sex offender. CP 364-68. The charges were based on the investigation of the Pierce County Sheriff's Department. *Id.*, *See Also* CP 402-406. On February 21, 2012, the prosecutor summonsed the plaintiff to court; he went there voluntarily,

and was arraigned for failing to register. CP 315-316.

Vance's counsel, Ms. Ko, began exchanging emails with the prosecutor, Ms. Giner, in order to determine whether the registration requirement was in error based on the Colorado documents and their discrepancies. CP 398-400. After thoroughly examining the documents and consulting with others, Ms. Giner contacted Ms. Ko, and agreed with her that the victim of the kidnapping—as the plaintiff pled—appeared to be James Sower and not the minor son, Larry Sower. CP 391. (Dec. MLG, Ex. 7, email dated 4/18/12.) Ms. Ko thanked Ms. Giner for her thoughtful review. CP 399-400.

Two weeks after Ms. Giner made the proper inquiries, she informed Ms. Jackson of her concerns, who then notated that the plaintiff was registered in error on the appropriate form. CP 175, 184-188. According to this form, "the kidnapping of a minor charge was dismissed and the kidnapping conviction was an adult victim." CP 185. On April 24, 2012, the charges against the plaintiff were voluntarily dismissed without prejudice. CP 360-362.

B. PROCEDURE

Defendant Pierce County and the individually named County defendants filed a motion for summary judgment arguing that (1) dismissal of all claims (negligence, outrage, and defamation/false light)

where the actions are barred by the statute of limitations; (2) Pierce County enjoys immunity on all claims where all actions taken were quasi-judicial in nature or prosecutorial immunity or discretionary immunity; (3) there was no claim for false arrest based on the finding of probable cause; (4) that plaintiff's negligence claims were subsumed by the false arrest/malicious prosecution claim; and (5) that Pierce County did not owe Vance a duty and thus there was no claim for negligence where plaintiff was brought here under an Interstate Compact Agreement. CP 266-291, 683-610. The court granted summary judgment in its entirety, based on the issues and arguments as raised in the briefs. CP 628-630, VRP 26.

IV. ARGUMENT

An appellate court reviews a trial court's summary judgment grant de novo, engaging in the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wash.2d 29, 34, 1 P.3d 1124 (2000). "A motion for summary judgment based on a statute of limitations should be granted only if the record demonstrates that there is no genuine issue of material fact as to when the statutory period commenced." *Zaleck v. Everett Clinic*, 60 Wash.App. 107, 110, 802 P.2d 826 (1991) (citing *Olson v. Siverling*, 52 Wash.App. 221, 224, 758 P.2d 991 (1988)). When considering a summary judgment motion, the court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Lybbert*,

141 Wash.2d at 34, 1 P.3d 1124. Further, "[q]uestions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion." *Swinehart v. City of Spokane*, 145 Wash.App. 836, 844, 187 P.3d 345 (2008) (citing *Alexander v. County of Walla Walla*, 84 Wash.App. 687, 692, 929 P.2d 1182 (1997)). A court may affirm a superior court's ruling on any grounds the record adequately supports. *LaMon v. Butler*, 112 Wn.2d 193, 200–01, 770 P.2d 1027, cert. denied, 493 U.S. 814, 110 S.Ct. 61, 107 L.Ed.2d 29 (1989).

(A) THE TRIAL COURT PROPERLY RULED THAT ALL FORMS OF IMMUNITY RAISED REQUIRE DISMISSAL

There are three² types of immunity in this case and the trial court properly granted dismissal on all three grounds: (1) quasi-judicial (2) statutory, (3) prosecutorial. Each is addressed in turn below.

1. Quasi Judicial Immunity

Quasi-judicial immunity attaches to persons or entities that perform functions so comparable to those performed by judges that they ought to share the judge's absolute immunity while carrying out those functions. *Lutheran Day Care v. Snohomish County*, 119 Wash.2d 91, 99, 829 P.2d 746 (1992) (citing *Butz v. Economou*, 438 U.S. 478, 512–14, 98

² Originally there was a claim of qualified immunity raised, but given that all individual defendants have been dismissed from this action that claim is moot.

S.Ct. 2894, 57 L.Ed.2d 895 (1978)), *cert. denied*, 506 U.S. 1079 (1993). Quasi-judicial immunity is absolute immunity. *Lutheran*, 119 Wash.2d at 99, 829 P.2d 746 (citing *Babcock v. State*, 116 Wash.2d 596, 606–08, 809 P.2d 143 (1991)).

A government employee is entitled to immunity where:

(1) The employee must perform a function which is analogous to that performed by persons entitled to absolute immunity, such as judges or legislators.

(2) The policy reasons which justify absolute immunity for the judge or legislator also justify absolute immunity for that official, and

(3) Sufficient safeguards exist to mitigate the harshness to the claimant of an absolute immunity rule. *See Lutheran*, 119 Wash.2d at 106, 829 P.2d 746 (citing *Butz*, 438 U.S. at 512–13).

Here, the function of both the State and Pierce County fell within the precise definition of a quasi-judicial act. First, the duty is one routinely performed by a judge. *See* RCW 10.01.200³; *See Also* CrR 4.2 (outlines form of pleas, including sex offense pleas to include the registration requirement). Second, policy reasons surrounding why judicial determinations entered at sentencing should be shrouded in immunity are well established, and the same applies here where RCW

³ RCW 10.01.200. Registration of sex offenders and kidnapping offenders-- Notice to defendants.

The court shall provide written notification to any defendant charged with a sex offense or kidnapping offense of the registration requirements of RCW 9A.44.130. Such notice shall be included on any guilty plea forms and judgment and sentence forms provided to the defendant.

9A.44.141 (4) provides for immunity of decisions made by an public official for removal from the registry under RCW 9A.44.140. Finally, sufficient safeguards exist to mitigate the harshness of immunity because the plaintiff could have sought relief⁴ in the form of a petition under RCW 9A.44.141,⁵ pursuant to RCW 7.16.040,⁶ a declaratory action pursuant to

⁴ It is important to note that plaintiff has never put forth a claim of violation of due process.

⁵ RCW 9A.44.141:
(3)(a) A person who is listed in the central registry as the result of a federal or out-of-state conviction may request the county sheriff to investigate whether the person should be removed from the registry if:
(i) A court in the person's state of conviction has made an individualized determination that the person should not be required to register; and
(ii) The person provides proof of relief from registration to the county sheriff.

(4) An appointed or elected public official, public employee, or public agency as defined in RCW 4.24.470, or units of local government and its employees, as provided in RCW 36.28A.010, **are immune from civil liability** for damages for removing or requesting the removal of a person from the central registry of sex offenders and kidnapping offenders or the failure to remove or request removal of a person within the time frames provided in RCW 9A.44.140 (emphasis added).

RCW 9A.44.140(4) provides: " For a person required to register for a federal or out-of state conviction, the duty to register shall continue indefinitely."

Former RCW 9A.44.140(3)(a) *effective until June 10, 2010*, provided in pertinent part:

(3)(a) Except as provided in (b) of this subsection, any person having a duty to register under RCW 9A.44.130 may petition the superior court to be relieved of that duty, if the person has spent ten consecutive years in the community without being convicted of any new offenses. The petition shall be made to the court in which the petitioner was convicted of the offense that subjects him or her to the duty to register, or, in the case of convictions in other states, a foreign country, or a federal or military court, to the court in Thurston County. . . .)

⁶ RCW 7.16.040 provides:
A writ of review shall be granted by any court, except a municipal or district

RCW 7.24.020,⁷ or by contacting the Interstate Compact Administrator (See *In re Wandell v. State of Washington*, 175 Wn.App. 447, 451, 311 P.3d 28 (2013)(quoting ICAOS Rule 2.101(c), found at <http://www.interstatecompact.org>, effective August 1, 2004).

For example, in *In re Detention of Enright*, 31 Wn.App. 706, 128 P.3d 1266 (2006), the court analyzed whether a sexually violent predator could raise a determination of the offender's risk level classification in a sexual violent predator hearing. In ruling that such a hearing was not the proper forum, the court determined that because the act of determination a risk level classification by either probation or the county sheriff involved was quasi judicial in nature, the determination could be reviewed under RCW 7.16.040. *Enright*, at 716.

court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

⁷ RCW 7.24.20 provides:

A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

See Also, Dubois v. Abrahamson, 214 P.3d 586 (Colo. App. 2009)(Parolee who successfully completed a deferred judgment and sentence for an earlier sex offense brought declaratory judgment action challenging requirement that he register as a sex offender pursuant to the Colorado Sex Offender Registration Act); *People v. Sheth*, 318 P.3d 533, reh'g denied (Apr. 25, 2013), (Petitioner filed an action for a declaratory judgment that his duties to register as a sex offender ended upon the termination of his probation for criminal attempt to commit Internet sexual exploitation of a child).

Like *Enright*, the probation officer and county sheriff both worked as quasi judicial officers in making a determination of whether plaintiff had a duty to register. The registration act, its classification system, and relief requirement is a complicated act, often subject to judicial review. Like judges, probation officers and county sheriffs who have to apply this act are entitled to immunity. Because of this, they enjoy absolute immunity. To the extent plaintiff disagreed with that determination, he could seek review in the courts of that quasi-judicial determination. He chose not to seek that relief.

Washington Court's have held that whether or not an out of state conviction triggers a registration requirement in Washington is subject to a comparability analysis – a very difficult analysis often subject to review. *State v. Morley*, 134 Wn.2d 588, 605–06, 952 P.2d 167 (1998). There are also many instances in which a trial court's determination of sex offender registration requirements or convictions were reversed in appellate courts. *State v. Howe*, 151 Wash. App. 338, 345, 212 P.3d 565, 568 (2009)(reversing trial court's entry of conviction for failure to register as a sex offender where defendant prevailed on the argument that his 2002 California conviction for violation of lewd acts upon a child is not legally comparable to second degree child molestation under Washington law); *State v. Werneth*, 147 Wash. App. 549, 555, 197 P.3d 1195, 1198

(2008)(reversing a failure to register as a sex offender conviction where Georgia conviction for child molestation was not comparable to Washington's crime of attempted second degree child molestation); *See Also, Oostr v. Holstine*, 86 Wash. App. 536, 546, 937 P.2d 195, 200 (1997)(reversing trial court's order requiring civil defendant to register as a sex offender where there has been no adult criminal conviction or a juvenile adjudication for a sex offense); *State v. S.M.H.*, 76 Wash. App. 550, 559-60, 887 P.2d 903, 909 (1995)(granting personal restraint petition where trial court erred in requiring juvenile convicted of second-degree burglary with a finding of sexual motivation since this offense was not a sex offense).

These cases illustrate the often convoluted and technical analysis a court, prosecutor, and in this instance, DOC and the sheriff's department is called upon to perform. For example in *Howe, supra*, where the court reversed the failure to register conviction based on a failed comparability analysis one of the appellate judges noted that it was the trial court that made the determination of the comparability of the California convictions rather than the jury. *Howe*, 151 Wash. App. 338, at 352, Quinn Britnall, dissenting). If plaintiff's argument is followed to its logical extension, the defendant in *Howe* should have redress for all the allegations contained in this complaint against the trial judge. However, it is axiomatic that judges

enjoy absolute immunity for determinations like this – and this is exactly why what was employed here was a quasi-judicial function and should be subject to absolute immunity. It does not mean the person is without redress, as outlined *supra*, but simply means that any agency who is misguided in their analysis, should not be subject to liability.

In light of absolute immunity, all of plaintiff's tort claims must fall away where all involved the same analysis and acts a judicial officer must undertake.

Plaintiff's reliance on Taggart in support of showing that the official must also engage in holding "hearings" and making "binding determinations" before this form of immunity may be applied is misplaced. Opening Brief of Appellant at 16-17(citing *Taggart v. State*, 118 Wash.2d 195, 822 P.2d 243 (1992)). *Lutheran*, *supra*, was issued after Taggart. In *Lutheran* the court issued the following warning about the application of Taggart: [h]owever, Taggart . . . should not be read as implying that in the absence of any form of procedural safeguards, other factors would be sufficient to justify quasi-judicial immunity." *Lutheran* 119 Wn.2d at 107. Because at all times the defendants were put in the position of performing judicial acts, e.g. by analyzing facts and law to make a determination regarding registration, all parties are entitled to quasi-judicial immunity for all acts. Further, the policy for providing

immunity is clear, lawmakers do not want law enforcement officers and probation officers tasked with the duty of determining who is required to register and who is not required to register, to become paralyzed with fear of civil liability.

2. Statutory immunity immunizes all publication actions

Here, the legislature erred on the side of the public having the right to know who may be required to register as a kidnap offender, even where that information was published in error. Therefore, any alleged error in publishing kidnap offender registration information regarding Mr. Vance is immune from suit.

RCW 4.24.550 authorizes local and State agencies to disseminate information to the public regarding sex and kidnap offenders. The statute furthers the purpose of providing the public with information by building in immunity for release of information. Under RCW 4.24.550 (7), all Pierce County defendants enjoy immunity from civil liability for any release or publication of information regarding registration:

An appointed or elected public official, public employee, or public agency as defined in RCW 4.24.470,⁸ or units of local government and its

⁸ See 4.24.470 (2)(a): "Public agency" means "any state agency, board, commission, department, institution of higher education, school district, political subdivision, or unit of local government of this state including but not limited to municipal corporations, quasi-municipal corporations, special purpose districts, and local service districts."

employees, as provided in RCW 36.28A.010, are **immune** from civil liability for damages for any discretionary risk level classification decisions or **release of relevant and necessary information**, unless it is shown that the official, employee, or agency acted with gross negligence or in bad faith.

RCW 4.24.550 (7). (emphasis added)

Vance asserts that the trial court erred in granting summary judgment because there is an issue of material fact regarding whether the officials acted with gross negligence or bad faith. Opening Brief of Appellant at 25. However, there is nothing in the record to support this.

"Gross negligence is failure to exercise slight care." *Kelley v. State*, 104 Wash. App. 328, 333, 17 P.3d 1189, 1192 (2000), *rev. granted*, 144 Wn.2d 1021 (2001) (*citing Nist v. Tudor*, 67 Wash.2d 322, 330, 407 P.2d 798 (1965)). But this "means not the total absence of care but care substantially or appreciably less than the quantum of care inhering in ordinary negligence." *Nist*, 67 Wash.2d at 331, 407 P.2d 798. It is "negligence substantially and appreciably greater than ordinary negligence." *Nist*, 67 Wash.2d at 331, 407 P.2d 798. Ordinary negligence is "the act or omission which a person of ordinary prudence would do or fail to do under like circumstances or conditions...." *Nist*, 67 Wash.2d at 331, 407 P.2d 798. There is no issue of gross negligence without "substantial evidence of serious negligence." *Nist*, 67 Wash.2d at 332, 407

P.2d 798.

In *Kelly v. State, supra*, the appellate court affirmed the grant of summary judgment despite the argument by appellant that DOC failed to establish the absence of gross negligence under RCW 72.09.320.⁹ In *Kelly* a woman was assaulted by a parolee and brought an action for negligent supervision. The court found that while the community corrections officer overseeing Ingalls "knew Ingalls had been drinking, had possibly violated his curfew, and had committed a crime, those lapses in supervision were not substantial evidence of serious negligence and fell short of showing gross negligence." *Whitehall v. King Cnty.*, 140 Wash. App. 761, 768, 167 P.3d 1184, 1187 (2007), *citing Kelly*, 104 Wn.app. at 336. The court held this in spite of the fact that the "the officer had missed 14 out of at least 27 required field contacts with Ingalls in eight months of supervision." *Id.*, *citing Kelly*, 104 Wn.app. at 336. While these deficiencies may constitute "negligence," the court concluded that the acts fell short of showing gross negligence. *Id.*

Similarly here, although it may be argued that the Sheriff's

⁹ The state of Washington, the department [of corrections] and its employees [and] community corrections officers ... are not liable for civil damages resulting from any act or omission in the rendering of community placement activities unless the act or omission constitutes **gross negligence**.

RCW 72.09.320, *emphasis added*.

Department could have analyzed the material differently, there is nothing that constitutes a showing of gross negligence – a much higher standard than simple negligence. Instead, the record shows that officials exercised due diligence in attempting to clarify whether the conviction was based on the kidnapping of a juvenile. *See* CP 408 (declaration of Craig Adams outlining attempts with La Plata County to reconcile the discrepancies in the records transmitted to the State for supervision). This underscores exactly why this immunity provision exists. It is difficult for agencies to manage sex offender registration and when and if they do error, the statute was designed to error on the side of caution. There were many indicators that Vance was required to register. This cannot constitute bad faith or gross negligence.

3. Prosecutor/Absolute Immunity

The common law provides prosecuting attorneys absolute immunity for acts done in their official capacity. *Creelman v. Svenning*, 67 Wash.2d 882, 884–85, 410 P.2d 606 (1966). This immunity is not provided to protect the individual official "but for the protection of the public and to insure active and independent action of the officers charged with the prosecution of crime, for the protection of life and property." *Id.* (quoting *Anderson v. Manley*, 181 Wash. 327, 331, 43 P.2d 39 (1935)). Our Supreme Court has held that this same public policy requires that this

immunity be extended to the State and the entity employing the prosecutor. *Id. at 885.*

Thus, plaintiff's claims for "malicious prosecution," are subject to absolute immunity and cannot survive against either the individual prosecutor or the entity itself.

Here, plaintiff attempts to recast the malicious prosecution claim as a negligent investigation claim and calls out the actions of former Sheriff's advisor Craig Adams (see argument *infra* regarding why this claims also fails). See Opening Brief of Appellant at 48-49; CP 597 (Plaintiff's Response to Pierce County and Associated Defendants' Motion for Summary Judgment, pg. 24). By calling out the Sheriff's advisor, plaintiff then bootstraps the argument that sheriff advisors do not enjoy absolute immunity. See Opening Brief of Appellant at 4 (citing *Burns v. Reed*, 500 U.S. 478, 492-96, 111 S.Ct. 1934, 114 L.2d.2d 547 (1991)). While it is true that a prosecutor acting in the capacity as a legal advisor does not enjoy absolute immunity, the focus of the acts in "malicious prosecution" is on that of a prosecutor in their role as a judicial officer. See *Bender v. City of Seattle*, 99 Wn.2d 582, 593, 664 P.2d 492 (1983)(outlining the elements of malicious prosecution). Here, it was alleged the "Pierce County Prosecuting Attorney's Office charged Mr. Vance with failing to register as a sex offender." CP 70-71. Prosecutor Giner brought the

charges (CP 364-67) and ultimately dismissed those charges (CP 360-61). These actions are subject to absolute immunity and the dismissal of the malicious prosecution claim should be upheld. Also, Adams' actions are also subject to quasi-judicial immunity as outlined *supra*.

B. THE TRIAL COURT PROPERLY DISMISSED THE MAJORITY PLAINTIFF'S TORT CLAIMS WHERE THE ACTION WAS FILED WELL OUTSIDE THE STATUTE OF LIMITATIONS PERIOD AND THERE IS NO EQUITABLE REASON TO TOLL THE PERIOD

Summary of claims at issue for Statute of Limitations

It appears from Opening Brief of Appellant that plaintiff rightly concedes that he filed this matter outside the statute of limitations – with the exception of his false arrest and malicious prosecution claims. Opening Brief of Appellant at 39. However, appellant argues that his actions, many of which are over a decade and a half old, should be considered because of two doctrines: (1) equitable estoppel, and (2) continuing torts. Because neither theory excuses his delay, the trial court properly dismissed this matter as being outside the statute of limitations.

Pierce County concedes that the with respect to the defamation and false light claim, those matters cannot be dismissed based on statute of limitations arguments because there is a dispute of material fact, but were properly dismissed on immunity grounds. Further, Pierce County concedes that that the plaintiff's claims for false arrest and malicious

prosecution are not barred by the statute of limitations, but were rightly dismissed on other grounds, including immunity.¹⁰ However, as to the rest of the plaintiff's claims, each of which accrued long before 2009, there is no genuine issue of material fact as to when the statutory period commenced.

General Statute of Limitations Law

The purpose of a statute of limitations is to ensure finality. *See Atchison v. Great Western Malting CO.*, 161 Wn. 2d 372, 382 (2007). "Statutes of limitations are designed to shield defendants and the judicial system from stale claims." *Hudson v. Condon*, 101 Wash. App. 866, 872, 6 P.3d 615, 619 (2000), (citing *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wash.2d 805, 813, 818 P.2d 1362 (1991)). "Evidence may be lost and witnesses' memories may fade if plaintiffs sleep too long on their rights." *Id.*

Under RCW 4.16.005, a civil cause of action commences "after the cause of action has accrued" and untimely actions must be dismissed. An action accrues "when a party has a right to apply to a court for relief." *Gunnier v. Yakima Health Center, Inc., P.S.*, 124 Wn.2d 854, 859 (1998), citing *Malnary v. Carlson*, 128, Wn.2d 521, 529 (1996).

¹⁰ *See Cabrera v. City of Huntington Park*, 159 F.3d 374 (9th Cir. 1998) (a cause of action for false arrest accrues at the time of the plaintiff's arrest).

A statute of limitations in a tort action generally accrues at the time the injury-producing act or omission occurs. *Matter of Estates of Hibbard*, 118 Wn.2d 737 (1992). Many causes of action—including those for negligence—accrue when the plaintiff knows or should know he has been injured; this is known as the "discovery rule." *See Gevaart v. Metco Const., Inc.*, 111 Wn.2d 499, 501 (1988). Under this rule, a claim accrues when the plaintiff has a "factual basis" to bring such a claim. *See Id.* at 502; *Allen v. State*, 118 Wn.2d 753, 757-58 (1992) (finding that a cause of action accrues when plaintiff knows or should know "the essential elements of a cause of action: duty, breach, causation and damages.") "The action accrues when the plaintiff knows or should know the relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action." *Allen v. State*, 118 Wn.2d at 758, 826. If the rule were otherwise, "the discovery rule would postpone accrual in every case until the plaintiff consults an attorney." *Id.*

A three-year statute of limitations applies to "any other injury to the person or rights of another." RCW 4.16.080 (2). Additionally, a claim for outrage must accrue within three years. *Cox v. Oasis Physical Therapy, PLLC*, 153 Wn.App. 176, 192 (2009). Consequently, a three-year statute

of limitations applies to all of the plaintiff's negligence claims,¹¹ and his claim of outrage: These claims must have accrued **between June 8, 2009,¹² and June 8, 2012, to withstand the statute of limitations – a showing plaintiff cannot make.**

Essential to every negligence action is the showing of an injury. *See Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 474 (1998). Plaintiff's claim for negligence/gross negligence/negligent infliction of emotional distress and outrage, if these claims ever arose,¹³ materialized long before he filed the instant lawsuit.

Timeframe of Facts Giving Rise to Claims

The plaintiff filed a claim for damages in 2008: there is no issue of material fact as to when he perceived a factual basis for his injuries. CP 195, 213, 225-228 - Vance Dep., Ex. 7 (Claim for Damages dated 11/13/08). First, he contested the terms of his registration with the PCSD in 1998 when he signed the first registration form. CP 68, ¶3.5. Second, he

¹¹ *See Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 474 (1998) (reiterating that "in order to prove actionable negligence, a plaintiff must establish the existence of a duty, a breach thereof, a resulting injury, and proximate causation between the breach and the resulting injury.")

¹² See CR 3(a): "Except as provided in rule 4.1, a civil action is commenced by service of a copy of a summons together with a copy of a complaint, as provided in rule 4 or by filing a complaint."

¹³ *See Youngblood v. Schireman*, 53 Wn.App. 95, 109 (1988) (reasoning that gross negligence "is negligence substantially and appreciably greater than ordinary negligence.")

created a timeline of the events concerning his registration in as early as 2006. CP 461, 306-307, 498-500. Third, in 2008, he allegedly "under duress" signed another registration form, and voiced his displeasure with the officers. CP 293, 356-357 (Answer to Interrogatory No. 20). Finally, the plaintiff alleged—in 2008—that "only recent events" brought his claim to light. CP 226-227 (Vance Dep., Ex. 7 - Claim for Damages dated 11/13/08). Because the injury-producing acts may have occurred over 15 years ago, and the plaintiff has allegedly contested such acts for at least a decade, his negligence action is untimely under RCW 4.16.080 (2). For these same reasons the claims for negligent infliction of emotional distress and outrage are also filed outside the limitation period.

1. Equitable Estoppel

Where the defendant was aware of all facts to bring forward his claim for over ten years and even took the steps to initiate a lawsuit by filing a torts claim, the statute of limitations has expired and dismissal was appropriate.

"Equitable estoppel is not favored." *Peterson v. Groves*, 111 Wn. App. 306, 310, 44 P.3d 894 (2002). It is only appropriate when a defendant has "fraudulently or inequitably invited a plaintiff to delay commencing his lawsuit until the applicable statute of limitations has expired." *Id.* The party asserting that equitable tolling should apply bears

the burden of proof. See *Benyaminov v. City of Bellevue*, 144 Wash.App. 755, 767, 183 P.3d 1127 (2008), review denied, 165 Wash.2d 1020, 203 P.3d 378 (2009). "[A] plaintiff must demonstrate that he or she could not by the exercise of reasonable diligence have discovered essential information bearing on the claim," in order to prove equitable tolling. *Gunnier v. Yakima Heart Ctr., Inc., P.S.*, 134 Wash. 2d 854, 864-65, 953 P.2d 1162, 1168 (1998)(E.g., *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir.1990); *Supermail Cargo, Inc., v. United States*, 68 F.3d 1204, 1207 (9th Cir.1995)(holding that dismissal of a medical malpractice action for violation was appropriate where the plaintiff discovered her cause of action in 1991, but did not file suit until more than a year later, thus showing she lacked diligence in pursuing her claim).

There is nothing in the record to support that Pierce County gave Mr. Vance false assurances. Instead, defendants guided him to seek relief in Thurston County. CP 215, CP 243. The fact that plaintiff was warned that failure to comply with DOC's directive under the Interstate Compact to register would result in incarceration was simply a statement of fact and did nothing to prevent Vance, or offer false assurances, that he could not pursue other forms of relief – including filing of a lawsuit.

Undermining his argument even more is the fact that Vance filed a tort claims form, pursuant to RCW 4.92.100, the precursor to a civil

lawsuit against the County all the way back in 2008. CP 195, 225-228. In the Tort Claim he outlines specific dates which he alleges resulted in damages and alleged that:

Mr. Vance has adamantly and diligently contested being listed, classified, and or categorized as being a Registered Sex Offender/Kidnapping (RSO). Only recent events have brought this very serious and dangerous issue to light. Claims to be raised by Mr. Vance include but are not limited to: Defamation/libel; 4th Amendment-right to privacy; 5th Amendment due process double jeopardy; 9th Amendment-cruel and unusual punishment; and the 14th Amendment due process-equal protection.

CP 226-227. This shows that plaintiff was well aware of both the facts and law giving rise to his claims and yet he chose to sit on these claims. This flies directly in the face of the rationale behind equitable estoppel.

There is nothing in the record to suggest that either defendant fraudulently or otherwise prevented him from filing a lawsuit back in 2008 or seeking other remedies. Even plaintiff proffers a letter from another attorney directing him to seek removal from the registration requirement in another court - in this instance – Colorado CP 224. (Dec. Vance, ¶15, Ex. 5 - letter from Amy Hansen). However, there is no evidence in the record that he made any attempts to seek relief in Colorado or Washington courts in any form. *See* CP 313-14 (Deposition testimony of Vernon Vance admitting that he never challenged the conditions of the interstate compact agreement, motioned a Washington court to lift the registration

requirement, or request that a court in Colorado modify the sentence.

Plaintiff also urges that there is no "prejudice" to defendants. First, it is always presumed that there is prejudice in having to defend stale claims. This is the reason for the statute of limitations. In this case, asking witnesses to remember and defend allegations which go back over a decade and a half, potentially contacting victims having long ago moved on, and the fact that by plaintiff sitting on his claims potentially led to further injury, all points to the prejudice in allowing this action to go forward.

Plaintiff asserts that under RCW 9A.44.141(1) Pierce County had a duty to investigate whether a person's duty to register had ended and thus this further establishes that false assurances and incorrect representations were made. Opening Brief of Appellant at 35. However, this argument throws plaintiff right into another form of immunity for Pierce County and does not support his claim. See RCW 9A.44.141 (A public employee or agency are immune from civil liability for damages for removing or requesting the removal of a person from the central registry of sex offenders and kidnapping offenders **or the failure to removal or request removal of a person** within the time frames provided in RCW 9A.44.140), *emphasis added*.

Because the doctrine of equitable tolling is to be sparingly applied and plaintiff has failed to meet his burden of showing that he was given false assurances, this tolling should be denied. Plaintiff's reliance on *Thompson v. Wilson*, is misplaced. 142 Wn.App. 803, 814, 175 P.3d 1149 (2008). In *Wilson*, the coroner had a statutory duty to meet with plaintiff, the coroner blew the plaintiff off, and this meeting was the very act that triggered the lawsuit for failure to regarding the accuracy of the autopsy determinations. If plaintiff is asserting that RCW 9A.44.141 is a similar statutory duty to meet or investigate, again – this act gives immunity. Also under the tort claims act there is no requirement for the entity to respond or meet and once the 60 days expires a tort action may be filed. Similarly, defendant's reliance on *Littlerfair*, is misplaced. 112 Wn.App. 749, 51 P.3d 116 (2002). *Littlerfair*, analyzed equitable tolling in a collateral attack of a criminal conviction where his own attorney and the court did not give him constitutionally protected notice regarding the timeframe in which to collaterally attack a conviction. There is no constitutional right to notice of when to file a civil claim as alleged here.

2. Continuing torts doctrine does not apply

While Washington has applied the continuing torts doctrine, it has done so in extremely limited circumstances, where the complained of action is abatable. *See Island Lime Co. v. Seattle*, 122 Wash. 632, 211 P.

285 (1922) (nuisance); *Doran v. City of Seattle*, 24 Wash. 182, 183, 64 P. 230 (1901) (negligence); *Fradkin v. Northshore Util. Dist.*, 96 Wash.App. 118, 977 P.2d 1265 (1999) (trespass). "When a tort is continuing, the statute of limitations runs from the date each successive cause of action accrues as manifested by actual and substantial damages." *Pacific Sound Resources v. Burlington Northern Santa Fe Railway*, 130 Wn.App. 926, 941, 125 P.3d 981 (2005), citations omitted. "A tort is continuing if the intrusive condition is reasonably abatable and not permanent. *Id.* The tort continues until the intrusive substance is removed." *Id.*, citing *Bradley v. Am. Smelting & Refining Co.*, 104 Wash.2d 677, 693, 709 P.2d 782 (1985). However, Washington courts have declined to extend the continuing torts doctrine to negligence claims. *Cox v. Oasis Physical Therapy, PLLC*, 153 Wn.App. 176, 192 (2009) citing *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

Plaintiff cites *Doran v. City of Seattle*, for the proposition that negligence claims may be subject to the continuing torts doctrine. 24 Wash. 182, 183, 64 P.230 (1901). However, *Doran* – a case issued in 1901 – does not explicitly hold that. The decision is fairly dense to read, but appears to stand for the proposition that where a negligence action involves real property and the negligence amounts to a nuisance then the plaintiff may pursue damages for the entire time the nuisance existed and

not just from the initial commencement of facts that gave rise to the nuisance. This case does not involve a traditionally abatable act such as a nuisance.

Here, the action accrued in 1998 when Mr. Vance first registered. But even assuming that this court may treat it as a continuing tort, the last action giving rise to a potential negligence regarding registration or which led to future potential defamation, was **May 14, 2008**, the date Vance last signed a registration form with Pierce County. CP 458, 483-490 (Dec. Vance, ¶16, Ex. 6). Thus, even assuming the doctrine of continuing torts applied, the last action was still taken well before the **June 8, 2009**, accrual period.

C. THERE WAS NO ARREST OF PLAINTIFF AND THE TRIAL COURT PROPERLY DISMISSED THE FALSE ARREST CLAIM

Appellant has failed to assign error to the dismissal based on the ruling that there was "no arrest," and therefore this argument is waiver on appeal. *See State v. Olson*, 126 Wash.2d 315, 321, 893 P.2d 629 (1995) (appellate court will not consider issues for which no assignment of error is made and no argument or legal citation is presented). Alternatively, because this court may affirm summary judgment on any grounds Pierce County asks that this court affirm dismissal of the false arrest claim. *See LaMon v. Butler*, 112 Wn.2d at 200–01. On review of an order for

summary judgment, a court considers those issues and evidence brought to the attention of the trial court. RAP 9.12; *Milligan v. Thompson*, 110 Wn.App. 628, 633, 42 P.3d 418 (2002).

Pierce County Sheriff's Department never placed plaintiff under arrest; instead plaintiff was summonsed into court, a finding of probable cause was made, plaintiff was booked on bond, and released. CP 292-294, CP 315-318. (MLG Dec. Ex.1, Vance Dep 9/12/13, p. 124:12; 125:1-6, 126:1-8, and 127:18-23; MLG Dec. Ex. 5).

In order to make out a prima facie case for false arrest the plaintiff must factually assert that he was placed under arrest. "The gist of an action for false arrest ... is the unlawful violation of a person's right of personal liberty or the restraint of that person without legal authority{.}" *Bender v. City of Seattle*, 99 Wn.2d 582, 591, 664 P.2d 492 (1983). Plaintiff mischaracterizes the act of taking him into custody once bail is set for a police "false arrest claim."

Plaintiff was not arrested by police; rather, he was only issued a citation. See, e.g., *Bielanski v. County of Kane*, 550 F.3d 632, 642 (7th Cir.2008) ("No court has held that a summons alone constitutes a seizure, and we conclude that a summons alone does not equal a seizure for Fourth Amendment purposes. To hold otherwise would transform every traffic ticket and jury summons into a potential Section 1983 claim."); *Martinez*

v. Carr, 479 F.3d 1292, 1299 (10th Cir.2007) ("[T]he issuance of a citation, even under threat of jail if not accepted, does not rise to the level of a Fourth Amendment seizure"); *DiBella v. Borough of Beachwood*, 407 F.3d 599, 603 (3d Cir.2005) ("[T]here could be no seizure significant enough to constitute a Fourth Amendment violation ... [when plaintiffs] were only issued a summons; they were never arrested; they never posted bail; they were free to travel; and they did not have to report to Pretrial Services."); *Britton v. Maloney*, 196 F.3d 24, 29–30 (1st Cir.1999) (issuance of a summons requiring plaintiff to appear in court is insufficient to establish a Fourth Amendment seizure), cert. denied, 530 U.S. 1204, 120 S.Ct. 2198, 147 L.Ed.2d 234 (2000). Therefore, "[n]o Fourth Amendment seizure occurred[,]" and plaintiff has not stated a viable Fourth Amendment claim for unreasonable seizure or false arrest. *Karam v. City of Burbank*, 352 F.3d 1188, 1194 (9th Cir.2003).

Further, any action by the prosecutor is a superseding intervening cause that "would limit any liability for false arrest and false imprisonment to damages accruing before criminal charges were filed by a fully informed prosecutor." *See Youker v. Douglas County*, 162 Wn.App. 448, 447. (citing *Bishop v. Miche*, 137 Wash.2d 518, 532, 973 P.2d 465 (1999) and *Tyner*, 141 Wash.2d at 86, 1 P.3d 1148; see *Townes v. City of New York*, 176 F.3d 138, 147 (2d Cir.), cert. denied, 528 U.S. 964, 120 S.Ct.

398, 145 L.Ed.2d 311 (1999), and cases cited therein). Assuming that an arrest did occur, the finding of "probable cause" insulates this action since "probable cause" establishes that the act was done with legal authority. Further, see argument *supra*, regarding quasi-judicial immunity.

D. THE TRIAL COURT PROPERLY DISMISSED THE MALICIOUS PROSECUTION CLAIM WHERE THERE WAS NO DISPUTE OF MATERIAL FACT AND PLAINTIFF FAILED TO SUPPORT EACH ELEMENT

Plaintiff failed to assign error to the ruling that plaintiff's actions for malicious prosecution failed as a matter of law and thus this ruling stands on appeal. Even if this issue was preserved on appeal, this court may affirm summary judgment on any grounds. The trial court properly dismissed where plaintiff could not meet his burden of showing (a) that the defendant continuously prosecuted plaintiff, and (b) lacked probable cause and, (c) acted with malice.

To establish a *prima facie* case for malicious prosecution, the plaintiff must show—in addition to further requirements¹⁴—that the defendant continuously and maliciously prosecuted the plaintiff, and lacked probable cause for the prosecution. *See Bender v. City of Seattle*, 99 Wn.2d 582, 583 (1983). The existence of probable cause is a complete

¹⁴ *See Rodriguez v. City of Moses Lake*, 158 Wn.App. 724, 729 (2010) (holding that the plaintiff must also show that the proceedings terminated on the merits in favor of the plaintiff).

defense to malicious prosecution. See *Rodriguez* at 729, citing *Hanson v. City of Snohomish*, 121 Wn.2d 552, 563 (2004). Probable cause must continue during the prosecution. *Rodriguez* at 729.¹⁵ Furthermore, malice does not exist unless the prosecution exhibited "bitterness, animosity or vindictiveness" towards the plaintiff. *Moore v. Smith*, 89 Wn.2d 932, 943 (1978). Because probable cause existed for the plaintiff's prosecution—which was not carried out maliciously the dismissal of the malicious prosecution claims should be affirmed.

1. Pierce County voluntarily dismissed the criminal charges against the plaintiff

The Federal Courts—much like Washington courts—require that the plaintiff demonstrate that the criminal proceedings brought against him were terminated in his favor. See *Ayala v. KC Environmental Health*, 426 F.Supp.2d 1070 (E.D. Cal. 2006). Additionally, the federal courts have held that a prosecutor's voluntary dismissal of criminal charges does not constitute a termination in favor of the plaintiff. *Id.* at 1086. Because Ms. Giner voluntarily dismissed the criminal charges against the plaintiff, he may not claim that these charges were terminated in his favor, and thus may not sustain an action for malicious prosecution. CP 360-362. Accordingly, Pierce County is entitled to judgment as a matter of law on

¹⁵ See Also *Bender* at 593 (finding that demonstrating the lack of probable cause rests on the plaintiff).

this claim for malicious prosecution where plaintiff cannot establish termination in his favor. Plaintiff tries to argue that dismissal without prejudice creates a dispute of material fact or requires a finding that the action was terminated in his favor. First plaintiff cites to no caselaw supporting this argument. Also, given that the prosecutor decided to rely on her oral assertions of Ms. Ko regarding the underlying facts of Mr. Vance's conviction so that she could immediately bring dismissal – it makes sense that she filed the matter without prejudice and defendant never made a request otherwise.

2. Pierce County never acted with malice in prosecuting the plaintiff

Because Pierce County did not act with bitterness, animosity or vindictiveness, plaintiff failed to establish another element as a matter of law and dismissal was appropriate. After he received the letter from the plaintiff, Craig Adams immediately sought further information as to the plaintiff's status. (CP 409-437. (Dec. Adams, Ex. A.) He expressed concern about the nature of this kidnapping, and used his discretion when interpreting the facts. *Id.* Jessica Giner acted with similar diligence: She made proper inquiries into the plaintiff's status, and, in her discretion, corresponded with Sunni Ko, to establish a just resolution of this matter. CP 391-400. (Dec. MLG, Ex. 7.) Furthermore, she notified Ms. Jackson

about her concerns, who promptly notated that the plaintiff was registered in error. *Id.* CP 184-192. (Dec. Miner, Ex. 4.) Such actions are not malicious. Indeed, Ms. Ko thanked Ms. Giner for her efforts and "taking [time] time to look at the case so thoroughly." CP. 400. Also, contrary to plaintiff's contentions, Ms. Ko recited procedural details of the underlying conviction that were not part of the court documents previously provided to Pierce County. CP 393. (Email from Ms. Ko to Ms. Giner outlining that there were originally three counts of Kidnap 1 but that as part of the plea bargain the prosecutor dismissed two of those counts – including the count involving the minor son – leaving only the count against the father/bank president). Neither Ms. Jackson or Mr. Adams had ever been provided with the charging documents or plea paperwork. (CP 407-408, 414, 438-440.)

Because actions for malicious prosecution are generally disfavored in the law, and Pierce County acted in good faith, no reasonable juror could find in the plaintiff's favor. Plaintiff is incorrect to assert that there is a dispute of fact with regard to this claim. All parties agree on the facts, the question is whether there are sufficient facts to support a finding of malice and plaintiff failed to put forward sufficient facts to sustain this high burden.

3. Pierce County had probable cause to prosecute the plaintiff

Finally, because there was a judicial finding of probable cause no action for malicious prosecution can stand. In *Rodriguez*, the defendant was prosecuted for insurance fraud in spite of her coming forth with evidence that the piano, which was the subject of the fraud, was in fact destroyed in the fire. *Rodriguez v. City of Moses Lake*, 158 Wn.App. 724, 726 (2010). After a jury acquitted her, the defendant sued for malicious prosecution. *Id.* The court held that there was probable cause for the plaintiff's prosecution, reasoning that although the plaintiff came forward with evidence to show that the piano was destroyed in the fire, this never negated probable cause. *Id.* at 730. In fact, the court found, the evidence "was defense evidence of the fact-finder to consider and assign weight." *Id.* Thus, the court granted summary judgment against the plaintiff. *Id.* at 730.

Here, The plaintiff may not sustain a claim of malicious prosecution because his claim was voluntarily dismissed, no Pierce County official acted maliciously, and there was indeed probable cause for his prosecution.

As in *Rodriguez*, sufficient facts existed here to establish probable cause, for which the law imposes a flexible burden. Much like the evidence in *Rodriguez*, Ms. Giner had sufficient evidence before her when she submitted her Declaration. CP 366-368. (MLG Dec. Ex. 5.) Because

she had police reports indicating that the plaintiff had failed to register, any facts she uncovered after her discretionary charging decision are immaterial to the initial finding of probable cause. CP 402-407. (Dec. Hudson, Ex. A.) The facts here, however, indicate that Ms. Giner carefully considered the defense attorney's arguments and subsequently acceded to dismissal without prejudice. Thus, the plaintiff may not sustain a claim for malicious prosecution and Pierce County should be granted judgment as a matter of law.

E. PLAINTIFF CANNOT RECAST A FALSE ARREST OR MALICIOUS PROSECUTION CLAIM AS NEGLIGENCE, GROSS NEGLIGENCE OR OUTRAGE

In Washington, there is no cause of action for negligent investigation. *See Fondren v. Kilickitat County*, 79 Wn.App. 850, 905 P.2d 928 (1995). It appears that the plaintiff negligence claim amounts to a claim of negligent investigation, or in the alternative, false arrest, malicious prosecution. Because a claim of negligent investigation does not exist, the claim for negligence should be dismissed.

Other courts have rejected similar attempts to recharacterize false imprisonment claims as negligence claims. *Snow–Erlin v. United States*, 470 F.3d 804, 808–09 (9th Cir.2006) (affirming the district court's dismissal of plaintiff's action, which alleged that her late husband was

wrongly incarcerated due to "negligent miscalculation" of his release date, and holding that the plaintiff could not evade the Federal Tort Claims Act's exclusion of false imprisonment claims "by suing for the damage of false imprisonment under the label of negligence"); *Kinegak v. State of Alaska, Dep't of Corrs.*, 129 P.3d 887, 888 (Alaska 2006) (holding that prisoner could not overcome state's immunity from false imprisonment claim by pleading that state department of corrections had "negligently failed to correctly compute plaintiff's release date").

Here, the proper claim surrounding the allegations that the officers or prosecutor failed to perform their job properly should be one of "false arrest," "false imprisonment," or "malicious prosecution." Plaintiff cannot recast these claims as other general torts of negligence, gross negligence, or outrage.

F. ASSUMING PLAINTIFF MAY BRING A NEGLIGENCE ACTION, AND ASSUMING A DUTY IS OWED TO PLAINTIFF AND NO IMMUNITY APPLIES, THE DUTY FELL ON DOC - NOT PIERCE COUNTY

The threshold determination in any negligence action "is a question of law; that is, whether a duty of care is owed by the defendant to the plaintiff." *Alexander v. County of Walla Walla*, 84 Wn.App. 687, 692-93 (1997)(citing *Taylor*, 111 Wn.2d at 163).

Even if there was a claim for negligent investigation or registration, the only government agency with authority to make determinations about conditions set pursuant to an interstate compact is Department of Corrections. RCW 9.94A.745 - Interstate Compact for Adult Offender Supervision (ICAOS); WAC 137-69-030. RCW 9.94A.745(2) provides that the department "shall process applications for interstate transfer of felony and nonfelony offenders requesting transfer of supervision out-of-state pursuant to RCW 9.94A.745, the Interstate compact for adult offender supervision." "Offenders transferred to Washington state under the interstate compact shall be supervised in a manner determined *by Washington State* and consistent with the supervision of other similar offenders sentenced in Washington State." WAC 137-69-030(1), *emphasis added*.

Colorado is part of the interstate compact agreement with Washington. *See* RCW 9.94A.745, C.R.S.A. §24-60-2801-2803. It is the State of Colorado, Mr. Vance, and the State of Washington, who entered into the agreement to (1) bring Vance to Washington, and (2) as one of many conditions - require him to register as a kidnap offender. CP 168-169. (Dec. Frank, Ex. 2.) It is the State who received the initial screening paperwork, entered into the agreement, and began initial monitoring. By statutory authority Pierce County was taken out of this equation and all of

this fell outside the duty and control of Pierce County. Currently, the burden is on the sending state to provide documentation of underlying facts supporting registration. See ICAOS Rule 3.101-3. This makes sense, because the state of origin is in the best position to supply court records, victim information, and other details of the offense.

"The modification of supervision authority for an offender under the ICAOS `may be authorized only with the involvement and concurrence of a state's compact administrator¹⁶ or the compact administrator's designated deputies.'" *In re Wandell v. State of Washington*, 175 Wn.App. 447, 451, 311 P.3d 28 (2013)(quoting ICAOS Rule 2.101(c), found at <http://www.interstatecompact.org>, effective August 1, 2004).

Here, petitioner could have sought relief from the contact administrator or challenged the quasi-judicial determinations of registration under RCW 7.16.040 as argued *supra*. Because DOC controlled what condition Vance could enter Washington under, all tort claims against Pierce County must be dismissed.

¹⁶ In Washington, the secretary of corrections or an employee of DOC designated by the secretary is the compact administrator under ICAOS. *In re Wandall*, 175 Wn.App. 447, 451 (citing RCW 9.94A.745(d)(2)). Interestingly, the ICAOS provides statutory immunity for compact administrators for "any claim for damage . . . or other civil liability caused or arising out of any actual or alleged act, error or omission that occurred within the scope of interstate commission employment, duties, or responsibilities." RCW 9.94A.745(d)(2).

G. THE TRIAL COURT PROPERLY DISMISSED THE ACTIONS AGAINST THE INDIVIDUAL DEFENDANTS WITH PREJUDICE

"A written order controls over any apparent inconsistency with [a] court's earlier oral ruling." *Shellenbarger v. Brigman*, 101 Wash. App. 339, 346, 3 P.3d 211, 214 (2000) (citing *State v. Eppens*, 30 Wash.App. 119, 126, 633 P.2d 92 (1981)).

Here, the trial court's written summary judgment order dismissed all matters with prejudice based on the issues raised in the brief. CP 629-630. Accordingly, this ruling should stand.

V. CONCLUSION

For the foregoing reasons, defendant Pierce County asks this court to affirm the trial court's dismissal of the actions based on principles of immunity, statute of limitations, lack of duty, and failure to state a legal claim.

DATED: January 20, 2015

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing BRIEF OF RESPONDENT PIERCE COUNTY was delivered this 20th day of January, 2015, to the following by electronic mail pursuant to the agreement of the parties:

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PIERCE COUNTY PROSECUTOR

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