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DIVISION II  
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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

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MICHAEL SEGALINE,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND  
INDUSTRIES and ALAN CROFT

Appellants

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RESPONDENT'S BRIEF

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## ASSIGNMENTS OF ERROR

**First:** A state Employee is not entitled to qualified immunity because the trial court identified a clearly established liberty right that was violated, considering the facts most favorably to an electrician, who was excluded from doing business in his local Labor and Industries office.

**Second:** There is no error and no prejudice to defendant when the uncontested facts establish that a State employee excluded an electrician from his local Labor and Industries office, using a “notice” issued without any guidelines, without giving a notice or opportunity to reasonably advise the electrician of the reason for exclusion, or provide a meaningful opportunity for him to address the reasons, and when no post-deprivation process was provided.

**Third:** A Civil Rights defendant waived the argument that court erred in allowing the jury to decide the process due by failing to raise the issue at trial; the trial court, however, did not err in submitting contested facts regarding due process to the jury.

**Fourth:** When a Civil Rights defendant proposes instructions that are fact specific and that do not accurately reflect the law, and when the court’s

jury instructions accurately charged the jury with the law and allowed defendants to argue its theory, there is no prejudice and no error.

**Fifth**: The trial court did not err in exercising its discretion to exclude a snippet of deposition testimony referring to a theoretical gun, that was speculative and highly inflammatory.

## **I STATEMENT OF THE CASE**

### **A. Overview of Trial Procedure**

The State of Washington Department of Labor and Industries and Alan Croft (hereafter L & I) appeal a jury verdict in the amount of \$953,000.00 for failure to provide due process to Micheal Segaline (hereafter Segaline). In 2003, L & I issued a “no trespass notice” of indeterminate duration, without notice, and without any opportunity to appeal, which prevented Segaline, the Administrator for his Electrician company, from purchasing permits and otherwise conducting business at L & I. Segaline was a licensed Journeyman Electrician, in addition to being the Administrator of his company and he was required to sign permits and to assure the quality of work that was regulated by L & I.

After 10 years of litigation and two prior appeals, this matter was finally heard by a jury which resolved the contested facts. Prior to sending the case to the jury, the court resolved as a matter of law two genuine

issues of material fact that the court had identified prior to trial. CP 265-266. The first was whether facts established that the civil rights claim was timely based upon a continuing violation theory—the court ruled, after hearing all of the testimony at trial, that the “ongoing action of Croft” takes the factual scenario within the statute of limitations. RP 883. Secondly, the trial court found that although there was no clearly established case law regarding specifically the duties of a State actor as to a trespass notice in 2003, RP 884, there was a clearly established right to conduct business in person in the public L & I office and due process protections applied. RP 884-885. Qualified immunity was denied to Croft. as to the liberty right to enter the office, and the liberty right to conduct business therein, and the Due Process claim was submitted to the jury. The court instructed the jury that it could not question the form or legality of the trespass notice, but it could consider the timing of it under the due process factors. CP 866 and Appendix II hereto.

L & I has presented and argued facts to this court as if the trial had not occurred, instead presenting its version that is inconsistent with the record and with the jury’s conclusion.

The trial court appropriately fashioned jury instructions consistently with the WPI and with the 9<sup>th</sup> Circuit Pattern jury Instructions for Civil

Rights claims, Appendices III and IV hereto, which recognize that the issue of deprivation of a constitutional right is an issue of fact to be submitted to the jury. After both parties had an opportunity to argue their theories, the jury rejected the slanted version that L & I urges to this court.

**B. Counter Statement Of The Case: Trial Facts**

Segaline was a licensed Journeyman Electrician and the Administrator of his Electrical business. RP 115. He had achieved his education, logged 8000 hours of experience, and then had worked 3 to 4 more years of self-study to pass the State exam to become Administrator for his company. RP 112-114. It was his responsibility to sign electrical permits, to know all calculations for fees and for specifications for installations, to control for safety, and to follow state law. RP 115.

Segaline frequented L & I to purchase electrical permits, and also for prevailing wage paperwork and other general information for his business, none of which was available by computer in 2003. RP 121.

Segaline became frustrated when a "Contractor Deposit" account, or CD account, was opened for his business. The account was an optional tool for payment for electric licenses, because in 2003 credit cards were not accepted by L & I. 770-771. Segaline did not want a CD because it

disrupted his habit of maintaining manual records of his transactions. RP 117. He felt it essential that he manage his business this way, because if other members could use the CD account without his knowledge and obtain permits, he may not be able to fulfill his supervisory obligations under the law and L & I could blame him if something was out of compliance. RP 118. Ms. Guthrie, L & I supervisor, confirmed that Segaline, and all contractors, for “many, many years” commonly had purchased permits, manually filled-out in the L & I office, using checks or cash, and not CD accounts. RP 770, 771.

Over a period a weeks in the spring of 2003, Segaline requested paperwork to close the CD account, first dealing with a customer service person, Alice Hawkins.<sup>1</sup> She recalled these requests, which started prior to the June “issues” with Segaline that are the subject of this action. RP 477-8. She did not know how to refund the CD account for him, and she did not go to anyone to find out. RP 479. After repeated requests, she did not help him so he became increasingly direct in asking for help with this. RP 123-125. When he became direct, Ms. Hawkins felt “uncomfortable” and told her supervisor. RP 472.

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<sup>1</sup> Hawkins testified through the reading of parts of her discovery deposition in this matter. She had served Segaline since 1991, with no incidents up to 2003. RP 471.

The sole dates of events which precipitated issuance of the “no trespass” notice, used to inform Segaline that he was barred from the office, included June 9, 10, and 13, of 2003. (per Guthrie RP 757.) On June 9, 2003, he called L & I and asked to speak to a supervisor, Jeanne Guthrie. By that time he was admittedly frustrated. The CD account had his money in it and he did not understand why the government office did not simply do its job and refund it. He told Ms. Guthrie that he needed the paperwork or someone is going to jail. RP 126. Instead of helping him, Ms. Guthrie referred him to the Supervisor of Electrical Inspections, Mr. Whittle, whom Segaline had never met. Segaline expected Mr. Whittle to address the CD account issues, but instead he insisted on meeting with Segaline. RP 127-128. Mr. Whittle sent a letter confirming the meeting which was to “clear up misunderstandings” and “establish good working relations” Exh. 1, read into the record at RP 129. There was no mention of any concerns about Segaline’s behavior, nor of any specific issues.

Defendant Alan Croft admitted that the telephone conversation on June 9 was not disruptive. RP 329. He was likewise not able to tell the jury of any specific conduct by Segaline he considered to be harassment during the June 9 telephone call. RP 334.

Segaline consulted counsel to discuss how to clear up “misunderstandings” at L & I and decided that he would record future transactions and the meeting with Mr. Whittle, to prevent future misunderstandings. RP 131-2. He informed Ms. Guthrie, on June 10, 2003, that he intended to record the June 19 meeting with Mr. Whittle, and that if by then Mr. Whittle did not have the paperwork, he should bring his resume and look for a job in the private sector. RP 133. Ms. Guthrie described his demeanor as “calm”. Defendant Alan Croft admitted that Segaline was calm and his comment-- that if an L & I employee could not do his job he needed to bring his resume—was not disruptive. RP 330.

On June 13, Segaline entered L & I to pay for 4 permits with a prepared check. He had used a manual published by L & I to pre-determine the amount of the check. RP 168. Unfortunately, one of the permits had been previously paid for with funds in the CD account. This made the amount of his check wrong. Segaline was frustrated. He felt that he had customers waiting, that L & I had to take his check, and that the CD account was the problem of L & I. He told the person serving him, Ms. Sanchez and then Ms. Guthrie, that the office was wasting his time. He left the check and exited to do his business. RP 171-176.

Ms. Sanchez testified that on other occasions that she served Segaline he was “very , very nice.” RP 566. Although she used the term “afraid” in her report, she clarified, she meant, “afraid” that he would yell at her again. RP 573. She was never afraid he would become violent or hurt her. RP 573, 579. Ms. Guthrie also testified that she did not see Segaline as a violent threat, and she did not feel threatened by him. RP 796-7.

Defendant Alan Croft, the L & I Regional Safety Co-ordinator, read the staff reports prior to the June 19 meeting; he considered Ms. Sanchez’s report for the June 13 incident, that Mr. Segaline was ‘demeaning and mean.’ RP 331. However, he never found out what Ms. Sanchez meant by that statement. RP 337. Likewise, he never investigated what the terms “evasive” or ‘uncooperative” meant in the staff reports. RP 440-1. He took the report to evidence “ongoing antagonism” by Segaline. RP 336. By “ongoing Harassment”, he meant the repeated contacts by Segaline on June 9, 10, and 13. RP 334. The “harassing” behavior was, according to defendant Croft, telling L & I that “someone” was going to jail, that Segaline would hire a lawyer and sue L & I, and Segaline’s “tone of voice,” and “nothing else.” RP 344-345. He admitted that threatening to sue and telling L & I that is was wasting his time, was not a threat or harassment. RP 345. He admitted that an L & I workplace policy (exh. 35) instructed staff that political arguments, “I’m going to get you,”

“better watch out”, “I’ll get you fired.” And “I’ll sue you” are specifically not threats. RP 345. He explained, “These comments happen but are not threats under our rules.” RP 348. He admitted that these standards guide him that acts such as these by members of the public are not threats. RP 456. He further admitted that Segaline never presented an immediate danger to staff. RP 348.

On the June 19 meeting, Segaline met Defendant Alan Croft for the first time. RP 179. Croft had previously met with the staff, (Ms. Guthrie and Ms. Hawkins), read the staff reports, and decided to attend the meeting with Mr. Whittle. RP 307, 315. He had not concluded that staff was being harassed prior to the June 19 Meeting. RP 318. He admitted that security was not a concern, He did not ask a security officer to attend the meeting. RP 319-20. He knew staff Guthrie and Hawkins that the CD account was Mr. Segaline’s complaint, RP 314, but defendant Croft did not know anything about such accounts. RP 311-313. He admitted that no one gave Segaline any information how to close his CD account at the June 19 meeting. RP 314.

Defendant Croft admitted that he never informed Segaline of concerns about his behavior before the meeting on June 19. RP 318. He admitted

that the letter sent by Mr. Whittle, exh. 1, did not provide any notice that harassment was a subject of the requested meeting. RP 318.

During the meeting, and for the first time that anyone mentioned his conduct, defendant Croft told Segaline that the staff thinks that he is harassing them. RP 181-2. Segaline could not understand how it could be harassing to ask for paperwork. He asked Croft to explain how he harassed people, and was told “I don’t know off the top of my head.” Defendant Croft confirmed that he never described to Segaline any behavior of concern at any time during the June 19 meeting. RP 323, 182. Segaline told L & I that in the future he would walk in, pay his money, and record the public business. RP 183. If he had issues with how the department is working, he would question it. RP 257. Defendant Croft admitted that no mention was made of a trespass issue during that meeting, RP 323-4. In fact, he had not heard of the concept nor thought about it until after the meeting. RP 324.

The meeting ended when Segaline walked out of the conference room to the public area, to try to locate Ms. Guthrie. (she was the highest ranking person physically officed at East Wenatchee from day to day. RP 779). Defendant Croft testified that he was “surprised” and therefore he “called 911” without any notice to Segaline. RP 404-405.

There was no further contact with Segaline until he came into L & I, on June 30, 2003. RP 192. Defendant Croft admitted that Segaline had never failed to follow directions how to contact the department prior to June 30, the date that the “trespass notice” was given to Segaline. AR 339-340.<sup>2</sup> Defendant Croft could have notified Segaline by letter of his intent to issue a ‘no trespass’ notice, but he never considered doing that. RP 341. He admitted that he alone directed the trespass process, RP 353, and that he told staff to give the notice to Segaline and call 911 if he came into the office. RP 350. He directed that Segaline was not to be served in the L & I office, and he admitted that the “notice” was to be effective from June 22, as long as he personally determined it to be. RP 457, 355.<sup>3</sup>

Testimony was undisputed that on June 30, Segaline sat in the public entry area waiting to buy a permit, and Ms. Hawkins pushed a paper across the counter and said, “You are no longer welcome. You need to leave.” RP 81. He had not even said anything. RP 85. He looked at the paper and told her that the paper is not legal, that it was not signed by a

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<sup>2</sup> Yet, the trespass notice, exh. 114, recited failure to follow directions for contacting the department as a basis for its issuance.

<sup>3</sup> Defendant Croft also testified, inconsistently, that he would have provided service in an emergency despite the notice, and admitted it would be confusing for a licensee to be served one day and arrested by police the next day, without any notice of L & I standards to prevent the latter. He concluded that he did not know the “ins and outs” of trespass notices. RP 462-3.

judge, and that she should contact the AG and learn how government is supposed to run. RP 85-6. The police were called, and an officer handed the “notice” to him. The “notice” said he was no longer “licensed or permitted” to enter the office, because of “disruptive behavior, harassment of staff, and failing to follow instructions to contact the department.” RP 87. It did not explain how he was disruptive, or what the L & I standards are for his conduct. RP 341-2. Defendant Croft admitted that the ‘notice’ did not provide any written standards as to how Mr. Whittle should decide whether or not to let Segaline return to the L & I office, nor did it give Segaline notice of the reasons for being “trespassed”, nor did it provide a process for appeal. RP 341-344. He admitted there was no provision of a neutral party and no avenue of appeal through which Segaline could request review. RP 466.

Segaline, who had purchased permits from L & I for 17 years, never received a description of supposedly objectionable conduct, no staff had told him he was harassing them, and he never received even a telephone call from L & I to explain what he was accused of. RP 87-88. Neither was he given standards with which to comply in order to enter the department. RP 90. Defendant Croft admitted there was no notice or hearing prior to his decision to exclude Segaline—he just “wrote it up.” RP 433.

Defendant Croft had “gotten into trouble” previously for going to court for a protection order—the attorney general had told him it was not his job to do so. RP 434. He knew that in order to get an order of protection the protocol was to ask his assigned State Patrol Patty Reed, who would ask the attorney general. RP 466-7. Although he had initiated the request to Sgt. Reed, he did not wait for an answer from the attorney general before issuing the “trespass notice.” RP 435. Croft knew there was an issue whether he could issue a trespass notice; RP 436, he knew by issuing it that he was changing Segaline’s ability to access services in order to practice his profession for which he was duly licensed and permitted. RP 437-8. He told his supervisor, on June 23, 2003 that he was exploring the “right of trespass.” And “if valid” it should be pursued. RP 443. He received no further advice of validity between June 23—29, before “writing up” his ‘trespass notice”, exh. 114. RP 444.

Segaline was allowed to purchase an emergency permit for emergency work done on August 20, 2003. The work was approved by Jim Dixon, an L & I employee. Segaline peacefully purchased the permit August 21, RP 98—100. Ms. Guthrie, in the meantime, asked Alan Croft if he still directed the staff to call 911 to have Segaline arrested if he came into the office. He told her to do so and she e-mailed staff with this instruction.

On August 23, Segaline entered the L & I office to buy a permit. He stood at the counter and began to fill it out, the police were called, arrested him, and took him to jail. Ultimately he was charged with trespass. RP 105—110. The criminal charge was dismissed. RP 194.

Defendant Croft admitted that Segaline did nothing harassing or disruptive on June 30, when given the trespass notice, nor in August when he purchased a permit and when he was arrested RP 350-352.

After dismissal of the charges, L & I resumed serving Segaline, when he elected to enter the office, without incident. RP 272. Mr. Segaline finally was able to close the CD account through a different L & I office in 2007. RP 240—241

### **C. The Snippet Of The Dieringer Deposition That Was Excluded**

L & I Objected to the court excluding a part of Officer Dieringer's discovery deposition in which he indicated that he acted out of speculative precaution that Mr. Segaline might go to his vehicle and get a weapon. RP 487. <sup>4</sup> The court granted plaintiff's motion in limine (CP 372) since no weapon was ever associated with Segaline during June—August 2003. RP 498. The State argued that the officer's safety precautions supported

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<sup>4</sup> RP 581—611 is the text read to the jury from his deposition.

an independent “probable cause” and proved the arrest was not malicious-- elements of the Malicious Prosecution cause of action. RP 487. The trial court’s order excluded the reference to a speculative gun unless L & I later brought a motion outside the hearing of the jury with evidence demonstrating that the reference to the gun had a basis in fact and was relevant. RCP 404-405. No such motion was attempted by L & I .

Officer Dieringer confirmed that never saw Mr. Segaline take any violent actions, RP 605; that he did not know the details of the dispute with L & I, RP 607; that he took the word of the L & I employees that Segaline had been unreasonable RP 599; and that he did not know if Segaline was dangerous or the “nicest man”. RP 604.

L & I cross-examined Segaline regarding his statement in his deposition that what the officer wrote in the police report “devastated” him. Segaline responded that was only part of what devastated him, but that it was L & I that destroyed him, and the police were an instrument that they used. RP 264,277. Segaline believed that the officers simply wrote in the reports what L & I had told him. RP 277.

#### **D. Jury Instructions**

At trial, L & I excepted to the court not giving its jury instructions 1, 2, 3, and 6; it objected to Jury instruction 13 on the basis that its offered instructions 2 and 3 more accurately described “due process.” RP 1033; . It excepted to the not giving of its jury Instruction #6. RP 1035.

L & I did not except to the jury verdict form at RP 1042 as claimed—that reference is to a general objection not identifying this issue.

Appendix I, attached, includes Defense proposed jury instructions 1, 2, 3, and 6. CP 445,446, 449, and the Defendant’s proposed jury form. CP 472-3 Appendix II attached includes court instructions 9 through 14. CP 829-32, and the Court’s jury form. CP 843-5.

**II. CROFT IS NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE TRIAL COURT IDENTIFIED A CLEARLY ESTABLISHED RIGHT THAT WAS VIOLATED, CONSIDERING THE FACTS MOST FAVORABLY TO SEGALINE.**

**A. The purported “controlling” authority cited in the L & I brief supports Segaline.**

L & I has mis-framed the ruling of the Trial Court in denying qualified immunity to Croft. The trial court did not base its denial of qualified immunity on the “trespass notice,” but rather on the clearly established right to enter L & I and conduct business in a public place created for the licensee.RP 884—886. The Court’s Jury Instruction 12. RP 831, clearly identifies the established right of “liberty” to enter L & I.

The *Vincent* case, A 5<sup>TH</sup> Circuit opinion, which is relied upon principally by L & I, provides: “*Supreme Court decisions amply support the proposition that there is a general right to go to or remain on public property for lawful purposes.*” *Vincent v. Town of Sulphur* 805 F.3d 543, 548 (5<sup>th</sup> Circ.,2015.) (*emph.added*) Viewing Segaline’s case in the light most favorable to him, and the uncontested trial record, and the facts as found by the jury, he presented on June 30, 2003, and again in August, peaceably for the lawful purpose of purchasing an electrical permit; The following pre-2003 cases were cited in *Vincent* to establish that liberty right:

*City of Chicago v. Morales*, 527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965); *Kent v. Dulles*, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958); *Williams v. Fears*, 179 U.S. 270, 21 S.Ct. 128, 45 L.Ed. 186 (1900)

Id, at 548. *Vincent* grappled with a specific issue, irrelevant to Segaline. The plaintiff there-in was a “person under investigation for threatening deadly violence against officials.” There, A trespass order was voluntarily lifted after a short, active police investigation and prosecutorial review.

L & I argues that *Vincent* creates a debate regarding Segaline's liberty right to enter L & I, listing purported similarities with *Vincent*. There are none of import. *Vincent* involved a threat in a private bank and there was no denial that witnesses had made the specific complaint that he had threatened the mayor, and named others, with gun violence. At fn. 6. However, at the Segaline trial, no witness testified that Segaline had acted violently or threatened any violent act. Although L & I argued that Croft felt he needed to protect his employees, Croft admitted that Segaline was never violent, nor a physical safety concern.

*Vincent* in no way changes the historically clearly established legal standards, and it does not address facts in the record in this case.

**B. Segaliune articulated a clearly established right based upon the correct analytical process for Constitutional Claims**

Claims of qualified immunity from suit under § 1983 must fail if the constitutional right allegedly violated was clearly established at the time of the act. *Harlow v. Fitzgerald*, 457 U.S. 800, 812, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). We review claims of qualified immunity based on the assumption that all facts alleged in plaintiff's complaint are true. *Kalina v. Fletcher*, 522 U.S. 118, 118 S.Ct. 502, 505, 139 L.Ed.2d 471 (1997); *Gomez v. Toledo*, 446 U.S. 635, 637 n. 3, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980).

. . . . The test of the official's conduct is an objective one measured by reference to clearly established law. *Id.* See also *Davis*, 468 U.S. at 190, 104 S.Ct. 3012 (" *Harlow*... rejected the inquiry into state of mind in favor of a wholly objective standard."). For purposes of qualified immunity, the court must accept the allegations of the complaint as true. *Kalina*, 118 S.Ct. at

505. Denial of qualified immunity is not a finding of liability, but simply a delegation of that question to the trier of fact. *Robinson v. City of Seattle*, 119 Wash.2d 34, 69, 830 P.2d 318 (1992).

When determining a motion to dismiss on qualified immunity grounds the court must ask, as a matter of law, whether the federal right assertedly violated was clearly established at the time the event described in the plaintiff's complaint occurred. *Elder v. Holloway*, 510 U.S. 510, 516, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994). A proper answer to the question requires the appellate court to consider all relevant precedents, not simply those cited or discovered by the trial court, *id.* at 512, 114 S.Ct. 1019; although a constitutional right may nevertheless be "clearly established" even absent a specific holding on the particular question at issue. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

The central purpose of qualified immunity is to protect public officials from undue interference with their duties and from potentially disabling threats of liability. *Elder*, 510 U.S. at 514-15, 114 S.Ct. 1019 (quoting *Harlow*, 457 U.S. at 806, 102 S.Ct. 2727). But the Court must likewise guard against potential abuse through unwarranted application of the doctrine:

By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective reasonableness of an official's acts. *Harlow*, 457 U.S. at 819, 102 S.Ct. 2727. See also *Mitchell v. Forsyth*, 472 U.S. 511, 524, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)

*Staats v. Brown*, 139 Wn.2d 757, 772-3, 991 P.2d 615, (2000)

*Staats* pronounces the pre-2003 process, adopted by Washington State, for determining qualified immunity. The court must deny qualified immunity if the plaintiff presents a factual theory in which he could prove

a clearly established right – even if there is a factual dispute. Here where L & I alleged that Mr. Segaline presented a safety issue, Segaline alleged that he did not threaten anyone and there was no cause to exclude him from the office. CP 6. The facts supported Segaline at trial, and there was no basis for granting qualified immunity as a matter of law.

The *Staats* court reasoned that there is a clearly established right to be free from excessive force, and found that the reasonableness of force is an issue of fact under the circumstances. Finding that the plaintiff's complaint described force unreasonable for the circumstances, qualified immunity was denied, subject to submission to the jury as to whether there was reasonable force applied.

Similarly, in this case, after Segaline claimed the clearly established right to enter L & I, the issue of whether or not Segaline was deprived of his liberty without reasonable due process was left for the jury, which found in the affirmative. The trial court's reasoning process was correct.

C. **Pre-2003 Cases Clearly Establishes A Liberty Interest.**

The right to enter public places has been recognized and subsequently codified in State law. See, i.e., *Brown v. Louisiana* 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966) convictions reversed for trespass by

blacks into a “white” library, “*it must be noted that petitioners’ presence in a library was unquestionably lawful. It was a public facility, open to the public.*” (emph. added.)

Since 1978 the Trespass Statute in Washington State, RCW 9A.52.010, has included a defense to criminal liability when the person claims “the premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises. . . .” 9A 52.090 (2) This codifies the well-established right to enter a public place found in Washington State Law.

The additional quality to Segaline’s right to liberty to enter L & I stems from his fundamental right to the liberty to practice his occupation. *Bell v. Burson* 402 US 535 (1971), set forth fully at CP 86—89. These fundamental rights are widely cited and respected in Washington cases, for instance *Mission Springs, Inc. v. City of Spokane*, 954 P.2d 250, 134 Wn.2d 947 (Wash. 1998) In which for a 42 USC 1983 case qualified immunity was denied for an official who interfered, however briefly, with the issuance of a lawful permit. The case was reversed and remanded for trial. Segaline’s business in L & I was to apply for a permit he had a right to be issued, and this right was clearly established and defendant Croft had no qualified immunity. It appropriately went to trial.

Furthermore, entry into a public building by persons for whom the forum was created has long been established as a liberty interest. *Goss v. Lopez* 419 U.S. 565 (1975) ruled that a temporary suspension of students from their school without a hearing, and without a prompt post-deprivation hearing, violated their right to due process because the State requires them to attend school; further *Goss* held, that these rights are the same as a deprivation of property, such as employment. Having chosen to regulate and create the right, the State cannot withdraw it on grounds of misconduct absent fundamentally fair procedures to determine if the misconduct occurred. Since the State chose to regulate electricians, Croft cannot exclude Segaline from his business in the public office for that purpose without fundamentally fair procedures.

Over the past 10 years, Segaline has cited the above cases, and numerous others, that establish his basic liberty interest, to enter the L & I office, and that also establish other aspects of his right to so enter, most fundamentally his occupational right to liberty and property. See CP 289-342, with the pre-2003 citations circled.

**D. Wayfield –on-point, analysis of clearly established right**

In *Wayfield v. Town of Tisbury* 925 F.Supp 880 (1996), (case in full at CP 90—99), Wayfield’s access to a public library was suspended by letter

without notice. When he returned to the library he was prosecuted for trespass; the charges were later dropped.

The *Wayfield* court first inquired into any State law that would establish entry into a public place is established as a liberty interest. In Washington, there is the Trespass statute, and inquiry need go no further.

There was no such statute in *Wayfield*, however. That court exhaustively surveyed decisions regarding entering public buildings, both the general liberty rights and “fundamental”, i.e. occupational, rights. CP 90-91. Finding string cites of pre-1996 cases, and observing that liberty interests in an occupation are *more* firmly established than general liberty rights in a public library (CP 93), the court painstakingly reviewed due process requirements for deprivations. CP 94-98. First that court cited numerous pre-2003 U.S. Supreme Court cases defining the rights “pre-deprivation” if process was feasible. If not feasible, (in exigent circumstances) there must be adequate post-deprivation procedures (i.e. *Zinermon v. Burch* 494 U.S. 113, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990). CP 95-97. Analyzing *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976), that court found that the interest of the plaintiff is significant if it impacts Constitutional Rights. It found that the lack of pre-deprivation procedures make the risk of wrongful

deprivation “high”, and the lack of standards for issuing “no trespass” notices makes the risk of wrongful deprivation “great.” The hardship on the defendant to provide reasonable process was deemed low—requiring perhaps a writing specifically informing the patron of the allegations, the standards he was purportedly violating, and allow him to respond in writing or in person.

The *Wayfield* court found that ‘no process’ had been afforded and that Wayfield should be entitled to judgment as a matter of law, but remanded to the trial court for that court to determine if there was an issue of fact requiring further evidentiary hearings.

This case is important to Segaline for 3 main reasons: first, it reflects a finding of no qualified immunity based upon analysis of all pre-2003 established rights. Secondly, it discusses cases establishing the liberty right as well as the parallel development of cases that define the due process associated with deprivation of the rights. Third, it is on point with the Segaline case, except the general right to enter the public library is more tentative than the general right paired with fundamental occupational right to enter L & I, which we have in this case.

**E. Cases involving “no trespass” notices rely upon pre-2003 cases to find that the right is clearly established.**

L & I erroneously assumes that Segaline must find a case that is on point and that is controlling authority regarding Trespass notices prior to 2003 in order to defeat qualified immunity. This is false. It is not the accepted analysis of this issue. First, the trial court did not base its denial of qualified immunity on the construct of a trespass notice, but on the clearly established liberty interest and fundamental occupational right. RP 884-886. Secondly, to determine whether a federal right is clearly established, courts “do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.” *Ashcroft v. al-Kidd*, 563 U.S. , 131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149 (2011) Not only was the liberty right to enter a public place and the fundamental right to enter a place reserved for licensees clearly established, but even today, courts rely upon pre-2003 law in concluding that these rights are clearly established.

*State v. Green* 157 Wn. App 833, 239 p.3D 1130 (2010), at CP 486-494 in its entirety, addresses almost identical issues as Segaline regarding a ‘trespass’ notice and due process requirements. A mother was excluded by ‘letters’ between 2003 and 2006 from her son’s school for “disruptive” conduct. She was charged with Trespass. The *Green* court reversed because her exclusion was in violation of her due process rights, as a matter of law, per the Trespass statute and pre-2003 controlling

pronouncements of law. The analysis in *Green* relies on pre-2003 caselaw that due process rights accrue for the clearly established right to enter a public place; the same authorities require that qualified immunity for Croft in 2003 must be rejected. *Green* relied upon the Seminole case of *Mathews v. Eldridge*, which established the analysis in which now every court engages when evaluating due process:

**the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.**

*Mathews v. Eldridge* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). The pre-2003 case relied upon in *Green* for the establishment of liberty and property rights is even more pertinent to Segaline, since it is an occupational licensing case:

The individual's interest in a professional license is profound. Dr. Nguyen's professional license clearly represents a property interest to which due process protections apply. Moreover this court has recognized a doctor has a liberty interest in preserving his professional reputation that is entitled to protection under the Fourteenth Amendment. *Ritter v. Bd. of Comm'rs of Adams County Pub. Hosp. Dist. No. 1*, 96 Wash.2d 503, 510-11, 637 P.2d 940 (1981).

*Nguyen v. State, Department of Health Medical Quality Assurance Commission*, 29 P.3d 689, 144 Wn.2d 516 (Wash. 2001). The *Green* court did not establish new law, it reversed the trespass conviction based upon clearly established rights, and based upon pre-2003 authorities.

Courts in other jurisdictions also find a lack of due process based upon the pre-2003 defined standards, when trespass notices are part of the factual scenario of excluding a person from a public place. A 2004 Texas conviction for violation of an ordinance that allowed a state employee to arbitrarily issue no-trespass notices was reversed because the ordinance was Unconstitutional in depriving a citizen of liberty without due process under the 14<sup>th</sup> Amendment:

Further, under the unwritten policy, the decision to exclude a person from the park is made before the person has a chance to present any evidence in his or her favor and without any evidence being presented against him or her. Due process is ordinarily absent if a party is deprived of his or her property or liberty without evidence having been offered against him or her in accordance with established rules. *In re Application of Eisenberg*, 654 F.2d 1107, 1112 (5th Cir. 1981). Further, due process ordinarily includes the right to confront witnesses. *Wolff v. McDonnell*, 418 U.S. 539, 559, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); but see *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262, 107 S.Ct. 1740, 95 L.Ed.2d 239 (1987). Most important, due process requires a neutral and detached hearing body or officer. *Gagnon v. Scarpelli*, 411 U.S. 778, 786, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

. . .

In some circumstances, the United States Supreme Court has held that a statutory provision for a post-deprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process. *Zinermon v. Burch*, 494 U.S. 113, 128, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). "[W]here a State must act quickly, or where it would be impractical to provide pre-deprivation process, post-deprivation process satisfies the requirements of the Due Process Clause." *Gilbert v. Homar*, 520 U.S. 924, 930, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997). Even if it would be impractical to provide pre-deprivation process, the City's appeal process is not adequate. While a temporary order pending a hearing may be adequate, [9] the decision in this case is a final ex parte determination. An appeal is inadequate because the decision has already been made without the ability to present evidence for or against the deprivation. An appeal will not cure the failure to provide a neutral and detached adjudicator. *Ward v. Monroeville*, 409 U.S. 57, 61, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972). Further, Anthony was not informed of the appeal procedure. While Pool did not explicitly state his decision was final, his statements left an impression of finality. Pool, himself, testified he viewed the decision as effective from that point on. Last, there are no procedures in the appeal process for the presentation of evidence for or against a violation.

After weighing the three factors, we conclude the City's unwritten policy does not meet the requirements of procedural due process. Although the fiscal and administrative burdens may weigh against a due-process violation, this factor is greatly outweighed by the other factors. Due process requires state procedures to provide proper procedural safeguards before a claimant's property or liberty interest is destroyed. See *Thoyakulathu v. Brennan*, 192 S.W.3d 849, 854 (Tex. App.-Texarkana 2006, no pet.). The unwritten policy fails to provide an opportunity to be heard at a meaningful time and in a meaningful manner. . . . "The Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.' " *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). Although there is no evidence Pool intended to exercise his discretion in an oppressive manner, the unwritten policy contains insufficient checks to prevent such discretion from being exercised in an oppressive manner. The unwritten policy fails to afford procedural due process.

*Anthony v. State*, 209 S.W.3d 296, 307-8, (Tex.App.—Texarkana 2006)

Croft's "unwritten policy" in which he determined to exclude Segaline independently of waiting for an attorney general's opinion, violated all of the well-established pre-2003 authorities cited in the Texas case.

Cases subsequent to 2003 that have been located have also denied qualified immunity for trespass issues based upon pre-2003 cases:

We must therefore determine whether Kennedy's right to lawfully remain in public spaces was clearly established. " [I]n the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself." *Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir.1988). Yet, to be " clearly established" there need not be a prior case deciding that " the very action in question has previously been held unlawful[.]" *Anderson*, 483 U.S. at 640, 107 S.Ct. 3034. In *McCloud*, we noted that if courts required prior precedent on the specific facts at issue in the pending case, " qualified immunity would be converted into a nearly absolute barrier to recovering damages against an individual government actor..." *McCloud*, 97 F.3d at 1557. . . . *United States v. Lanier*, 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997).

It is apparent that Kennedy had a clearly established right to remain on public property based on the Supreme Court's holdings in *Fears*, 179 U.S. at 274, 21 S.Ct. 128, *Papachristou*, 405 U.S. at 164, 92 S.Ct. 839, *Kent*, 357 U.S. at 126, 78 S.Ct. 1113, and *Morales*, 527 U.S. at 53-54, 119 S.Ct. 1849. " [T]he preexisting law was sufficient to provide the defendant with ' fair warning ' that his conduct was unlawful." *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir.2000) (quoting *Lanier*, 520 U.S. at 270-71, 117 S.Ct. 1219). Any competent government official, particularly a police officer, should have realized that he cannot deprive a person, who has not committed a crime or violated some regulation, nor was likely to do so, of access to public grounds

without due process of law. Therefore, we hold that for purposes of defendants' motion for summary judgment, Kennedy possessed a constitutionally-protected liberty interest to use municipal property open to the public and that depriving him of his liberty interest, without procedural due process, constituted a violation of a clearly established constitutional right.[7]

*Kennedy v. City of Cincinnati*, 595 F.3d 327, 337-338 (6th Cir. 2010);

Kennedy had been suspected of looking at girls at a public pool and was excluded from the pool, even after an investigation found he was not dangerous. Croft similarly knew that Segaline was not dangerous per his investigation of the June 9, 10, and 13 events, but excluded him anyway.

In another example, a student was summarily ejected from school by a trespass notice and the court relied upon *Goss v. Lopez* and other pre-2003 authorities to find that the right to liberty was clearly established:

A due process claim requires a two-part analysis—was plaintiff deprived of a protected interest, and if so, what process was he due. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 [102 S.Ct. 1148, 71 L.Ed.2d 265] (1982). Plaintiff has a protected property interest in continued enrollment at a public institution of higher learning. *Univ. of Mo. v. Horowitz*, 435 U.S. 78, 84-85 [98 S.Ct. 948, 55 L.Ed.2d 124] (1978).... When a student is suspended from a public school or university for disciplinary reasons due process requires " that the student be given oral or written notices of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Goss v. Lopez*, 419 U.S. 565, 581 [95 S.Ct. 729, 42 L.Ed.2d 725] (1975)....

*Hunger v. University of Hawaii*, 927 F.Supp.2d 1007 (D.Hawaii 2013)

There is no new, intervening law, since 2003, that has further defined the well-established right to enter public places either as a general right or a fundamental employment right; cases are decided on pre-2003 law and at the time of the Segaline case the rights were clearly established.

**F. The Concepts Of Which Process Is Due Were Also Clearly Established In 2003.**

Once a clearly established right is identified, the right may not be abridged without due process. The *Mathews* criteria are repeatedly referenced throughout state and federal case law. The fundamental requirement of procedural due process " is the opportunity to be heard at a meaningful time and in a meaningful manner." *Post v. City of Tacoma*, 167 Wn.2d 300 at 313, 340 P.3d 969 (2009), (citing *Mathews v. Eldridge*, (cit.omitted)). To determine whether existing procedures are adequate to protect the interest at stake, a court must consider the *Mathews* factors. *Post v. City of Tacoma*, 167 Wn.2d at 313; see also *Tellevik v. W. Rutherford St.*, 120 Wn.2d 68, 78, 838 P.2d 111 (1992) (adopting and applying the *Mathews* test).

If there is an exigent situation, pre-deprivation process may not be required, however, then post-deprivation procedure is required. *Zinermon v. Burch*, 494 U.S. 113, 136, 110 S.Ct. 975, 989, 108 L.Ed.2d 100 (1990).

The L & I brief is at best cursory, and mostly omissive in its discussion of all of the cases cited above. It appears to argue that in 2003 there was no clearly established standard in determining when exigent circumstances would excuse the denial of process upon deprivation of a well-established right. This is not correct. In finding no qualified immunity for failure to provide pre or post due process, the following 6<sup>th</sup> Circuit, 1994, case, shows a correct and thorough discussion of the clearly established criteria:

Aside from only minimal notice to evacuate, Bosanac provided the Flatfords with no due process. We must, therefore, determine whether Bosanac is qualifiedly immune for his failure to provide the Flatfords any process before or after the eviction. . . .

The dispositive issue, therefore, [as to whether there is qualified immunity on the basis of exigent circumstances, ]is whether Bosanac's conclusion that an emergency situation existed was an objectively unreasonable decision in light of the information he then possessed, construing the evidence in a light most favorable to the Flatfords. . . .

Fundamental fairness requires notice in short order of the right to an administrative hearing, including the manner designated for obtaining timely review. [6] The requirement of an immediate and meaningful post-deprivation process becomes even more important in view of the license which qualified immunity essentially allows public officials when they make judgments affecting the health and safety of our citizens under perceived exigent circumstances. Even though we recognize that these judgments may be mistaken, the opportunity of an administrative hearing assures that fairness will quickly prevail and that constitutional rights, if mistakenly curtailed, will be immediately restored. Without the assurance of immediate review, qualified immunity may be wrongly perceived as an open invitation for public officials to ignore fundamental rights without any fear of censure.

*Flatford v. City of Monroe*, 17 F.3d 162, 167-8. (6th Cir. 1994). Qualified immunity was denied because the official knew that the plaintiffs had rights that were interfered with—just as Croft knew or reasonably should have known, he was interfering with Segaline’s right to enter the public office of L & I and purchase permits required in order to practice his business. Qualified immunity was denied for failure of a reasonable and fair post deprivation remedy, including notice and how and when to exercise it. In Segaline’s case, there are no exigent circumstances and therefore no qualified immunity as to pre- or post-deprivation process.

In *McGee v. Bauer*, 956 F.2d 730 (7th Cir. 1992), a pre-2003 case cited in the brief of L & I, the court granted qualified immunity for an official only because that person was not the decision maker who should have provided process to the plaintiff. The facts in that case are distinguished from this one, for trial testimony is uncontested that Croft is the person who made the determination to exclude Segaline from L & I, and who had control over any process provided. Thus, applying the reasoning in *McGee* to this case, Croft should not be granted qualified immunity. In *McGee*, The court noted that excluding plaintiff and then giving him a phone number to call if he has questions is not adequate post-deprivation process. Id at 737. *McGee*, therefore, is another of the few and sparse citations in the L & I brief to an authority that actually supports the

plaintiff, and not L & I.

The exigent exception to pre-deprivation due process, moreover, was in place in the early 1970's, per U.S. Supreme Court authority, i.e., *Bell v. Burson* that considered the rights to due process before being deprived of the right to exercise one's occupation and one's driving privileges.

It is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford "notice and opportunity appropriate to the nature of the case" before the termination becomes effective. *Id at 542.*

*Bell v. Burson* 402 U.S. 535, 542(1971). Note that this case was decided 5 years prior to *Matthews*, but the decisional process for this type of case was already in place.

**G. The state's argument that the right to be on public property was debatable has no merit.**

The State argues that Croft rightfully relied upon a mall security guard who impliedly told him that he could issue a no trespass notice. First, there is no competent testimony of record to this point. Secondly, Croft had no objective legal basis to consider that this implied information made a person's right to enter a public office debatable.

In *Southcenter Joint Venture v. National Democratic Policy Committee*, 780 P.2d 1282, 113 Wn.2d 413 (Wash. 1989), Washington State adopted U.S. Supreme Court law that the State is subject to the exercise of constitutional rights, such as the First Amendment Right to protest or petition, and distinguished private shopping malls from the same already established constitutional constraints. That case demonstrates a long prior history of rulings that persons cannot be ejected from public places without due process. The 1989 case nullifies any argument by Croft that he could issue a “trespass” memo like a private owner of a mall could.

#### **H. Summary as to qualified immunity.**

The liberty right to enter a public office has been beyond debate, based upon U. S. Supreme Court authority, since the 1960’s. It has been codified as part of the Washington State trespass statute since the 1970’s. The right to enter public buildings for a particular purpose, such as schools, was established by the U. S. Supreme court in the 1970’s. The heightened protection of licensed professionals to pursue their fundamental right to practice their livelihood in Washington has been established since 2001. Once an established right is violated, the right to due process and parameters of process have been established since the

1970's. Considerations for exigent circumstances have been defined also since the 1970's.

The reasoning and process for considering qualified immunity has been standardized in Washington State since before 2000. If a plaintiff articulates facts that, if true, would amount to a deprivation of a clearly established right, there is no qualified immunity. The trial court correctly ruled that there was no qualified immunity for Croft and that the claims must be allowed to go to trial.

### **III. UNCONTESTED FACTS IN THIS CASE ESTABLISH THAT CROFT DEPRIVED SEGALINE OF PRE-AND POST-DUE PROCESS.**

Applying the facts established at trial, once the trial was completed, there was no provision of due process to Segaline.

#### **A. The Letter Was not Due Process.**

L & I argued that certain facts of record evidenced adequate due process. First, that a letter was sent. But the letter never advised Segaline that he was suspected of harassing anyone, nor of any issues about excluding him from the L & I office. RP 318. RP 129. .

#### **B. The trespass Notice did not Provide Due Process.**

L & I argued that the “no trespass notice” provided process. However, it failed to provide notice of allegations against Segaline, to provide an opportunity to respond to any allegations, and to provide required standards of conduct, (See CP 959) It did not provide review by a neutral third party nor did it advise Segaline how he could request review. RP 344, 466.

**C. June 19 Meeting Was Not Due Process.**

L & I argued that the June 19 meeting provided process, however, Croft admitted that he never described to Segaline any specific objectionable behavior. RP 323. He never mentioned excluding Segaline from L&I, or issuing a no trespass notice. RP 323-4.

**C. Telephone call was not Due Process.**

L & I argued that a telephone call (assumedly on June 9 or 10) to Segaline from Mr. Whittle provided process, however, the contents of that call were never testified to at the trial by a State employee. Mr. Segaline testified that during the call, he agreed to meet, and he thought the meeting was for the paperwork to close a CD account. RP 127-8.

None of the facts at trial support the three-word arguments by L & I counsel, that “process was provided.” The contacts with Segaline were not reasonably calculated to provide notice of any complaints about his

behavior. They did not provide him a fair opportunity to respond to complaints about his behavior. The decision to exclude him from the office was made without notice. The “trespass notice” told him to call Mr. Whittle to gain re-entry into the office, however, that fell far short of providing a neutral review by a third party, advising him of why he was excluded, or prescribing expected standards for allowing him to come to the L & I office. The jury resolved the question based upon *Matthews* criteria and uncontroverted facts of record.

**IV. L & I WAIVED THE MERITLESS ARGUMENT THAT THE JURY COULD NOT DECIDE THE PROCESS DUE.**

**A. L & I failed to preserve this objection.**

L & I never excepted to the due process instruction on the basis that the court had to decide the issue of due process as a matter of law. RP 1031-1040. Failure to preserve objections regarding jury instructions is invited error and waives the objection: . . .

The City also assigns error to the giving of Jury Instruction No. 12 on the grounds that it injects a negligence standard into the malicious prosecution action. [4] Neither at the trial court level in its exceptions to Instruction No. 12 nor in its assignments of error to the Court of Appeals was objection raised to this portion of the instruction. Instead, the City stated an entirely different theory in its exception and assignment of error:

Defendants would next except to the Court's proposed instruction no. 12 on the basis that, first of all, an officer does not

need probable cause to go to a prosecuting attorney. . . .  
Verbatim Report of Proceedings, at 4.

The assignment of error to the Court of Appeals concerned itself with an objection to the instruction because it failed to include the City's immunity theory of its case. It is only in its petition for review to this court that the City claims the offending language noted above was in error. This is too late. Our rules require that

[t]he objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.

CR 51(f). Appellate courts will only review claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto. RAP 10.3(g). See also RAP 10.3(a)(3); RAP 12.1(a); *Pettet v. Wonders*, 23 Wash.App. 795, 599 P.2d 1297 (1979).

*Bender v. City Of Seattle*, 99 Wn.2d 582, 598-9, 664 P.2d 492 (1983)

Although Segaline previously pointed out that this objection was not preserved, during the post-trial motions of defendant, CP 895, L & I has failed to disclose this omission to this court. Further, although L & I relies upon *McGee* support its claim that the trial court should not have submitted the issue of due process to the jury, it has failed to disclose that *McGee* holds that if the court submits a legal issue to the jury, and there is no objection at trial level, it is too late to object on appeal:

Under *Jett v. Dallas Independent School District*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989), whether a local official is a policymaker is a question of law to be decided by the trial judge before the case is submitted to a jury. *Id.* at 737, 109 S.Ct. at 2723. The district court therefore should not have let the policymaker

question go to the jury. However, neither party raised the issue of Jett during the proceedings below, and the district judge was apparently not aware of the case. . . . It is too late to raise the argument that the judge should have decided the policymaker question since it was not made below.

*McGee v. Bauer*, 956 F.2d 730 (7th Cir. 1992)

**B. L & I fails to cite any authority that justifies reversing a case if the judge submits the question of due process to the jury; the argument is meritless.**

Questions of fact are found in civil rights cases by the jury.

Appendix III hereto includes the Washington Pattern Jury Instructions for Civil Rights cases, and how to list the elements of the causes of action::

Examples of claim descriptions for use in paragraph (1). Section 1983 can cover a wide variety of constitutional claims. For some of the more typical claims, the committee sets forth below examples of how these claims may be summarized for purposes of the instruction's Paragraph (1). Practitioners should replace the labels "plaintiff" and "defendant" in these examples with the names of the parties.

. . . .  
(4) [the defendant deprived the plaintiff of life, liberty, or property without due process of law as guaranteed by the Fourteenth Amendment to the Constitution.

WPIC 340.,01. If the issue could not be presented to the jury one would expect the pattern instructions would so advise, and there would not be an instruction on this element.

Note that in the *Wayfield* case, and numerous cases above, courts remanded back for trial in order to determine cases in which facts were

contested. Further, Washington cases that rule upon due process as a matter of law do so when the operative facts are undisputed, i.e., *Pal v. Department of Social and Health Services*, 185 Wn.App. 775, 783-4, 342 P.3d 1190 (2015) where the question of process was treated as an issue of law, however, dispositive facts—the date and time of FAXING the appeal and the language of the notice, were undisputed.

Washington Case law indicates that factual hearings must be held if contested in due process cases, i.e., in *Rabon v. City of Seattle*, 928 P.2d 418w (Wash.App. Div. 1 1996) every *Matthews* element was analyzed to determine whether summary judgment should be granted and due process determined as a matter of law, or whether there were genuine contested facts that needed to be found by a jury.

*Robinson v. City of Seattle*, 830 P.2d 318, 119 Wn.2d 34 (Wash. 1992) is another Washington case which demonstrates when factual issues in civil rights cases are sent to the jury. In *Robinson*, the court denied qualified immunity for City employees acting upon advice of a City Attorney, finding that the violation of an established right is an objective test; the court left for the jury question whether each individual defendant actually acted under color of law to deprive plaintiff.

In Segaline, since L & I argued it had provided process, the trial court had the discretion to submit the issue to the jury. L & I did not ask for a trial court decision as matter of law that process had been provided. No such alleged error was preserved.

In addition to failing to preserve this objection, failing to cite dispositive authority, and failing to address Washington's own WPIC, the jury verdict merged with the appropriate legal decision if had been made in this case—as a matter of law, Croft denied due process to Segaline. Thus, there is no prejudice to L & I even if the court should have made the due process decision as a matter of law.

**V. THE COURT'S JURY INSTRUCTIONS ACCURATELY CHARGED THE JURY WITH THE LAW AND DEFENDANT FAILED TO OFFER BETTER INSTRUCTIONS.**

Characteristic of its brief, L & I has failed to offer any citations to demonstrate how its proposed jury instructions 1 through 3 (CP 445-6 and Attachment I hereto, would have correctly charged the jury or prevented prejudice. The portion of L & I instruction #1 that differs from instructions given to the jury (CP 824-836, and Appendix II hereto) are:

Alan Croft claims that he acted reasonably in issuing the trespass notice after Mr. Segaline refused to agree to conduct his business in the L & I office in a non-intimidating manner.

(Portion of defendants' proposed #1)

That the acts of Alan Croft in drafting and issuing a trespass notice in order to protect L&I employees subjected Michael Segaline to the deprivation of due process

(Portion of defendants' proposed #2)

Due process includes a procedure to appeal. Providing Mr. Segaline with an explanation of how to have the trespass notice removed would satisfy due process.

(Portion of defendants' proposed #3)

Because L & I failed to specifically identify which portions of the instructions correctly state the law, it is assumed that the parts of the proposed instructions that differ from instructions given are the parts that are alleged to correctly express the law.

Segaline is left to provide the standard for this court to review the claimed errors of the appellant.

[¶54] The standard of review we apply to jury instructions depends on the decision under review. The instructions must be sufficient to allow the parties to argue their theory of the case. *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 165, 876 P.2d 435 (1994). Whether or not that standard has been met is a question of law that we review de novo. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000). And, whether the court's instructions to the jury are accurate statements of the law is also a question of law that we review de novo. *State v. Becklin*, 163 Wn.2d 519, 525, 182 P.3d 944 (2008). But once these threshold requirements have been met, we then review the judge's wording, choice, or the number of instructions for abuse of discretion. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996).

. . .

¶57] Mr. Strange also contends that the court should have defined the terms " notice," " flight," and " forcible resistance." A court must define technical words and expressions, but need not define words or expression that are of ordinary meaning or are self-explanatory. In re *Det. of Pouncey*, 168 Wn.2d 382, 390, 229 P.3d 678 (2010). A court has discretion to decide the technical nature of words. *Id.* The court here determined that the terms were of common understanding and need not have a definition. That was well within the judge's discretion.

*Strange v. Spokane County*, 171 Wn. App 585, 287 P.3d 710, (2012)

This brief has previously demonstrated that the *Matthews* criteria, which comprised most of the Court's Instruction #13, are indisputably basic and essential law for the due process criteria. L& I's instruction 1—3 fail to incorporate that criteria and are not a correct statement of the law. Nor are any of the objections of L & I pointing to an erroneous statement of the law in jury Instruction # 13.

The court's instructions in this matter allowed both parties to argue their case. The record shows that L & I opened the case arguing that the issue was one of safety. RP 70. It opened its closing with the same theory. RP 1104. It argued that Mr. Segaline was "Potentially dangerous" and "irrational." RP 1112. That his statements were "bizarre" RP 1107. It argued that Mr. Croft's actions were necessary to "protect employees." RP 1107. Instruction #13 allowed the State to argue that the jury could consider and balance "the government's interest, including the burdens that accompany additional procedures." ( a more general statement than

the language of proposed #1 and #2, but allowing the same arguments) It allowed the state to argue “whether there was notice and opportunity to be heard available to remedy any wrongful deprivation.” (a more general statement than the language of proposed #3, but allowing the same arguments.) L & I has provided no authority nor any argument that either demonstrate the court’s instructions were erroneous as a matter of law or that it abused its discretion in choosing the language of the instructions.

Further, defendants’ proposed instructions are erroneous. A jury instruction is erroneous if it focuses upon one fact, and not the entire record, in asking the jury to make a finding.

*Harvey v. Plains Township Police Department*, 635 F.3d 606 (3d Cir.2011). Harvey, a private citizen, brought a § 1983 claim against a police officer who had assisted her ex-boyfriend in obtaining personal possessions from her apartment while she was not home, despite a " protection from abuse order" that granted her exclusive possession of the once-jointly-rented apartment. Harvey, 635 F.3d at 608. The federal district court instructed that, in order to find that the police officer " act[ed] under color of state law," the jury had to answer only one question: Did the police officer order the landlord to open the apartment door? *Harvey*, 635 F.3d at 609. The jury answered this question in the negative, and Harvey appealed. *Harvey*, 635 F.3d at 609. On appeal, the Third Circuit reversed and remanded for a new trial, holding that the jury instruction and verdict form were erroneous because " [t]he state action question must be addressed after considering the totality of the circumstances and cannot be limited to a single factual question." *Harvey*, 635 F.3d at 610-11.

*Osborne v. Seymour*, 164 Wn.App. 820, 855, 265 P.3d 917(2011)

Instructions 1—3 do not attempt to hide that L & I wanted the court, by giving those factually specific instructions, to direct the verdict for it. Proposed #1 would have directed the jury that “Mr. Segaline refused to agree to conduct his business in the L & I office in a non-intimidating manner.”, a hotly contested fact; Proposed #2 would have directed that the trespass notice was issued “in order to protect L & I employees”, another material and hotly contested fact. And proposed #3 would have erroneously expressed the legal standard of the due process requirements for a notice of appeal, at minimum “notice and opportunity to be heard”., by telling the jury that was the same thing as an explanation of how to have the trespass notice removed.

L & I also references an error for the court to not give its proposed #6, defining the crime of threatening force against a public servant, however, the facts of the case did not support the giving of this instruction. L & I failed to cite any authority that would support giving such an instruction in a due process case. Further it did not propose any instruction that would connect the proposed instruction to the elements of a civil rights claim for failure to provide due process.

Without any analysis or citation to authority, L & I also now objects to not giving its proposed verdict form, which essentially comprised a set of

factually specific interrogatories, which erroneously described the law or which were invalid jury instructions because they did not allow the jury to consider all of the facts of record in its determinations.

Finally, even if a jury instruction is erroneous, it is not grounds for reversal unless the party demonstrates that the outcome of the trial would likely be different. *Torno v. Hayek* 133 Wn. App 244, 135 P.3d 536 (2006). The trial record here contains evidence substantially supporting the jury verdict.

The objections as to jury instructions should be denied for failure to demonstrate that the court's instruction is legally deficient, failure to cite authorities, failure to provide analysis of any prejudice, and for failure to defend the legal accuracy of the proposed instructions.

## **VI. THE TRIAL COURT DID NOT ERR IN EXERCISING ITS DISCRETION TO EXCLUDE A SNIPPET OF DEPOSITION TESTIMONY**

### **A. L & I failed to provide for the record the specific proposed testimony.**

It is believed that L & I intended to offer the police report of Officer Dieringer, set forth at CP 799. However, L & I failed to call the officer in person to testify. Over the objection of plaintiff, the court allowed deposition testimony to be read for this available witness, CP 490—512.

However, L & I never offered the police report, as it could not have because the officer did not testify live. There is no deposition in the clerks papers so that the exact language wanted from the deposition is not identified in the record or in the brief of L & I.

The trial court correctly ruled that a statement about a weapon was speculative and unmistakably prejudicial, and L & I never attempted to comply with the Court's Order on Motion in Limine to make a showing outside the jury of relevancy and of evidentiary quality beyond mere speculation.

**B L & I has failed to brief the applicable standard of abuse of discretion, and shown no prejudice.**

L & I has not cited to any authority that would describe standards that would make this evidentiary ruling an abuse of discretion of the court, per Wash. Rule Evid. 403. The court made numerous discretionary decisions regarding the testimony allowed from the officer's discovery deposition. RP 496-512., which were consistent with this ruling.

L & I preserved this issue only for the purpose of defeating Plaintiff's probable cause, and malice allegations, both relating to the Malicious Prosecution claim and not the Civil Rights claim herein.. CP 487. The trial court was not given the opportunity to rule upon any alleged relevance to the civil rights claim. Similarly to authorities cited herein as

to the failure to preserve the error of law argument as to due process, this purported error was not properly preserved.

**VI. CONCLUSION:**

The Court of Appeals should affirm the trial court's jury verdict and judgment.

**VII. ATTORNEYS FEES:**

The Court of Appeals should award attorneys fees to plaintiff if it rules in his favor, per 42 USC 1983., and allow an application for fees to be

submitted within 10 days of the court's ruling.

*I hereby certify I served Ms. Patricia Todd this date via her e-mail of record.*

Respectfully Submitted this 14<sup>th</sup> day of July, 2016

  
/s/ Jean Schiedler-Brown

Jean Schiedler-Brown, WSBA # 7753  
For Michael Segaline

APPENDIX I

## INSTRUCTION NO. 1

To enforce civil rights guaranteed to persons by the United States Constitution, Congress has enacted a law, known as Section 1983, which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Michael Segaline claims that by issuing him a trespass notice that directed Michael Segaline not to access the L&I office, deprived Michael Segaline of liberty and property without due process of law as guaranteed by the Fourteenth Amendment to the Constitution, and deprived Michael Segaline his right to freedom of assembly in violation of the First Amendment to the Constitution.

Michael Segaline further claims that Alan Croft's conduct was a proximate cause of injuries or damage to Mr. Segaline.

Alan Croft denies that the issuance of the trespass notice deprived Mr. Segaline of due process or his right to freedom of assembly.

In addition, Alan Croft claims the following affirmative defense:

Alan Croft claims that he acted reasonably in issuing the trespass notice after Mr. Segaline refused to agree to conduct his business in the L&I office in a non-intimidating manner. Alan Croft claims that Mr. Segaline did not provide sufficient facts to support a violation of a constitutional right.

Michael Segaline denies these claims.

Alan Croft further denies that Mr. Segaline was injured or sustained damage.

Alan Croft further denies the nature and extent of the claimed injuries or damage.

WPI 340.01 (6th ed.) (modified)

## INSTRUCTION NO. 2

On his Section 1983 claim, Michael Segaline has the burden of proving each of the following propositions:

(1) That the acts of Alan Croft in drafting and issuing a trespass notice in order to protect L&I employees subjected Michael Segaline to the deprivation of due process and freedom of assembly protected by the Constitution or the laws of the United States; and

(2) That Alan Croft's actions proximately caused injury or damage to Michael Segaline.

WPI 340.02 (6th ed.) (modified)

## INSTRUCTION NO. 3

Establishing a cause of action under Section 1983 for violation of a right to procedural due process, requires proof of the following elements:

(1) A liberty or property interest protected by due process; and

(2) Deprivation of due process.

Due process includes a procedure to appeal. Providing Mr. Segaline with an explanation of how to have the trespass notice removed would satisfy due process.

WPI 340.02 (6th ed.) (modified); *Portman v. Cnty. of Santa Clara*, 995 F.2d 898 (9th Cir. 1993) (analysis of interest in employment); *see also Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 719 P.2d 98 (1986); WPI 340.06 (6th ed.) (Comment 3, Due Process); *State v. Green*, 157 Wn. App. 833, 848, 239 P.3d 1130, 1137 (2010); *Acevedo-Garcia v. Monroig*, 351 F.3d 547 (1st Cir. 2003)

*City of Marshfield*, 203 F.3d 487, 494 (7th Cir. 2000) (“whether a property has historically been used for public expression plays an important role in determining if the property will be considered a public forum.”); *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 749 (6th Cir. 2004) (“[t]here is no evidence in the record in this case that indicates that Ohio intended to open up nontraditional forums such as schools and privately-owned buildings for public discourse merely by utilizing portions of them as polling places on election day”). In determining that utility poles do not constitute a traditional public forum, the court in *Mighty Movers* considered whether a principal purpose of utility poles is the free exchange of ideas, whether utility poles share the characteristics of a traditional public forum, as well as the historical use of utility poles. *Mighty Movers, Inc.*, 152 Wn.2d at 358-59.

*Sanders*, 160 Wn. 2d at 211-12, 156 P.3d at 881 (2007).

#### INSTRUCTION NO. 6

It is unlawful to intimidate a public servant. A person is guilty of intimidating a public servant if, by use of the threat, he or she attempts to influence a public servant’s vote, opinion, decision, or other official action as a public servant.

Threat means threatening to communicate, directly or indirectly, the intent to use force against a person who is present at the time, or to do any act which is intended to harm substantially the person threatened or another, with respect to his or her health, safety, business, financial condition, or personal relationships.

RCW 9A.76.180; RCW 9A.04.110 § 28(J)

#### INSTRUCTION NO. 7

In order to maintain an action for malicious prosecution, Michael Segaline must prove each of the following elements;

First, that the prosecution claimed to have been malicious was instituted or continued by Labor & Industries;

Second, that there was no probable cause for the institution or continuation of the prosecution;

Third, that the proceedings were instituted or continued through malice; and

**STATE OF WASHINGTON  
THURSTON COUNTY SUPERIOR COURT**

MICHAEL SEGALINE, a single person,  
Plaintiff,

vs.

THE STATE OF WASHINGTON,  
DEPARTMENT OF LABOR AND  
INDUSTRIES; ALAN CROFT,  
Defendants.

NO. 05-2-01554-1

SPECIAL VERDICT FORM

We, the jury, answer the questions submitted by the Court as follows:

**I. MALICIOUS PROSECUTION CLAIM AGAINST  
DEFENDANT LABOR AND INDUSTRIES**

QUESTION NO. 1: At the time of his arrest, did probable cause exist to believe that Mr. Segaline was committing the crime of "trespass" or the crime of remaining unlawfully?

ANSWER:     \_\_\_\_\_ Yes     \_\_\_\_\_ No

(If your answer to Question No. 1 is "yes," do not answer Questions No. 2-5, skip to Section II Civil Rights and answer Question No. 1 in Section II Civil Rights, Section A. Due Process Claims. If you answered "no" to Question No. 1, answer Question No. 2.)

QUESTION NO. 2: Did the Department of Labor and Industries' East Wenatchee office act with malice in causing Mr. Segaline's arrest?

ANSWER:     \_\_\_\_\_ Yes     \_\_\_\_\_ No

(If your answer to Question No. 2 is "no," do not answer Questions No. 3-5, skip to Section II Civil Rights and answer Question No. 1 in Section II Civil Rights, Section A. Due Process Claims. If you answered "yes" to Question No. 2, answer Question No. 3.)

QUESTION NO. 3: Was the conduct of the Department of Labor and Industries' East Wenatchee office the proximate cause of Mr. Segaline's arrest for trespass on August 22, 2003?

ANSWER:     \_\_\_\_\_ Yes     \_\_\_\_\_ No

(If your answer to Question No. 3 is "no," do not answer Questions No. 4-5, skip to Section II Civil Rights and answer Question No. 1 in Section II Civil Rights, Section A. Due Process Claims. If you answered "yes" to Question No. 3, answer Question No. 4.)

QUESTION NO. 4: Was Mr. Segaline's arrest a proximate cause of injury or damage?

ANSWER:     \_\_\_\_\_ Yes     \_\_\_\_\_ No

(If your answer to Question No. 4 is "no," do not answer Questions No. 5, skip to Section II Civil Rights and answer Question No. 1 in Section II Civil Rights, Section A. Due Process Claims. If your answer to Question No. 4 is "yes," answer Question No. 5.)

QUESTION NO. 5: What do you find to be Mr. Segaline's damages?

ANSWER: \$ \_\_\_\_\_

(Go to Section II Civil Right's Claim A. Due Process Claim Question No. 1)

## II. CIVIL RIGHT'S CLAIM

### A. DUE PROCESS CLAIM AGAINST DEFENDANT ALAN CROFT

QUESTION NO. 1: Did Michael Segaline engage in unlawful conduct in the Department of Labor and Industries' East Wenatchee office by threatening or intimidating the Department's employees prior to issuance of the Trespass Notice?

ANSWER:     \_\_\_\_\_ Yes     \_\_\_\_\_ No

(If your answer to Question No. 1 is "yes," do not answer Question Nos. 2-5, skip Section B. Lawful Assembly, and do not answer any further questions, sign and return this verdict form.

If you answered "no" to Question No. 1, answer Question No. 2.)

QUESTION NO. 2: Did the Trespass Notice contain a provision of how the Trespass Notice could be removed?

ANSWER:     \_\_\_\_\_ Yes     \_\_\_\_\_ No

(If your answer to Question No. 2 is "yes," do not answer Question Nos. 3-5, skip ahead to Section B. Lawful Assembly. If you answered "no" to Question No. 2, answer Question No. 3.)

QUESTION NO. 3: Was the law clearly established at the time when the Trespass Notice was issued such that every reasonable public official would know that doing so was unlawful?

ANSWER:     \_\_\_\_\_ Yes     \_\_\_\_\_ No

(If your answer to Question No. 3 is "no," do not answer Question Nos. 4 or 5, skip ahead to Section B. Lawful Assembly. If you answered "yes" to Question No. 3, answer Question No. 4.)

QUESTION NO. 4: Was the issuance of the Trespass Notice a proximate cause of injury or damage to Michael Segaline?

ANSWER:       Yes       No

(If your answer to Question No. 4 is "no," do not answer Question No. 5, skip ahead to Section B. Lawful Assembly. If you answered "yes" to Question No. 4, answer Question No. 5.)

QUESTION NO. 5: What do you find to be the damages that resulted to Mr. Segaline from the issuance of the Trespass Notice?

ANSWER: \$ \_\_\_\_\_

(Do not include any damages in the amount above that are part of any award in your answer to Question No. 5 in the preceding Section I. Malicious Prosecution Claim Against Defendant Labor and Industries)

**B.      LAWFUL ASSEMBLY CLAIM AGAINST DEFENDANT ALAN CROFT**

QUESTION NO. 1: Did Michael Segaline engage in unlawful conduct in the Department of Labor and Industries' East Wenatchee office by threatening or intimidating its employees prior to the issuance of the Trespass Notice?

ANSWER:       Yes       No

(If your answer to Question No. 1 is "yes," do not answer any further questions, sign and return this verdict form. If you answered "no" to Question No. 1, answer Question No. 2.)

QUESTION NO. 2: Did Michael Segaline engage in unlawful conduct in the Department of Labor and Industries' East Wenatchee office by remaining unlawfully?

ANSWER:       Yes       No

(If your answer to Question No. 2 is "yes," do not answer any further questions, sign and return this verdict form. If you answered "no" to Question No. 2, answer Question No. 3.)

QUESTION NO. 3: Is the Department of Labor and Industries' East Wenatchee office a public forum in which Michael Segaline had a right to assemble?

ANSWER:       Yes       No

(If your answer to Question No. 3 is "no," do not answer any further questions, sign and return this verdict form. If you answered "yes" to Question No. 3, answer Question No. 4.)

QUESTION NO. 4: Actions/conduct of \_\_\_\_\_ constitute lawful assembly. Did Mr. Segaline engage of actions/conduct of \_\_\_\_\_ in the Department of Labor and Industries' East Wenatchee office?

ANSWER:       Yes       No

(If your answer to Question No. 4 is "no," do not answer any further questions, sign and return this verdict form. If you answered "yes" to Question No. 4, answer Question No. 5.)

QUESTION NO. 5: Was Mr. Segaline's actions/conduct listed in Question No. 4 the reason why Mr. Croft issued the Trespass Notice?

ANSWER:       Yes       No

(If your answer to Question No. 5 is "no," do not any further questions, sign and return this verdict form. If you answered "yes" to Question No. 5, answer Question No. 6.

QUESTION NO. 6: Was Mr. Croft's issuance of a Trespass Notice a proximate cause of injury or damage to Mr. Segaline?

ANSWER:       Yes       No

(If your answer to Question No. 6 is "no," do not answer any further questions, sign and return this verdict form. If you answered "yes," to Question No. 6, answer Question No. 7.)

QUESTION NO. 7: What do you find to be the damages that resulted to Mr. Segaline from the issuance of the Trespass Notice?

ANSWER: \$ \_\_\_\_\_

(Do not include any damages in the amount above that are part of any award in your answer to Question No. 5 in the preceding Section I. Malicious Prosecution Claim Against Defendant Labor and Industries or in answer to Question No. 5 in the preceding Section A. Due Process Claim Against Defendant Alan Croft.)

*(INSTRUCTION: Sign this verdict form and notify the bailiff.)*

DATE: \_\_\_\_\_, 2015.

\_\_\_\_\_  
Presiding Juror

APPENDIX II

insurance or other funding available to a party, the question of who pays or who reimburses whom would be decided in a different proceeding. Therefore, in your deliberations, do not discuss any matters such as insurance coverage or other possible sources of funding for any party. You are to consider only those questions that are given to you to decide in this case.

**INSTRUCTION NO. 7**

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression “if you find” is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

**INSTRUCTION NO. 8**

The term “proximate cause” means a cause which in a direct sequence produces the injury or event complained of and without which such injury or event would not have happened.

There may be more than one proximate cause of an injury event

**INSTRUCTION NO. 9**

Michael Segaline claims that by directing him not to come to the L&I office, Alan Croft deprived Michael Segaline of rights without due process of law as guaranteed by the Fourteenth Amendment to the Constitution.

COURT'S INSTRUCTIONS, Page 6.

Michael Segaline further claims that Alan Croft's conduct was a proximate cause of injuries or damage to Mr. Segaline.

Alan Croft denies that directing Mr. Segaline not to come to the L&I office deprived Mr. Segaline of due process.

Alan Croft claims that Mr. Segaline did not provide sufficient facts to support a violation of a constitutional right.

Michael Segaline denies these claims.

Alan Croft further denies the nature and extent of the claimed injuries or damage.

Michael Segaline also claims that The Department of Labor and Industries, through its agents, maliciously prosecuted him, causing and / or continuing a criminal prosecution without probable cause. The Department of Labor and Industries denies this. They also deny the nature and extent of the claimed injuries and damage.

**INSTRUCTION NO. 10**

The forgoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed; and you are to consider only those matters that are established by the evidence. These claims have been outlined to aid you in understanding the issues.

**INSTRUCTION NO. 11**

COURT'S INSTRUCTIONS, Page 7.

To enforce civil rights guaranteed to persons by the United States Constitution, Congress has enacted a law, known as Section 1983, which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

**INSTRUCTION NO. 12**

To prevail on his Section 1983<sup>claim</sup> Michael Segaline must prove each of the following by a preponderance of the evidence:

That Alan Croft subjected, or caused Michael Segaline to be subjected, to deprivation, of his liberty interest to enter the East Wenatchee Department of Labor and Industries by keeping him out of the East Wenatchee Department of Labor and Industries from approximately June through October, 2003;

That Alan Croft was acting under color of law; You are instructed that the parties agree that Alan Croft was acting under color of law;

That Alan Croft acted intentionally; and

That Alan Croft did not provide Michael Segaline with due process prior to depriving him of his interest.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for Michael Seglaine on this claim. On the other hand, if any of these propositions have not been proved, your verdict should be for Alan Croft on this claim.

**INSTRUCTION NO. 13**

Due process is a flexible concept and that the procedures required depend upon the facts of a particular circumstance. Due process requires the opportunity to be heard at a meaningful time in a meaningful manner. You may consider the timing of the trespass notice but are not to consider issues as to the legalities or form of the notice. In determining the reasonableness of the opportunity for hearing, you should consider:

The nature of Mr. Segaline's interest ;

The risk of a wrongful deprivation by the procedures, if any, that were used and the value of additional procedures;

and the government's interest, including the burdens that accompany additional procedures.

You should also consider whether there was notice and opportunity to be heard available to remedy any wrongful deprivation.

**INSTRUCTION NO. 14**

A person subjects another to the deprivation of a constitutional right, within the meaning of Section 1983, if he does an affirmative act, participates in another's

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF THURSTON

FILED  
SUPERIOR COURT  
THURSTON COUNTY, WA  
2015 NOV 12 PM 2:53  
Linda Myhre Enlow  
Thurston County Clerk

MICHAEL SEGALINE

Plaintiff,

vs.

WASHINGTON STATE DEPARTMENT  
OF LABOR & INDUSTRIES

and ALAN CROFT,

Defendants.

No. 05-2-01554-1

SPECIAL VERDICT

We, the jury, answer the questions submitted by the Court as follows:

A. Did Alan Croft violate Michael Segaline's Fourteenth Amendment Right to enter a public office. X YES \_\_\_ NO

If you answer "yes" Answer question 1, 2, and/or 3 regarding this claim.

If you answer "no" go to question B below.

1. Do you award damages to Mr. Segaline? X YES \_\_\_ NO

If you answer "no", go to question 2.

If you answer "yes" answer the following:

05-2-01554-1  
SPV  
Special Verdict Form  
15998



What is the amount you award for economic damages? \$203,000

What is the amount you award for non-economic damages? \$750,000

2. Do you award punitive damages to Mr. Segaline?

YES  NO

If you answer "yes", what is the amount you award: \_\_\_\_\_

If you awarded punitive damages, go to question B below

If you answer "no", go to the next question.

3. Do you award nominal damages to Michael Segaline?

YES  NO

*(INSTRUCTION: Go to question B)*

B. Did The State of Washington Department of Labor and Industries, through its employees, maliciously prosecute Michael Segaline?  YES  NO

If you answer "yes", then answer part 4, regarding this claim below:

If you answer "no", then Date and Sign this Special Verdict Form and give it to the bailiff.

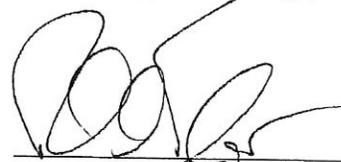
4. Do you award damages to Michael Segaline for this claim?

YES  NO

If you answer "yes", what is the amount you award: \_\_\_\_\_

*(INSTRUCTION: Sign this verdict form and notify the bailiff.)*

12 Nov 15  
DATE

  
\_\_\_\_\_  
Presiding Juror

## APPENDIX III

WestlawNext **Washington Civil Jury Instructions**[Home Table of Contents](#)*WPI340.01 Introductory Civil Rights Instruction*Washington Practice Series TM  
Washington Pattern Jury Instructions--Civil

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 340.01 (6th ed.)

Washington Practice Series TM  
Washington Pattern Jury Instructions--Civil  
Database updated June 2013Washington State Supreme Court Committee on Jury Instructions  
Part XVII. Civil Rights  
Chapter 340. Civil Rights—General Introductory Instructions**WPI 340.01 Introductory Civil Rights Instruction**

To enforce civil rights guaranteed to persons by [the United States Constitution] [federal statute(s)], Congress has enacted a law, known as Section 1983, which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(1) (Name of plaintiff) claims that (name of defendant) [subjected [him] [her] [it]] [caused [him] [her] [it] to be subjected] to the deprivation of a [constitutional] [federal statutory] right, in that (name of defendant) has:

(Set forth in simple form without undue emphasis or repetition those claims by the plaintiff that have not been withdrawn or ruled out by the court and are supported by the evidence. Summary descriptions of typical constitutional claims are set forth in the Comment below.)

(Name of plaintiff) claims that [(name of defendant) was acting under color of law at the time of the incident, and that] (name of defendant's) conduct was a [proximate] cause of injuries or damage to (name of plaintiff). (Name of defendant) denies these claims.

(2) [In addition, defendant[s] (name of individual defendant(s)) claim[s] the following affirmative defenses:

(Set forth in simple form without undue emphasis or repetition any affirmative defenses that have not been withdrawn or ruled out by the court and are supported by the evidence.)

(Name of plaintiff) denies these claims.]

(3) [In addition, the defendant[s] (name of municipal defendant[s]) claim [s] the following affirmative defenses:

(Set forth in simple form without undue emphasis or repetition any affirmative defenses that have not been withdrawn or ruled out by the court and are supported by the evidence.)

(Name of plaintiff) denies these claims.]

(4) [(Name of defendant) further denies that (name of plaintiff) was injured or sustained damage.]

(5) [(Name of defendant) further denies the nature and extent of the claimed injuries or damage.]

**NOTE ON USE**

Select the bracketed phrases or sentences as applicable.

This instruction is based upon the format of WPI 20.01 (Issues), adapted for a civil rights action under Section 1983, Title 42, U.S.C.A. Causes of action under Sections 1981 (contractual issues) and 1985 (conspiracy) are not addressed in these instructions. See WPI 340.00 (Civil Rights—Introduction).

This instruction, adapted appropriately, is designed for use in all Section 1983 cases. With regard to individual defendants, this instruction should be combined with instructions drawn from the remainder of WPI Chapter 340 (General Introductory Instructions).

With regard to defendants that are local governmental entities, or individuals acting in their official capacities, combine this instruction with applicable instructions from WPI Chapter 341 (Municipal and Local Government Liability). See WPI 340.00 (Civil Rights—Introduction).

Regarding the bracketed word “proximate,” see the detailed discussion of causation issues found in WPI 340.06 (Civil Rights—Causation—Comment Only). Instructions on causation must be carefully tailored to the specific case. See also WPI340.02, WPI340.04, WPI343.02, and WPI343.04 343.04, and the Notes on Use and Comments to these instructions.

The numbers in parentheses preceding each paragraph should not be included when the instruction is given. They are used here for convenience in referring to paragraphs in this note and when instructions are being prepared for a particular case.

Paragraph (1) will always be used. In that paragraph, practitioners will need to summarize the constitutional claim at issue. See the Comment for examples of typical claim summaries. Insert the bracketed reference to “acting under color of law” if that is a contested issue in the case, and also use with WPI 340.03 (Civil Rights—“Under Color of Law”—Definition).

The pertinent paragraphs (2) through (5) should be selected according to the issues properly in the case and supported by the evidence. Paragraphs (2) and (3) are set forth separately, because defendants sued in their individual capacities have different defenses available to them than individuals sued in their official capacities or governmental entities, collectively designated municipal defendants. See the Comment below and the Comment to WPI 341.01 (Civil Rights—Municipal and Local Government Liability—General Introductory Instruction).

The instruction uses the word “persons.” Section 1983 protects U.S. citizens and others who are within the jurisdiction of the United States. If factual issues exist as to whether the plaintiff falls within this scope, then the instruction will need to be modified.

If the case contains another type of claim, such as an action in tort, care should be taken to label the civil rights or Section 1983 instructions as such.

If the case involves a counter-claim by defendant, see WPI 20.02 (Issues—Claim and Counterclaim).

#### COMMENT

**Changes made in 2013.** The instruction’s first sentence was changed to use the word “persons” rather than “citizens.” See the discussion of citizens later in this Comment. Brackets were added to the word “proximate.” See the discussion in WPI 340.06 (Civil Rights—Causation—Comment Only).

**General.** With regard to the right of each party to have the trial court instruct on its theory of the case, see the Comment to WPI 20.01 (Issues).

This is an introductory instruction designed to acquaint the jury with the general subject matter of the Section 1983 lawsuit. The text of 42 U.S.C.A. Section 1983 is included in the introductory instruction to introduce the jury to the statutory basis of the civil rights cause of action.

A cause of action under Section 1983 requires proof that the defendant acted under color of state law, and that the defendant deprived the plaintiff of a right protected by the federal constitution or federal statute. *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992); *Torrey v. City of Tukwila*, 76 Wn.App. 32, 37, 882 P.2d 799 (1994). Federal action is not actionable under Section 1983. *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1987).

**Citizens and others within the jurisdiction of the United States.** Section 1983 protects not only U.S. citizens, but also others within the jurisdiction of the United States. Accordingly, non-citizens may be covered under some circumstances. See *Lynch v. Cannatella*, 810 F.2d 1363, 1372–73 (5th Cir. 1987) (holding that the plaintiff was entitled to protection under the Fifth and Fourteenth Amendments against “gross physical abuse at the hands of state or federal officials” even though the plaintiff was an “excludable alien”).

Whether a plaintiff qualifies as a citizen or as being within the jurisdiction of the United States will usually be determined as a matter of law. If factual issues exist, the instruction will need to be modified.

**Examples of claim descriptions for use in paragraph (1).** Section 1983 can cover a wide variety of constitutional claims. For some of the more typical claims, the committee sets forth below examples of how these claims may be summarized for purposes of the instruction’s Paragraph (1). Practitioners should replace the labels “plaintiff” and “defendant” in these examples with the names of the parties.

(1) [the defendant used unreasonable force against the plaintiff, depriving [him] [her] of a right guaranteed by the Fourth Amendment of the Constitution. The Fourth Amendment guarantees every person the right to be secure against unreasonable seizures of the person.]

(2) [the defendant subjected [him] [her] to an unreasonable search of [his] [her] [person] [home] [papers and effects], depriving [him] [her] of a right guaranteed by the Fourth Amendment to the Constitution. The Fourth Amendment guarantees every person the right to be secure in his or her [person] [home] [papers and effects] against unreasonable searches and

seizures.]

(3) [the defendant [seized the plaintiff without reasonable suspicion] [arrested the plaintiff without probable cause], thereby depriving [him] [her] of a right guaranteed by the Fourth Amendment to the Constitution. The Fourth Amendment guarantees every person the right to be secure in his or her person against unreasonable searches and seizures.]

(4) [the defendant deprived the plaintiff of life, liberty, or property without due process of law as guaranteed by the Fourteenth Amendment to the Constitution.]

(5) [the defendant took the plaintiff's private property for public use without just compensation, thereby depriving [him] [her] of a right guaranteed by the Fifth Amendment to the Constitution.]

(6) [the defendant deprived the plaintiff of equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution.]

(7) [the defendant subjected the plaintiff to cruel and unusual punishment in violation of the Eighth Amendment to the Constitution.]

(8) [the defendant deprived the plaintiff of [his] [her] [its] right to freedom of speech in violation of the First Amendment to the Constitution.]

**Color of law.** The "color of law" element may be admitted or established by the court as a matter of law. See the Comment to WPI 340.03 (Civil Rights—"Under Color of Law"—Definition). Because the statute is quoted, however, it may be advisable to instruct the jury if color of law is not an issue. Cf. WPI 32.01 (Admitted Liability or Directed Verdict—Issues and Burden of Proof).

**Causation.** See the discussion of causation issues in WPI 340.02 (Civil Rights—Individual Defendant—Burden of Proof on the Issues), WPI 340.04 (Civil Rights—"Subjects" and "Causes to be Subjected"—Definition), and WPI 340.06 (Civil Rights—Causation—Comment Only).

**Corporate plaintiff.** The impersonal pronoun is included in the instruction because it appears that in appropriate circumstances a corporation may be a Section 1983 plaintiff. See *CarePartners LLC v. Lashway*, 545 F.3d 867 (9th Cir. 2008); *Gomez v. Alexian Bros. Hosp.*, 698 F.2d 1019 (9th Cir.1983); *Soranno's Gasco., Inc. v. Morgan*, 874 F.2d 1310 (9th Cir. 1989). But see *Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969) (shareholder lacks standing).

**Affirmative defenses.** Affirmative defenses should be included when they involve jury issues. See, e.g., *Smiddy v. Varney*, 665 F.2d 261 (9th Cir. 1981) (independent prosecution), called into doubt on other grounds in *Beck v. City of Upland*, 527 F.3d 853, 864–65 (9th Cir. 2008).

**Qualified immunity.** Individual defendants in a Section 1983 action are entitled to qualified immunity from damages for civil liability if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

Qualified immunity is decided under a two-part test: first, does the plaintiff have sufficient facts to support a violation of a constitutional right; second, was the constitutional right at issue clearly established? The trial court has discretion to decide which part should be analyzed first, because one or the other question may be dispositive on summary judgment. *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

To determine whether a federal right is clearly established, courts "do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. \_\_\_\_, 131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149 (2011) (in a *Bivens* cause of action, the Court held that the United States Attorney General was immune from a lawsuit for damages, under qualified immunity doctrine, because there was no clearly established right concerning the Attorney General's approval of a material witness warrant for a terrorism suspect under then-existing Fourth Amendment jurisprudence). The qualified immunity inquiry is whether the federal right, under the constitution or laws of the United States, would have been clear to a reasonable defendant: "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 131 S.Ct. at 2083 (internal citation omitted); see also *Torres v. City of Madera*, 648 F.3d 1119 (9th Cir. 2011), cert. denied, 132 S.Ct. 1032, 181 L.Ed.2d 739 (2012) (holding that a police officer was not entitled to qualified immunity when Ninth Circuit case law made it clear that firing a gun at the chest of an unarmed, immobilized suspect was an unreasonable use of force; no qualified immunity when the officer mistakenly thought she had a taser gun in her

hand instead of her pistol).

Normally, qualified immunity is decided by the court. Because it is an immunity from suit and not merely an affirmative defense, *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815–16, 86 L.Ed.2d 411 (1985), the court should resolve the issue of qualified immunity as soon as practicable. *Pearson v. Callahan*, 129 S.Ct. at 815. State law may be used as part of the analysis to determine whether a seizure was reasonable. State law is relevant as to probable cause; state law is used to analyze whether the federal constitutional right under the Fourth Amendment was clearly established in the context of the state criminal law that the officers were using as a basis for the arrest. *Pierce v. Multnomah County*, 76 F.3d 1032, 1038–39 (9th Cir. 1996).

The issue should not be submitted to the jury for determination unless there are genuine issues of material fact. *Johnson v. Jones*, 515 U.S. 304, 313–20, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995).

If issues of fact need to be determined by the trier of fact before the court can make a determination on qualified immunity, these issues typically are presented as a list of questions in a special verdict form. See *Torres v. City of Los Angeles*, 548 F.3d 1197, 1210–12 (9th Cir. 2008); *Ortega v. O'Connor*, 146 F.3d 1149, 1154–57 (9th Cir. 1998) (qualified immunity instruction upheld).

**Avoiding comments on the evidence.** When describing the relevant factors and the factual basis of the claim in a jury instruction, it is necessary to consider the Washington State Constitution, Article IV, Section 16, which prohibits the trial court from commenting on the evidence. If the court takes care to refrain from either explaining or criticizing evidence, and the court avoids any suggestion that the evidence proves a fact or element at issue, there is no comment on the evidence. See WPI 1.01 (Advance Oral Instruction for Civil Cases); Wash. Const. Art. IV, § 16; *Kerr v. Cochran*, 65 Wn.2d 211, 214–18, 396 P.2d 642 (1964); *Tegland*, 14A Washington Practice, Civil Procedure 31:20 (through 2010 pocket part).

*[Current as of January 2013 ]*

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