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NO. 35823-9-II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL SEGLAINE
Appellant.

vs.

STATE OF WASHINGTON DEPARTMENT OF LABOR AND
INDUSTRIES,
Respondent,

PETITION FOR REVIEW BY APPELLANT

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I. IDENTITY OF THE PETITIONER:

MICHAEL SEGALINE, Plaintiff/Appellant

II. CITATION TO COURT OF APPEALS DECISION:

Michael Segaline v. State of Washington Dept. of Labor and Industries,
Division II No. 35823-9-II, filed April 29, 2008.

III. ISSUES PRESENTED FOR REVIEW:

1. The appellate court's decision that "person" includes the State and grants it immunity under RCW 4.24.510 is in conflict with a Division III case interpreting the same statute;
2. Since it has been amended, RCW 4.24.510 has not been interpreted as to its good faith requirement and plaintiff presented a question of fact that should have been resolved by the fact finder.
3. As applied, RCW 4.24.510 is Constitutionally overbroad, and violates plaintiff's right to access to the courts.
4. The appellate court's decision that the Malicious Prosecution claim is extinguished by RCW 4.24.510 is in conflict with numerous cases applying RCW 4.24.350(1) and cases establishing statutory interpretation; it is also an issue of substantial public interest whether or not section 510 extinguishes this common law and statutory cause of action of malicious prosecution.
5. The appellate decision conflicts with established federal law in

ruling that June 30, 2003, and not August 22, 2003, was the date that the cause of action accrued; additionally, the opinion conflicts with *Gildon v. Simon Property Group Inc.*, 158 Wn. 2d 483, fn9, 145 P.3d 1196 (2006) by limiting the relation back of the First Amended Complaint, to incidents occurring after August 4, 2003.

6. A significant question under the United States Constitution was not reached because of the erroneous decision regarding the date that this action accrued; the parties fully briefed the appellant's claim that persons have a constitutional liberty interest and right to enter public places of business if they are licensed, invited, or otherwise privileged to do so, and that there was at least a question of material fact whether Croft had qualified immunity. This case should be reversed and remanded for this issue to be decided, or the parties should be allowed to update briefing to this court. See the extensive briefing in the opening, responding and reply briefs in the record herein. They analyze the liberty interests, the property and due process standards in State Law, the violation of Mr. Segaline's property and liberty interests by excluding him from the State office, and the issues of qualified immunity.

IV. STATEMENT OF CASE

A. PROCEDURE

Plaintiff brought an action against the State of Washington Department of Labor and Industries (L & I) for, among others, Negligent supervision and malicious prosecution, and later joined Alan Croft, an L & I employee, for violation of his Constitutional Rights under 42 USC 1983.

On December 5, 2005, the Department of Labor and Industries (L&I) responded to plaintiff's first set discovery requests, and in response to Interrogatory number 6, indicated that "Alan Croft" drafted and designed the notice (of trespass). CP 223, 228. Mr. Croft's address was not disclosed in the responses to interrogatories, although plaintiff's requests demanded addresses as part of the witness identification. CP 224, 227. Mr. Croft was not produced for deposition until June 9, 2006. He testified that he made the decision to issue the "no trespass" notice, without direction from superiors. CP 223—225; 230—241. The deposition was not transcribed until June 25, CP 241;

On July 3, 2006 plaintiff filed his response opposing the motion for summary judgment by L & I, and gave notice of the possibility of amending the lawsuit to name the recently discovered official responsible for issuing the trespass notice. CP 190. On August 3, plaintiff filed his

motion to amend the complaint to individually name an employee of defendant, Alan Croft, under 42 USC § 1983. CP 220.

B. STATEMENT OF FACTS

Alan Croft is the regional Safety and Health Coordinator for the East Wenatchee Department of Labor and Industries. CP 60. Mr. Croft requested an opinion, process, or protocol from the attorney general via his Chain of command in the Department of Labor and Industries, regarding when members of the public may be excluded from State Offices. He requested an opinion multiple times starting shortly after he met with plaintiff on June 19, 2003. CP 62—4 There is no written departmental policy or procedure on this issue, CP 68.

In October, 2003, Security Coordinator Sgt. Patty Reed, CP 69, informed Mr. Croft she had still not heard back from the attorney general regarding issuing No Trespass notices to the public. CP 65. In fact, Mr. Croft never received any direction how to make a decision of when to bar a member of the public from a State office. CP 67; CP 419—426; CP 90-91 He is not sure that it is ever permissible to use a “trespass notice”, and he was aware of this issue prior to issuing it in June, 2003. CP 91—2.

Mr. Croft denied having concluded, prior to June 19, 2003, that Mr. Segaline had intimidated or harassed any Labor and Industries staff, or had disrupted business in that office. CP 72. Mr. Dave Whittle was the

other person that Mr. Croft invited to the June 19 meeting with Mr. Segaline. He did not include a member of the security coordinator's office and there was no security concern at that point. CP 73,74. Both parties agreed to tape record the meeting. CP 75. Mr. Segaline did not yell at the meeting. He raised his voice a few times. He did not call Mr. Croft any names. He did not use profanity. CP 74,75. According to Mr. Croft, his voice was elevated or raised a bit, but he did not yell. Cp 76, 77. In fact, during the entire meeting, his voice sounded like he was trying to be reasonable. CP 77. Mr. Croft noticed that Mr. Segaline had a red face, but admitted at his deposition that Mr. Segaline naturally has a red face much of the time. CP 97.

Without warning to Mr. Segaline, when Mr. Segaline left the meeting, Mr. Croft called the police. He did not tell Mr. Segaline he intended to call the police or request any change in Mr. Segaline's behavior before deciding to call. He called the police prior to asking Mr. Segaline to leave the office. CP 78—80.

On June 23, Mr. Croft wrote a memorandum to his supervisors, in part:

The right of trespass by the department is being explored. If valid, procedures should be established, including a formal trespass warning form or letter.

If Mr. Segaline's inappropriate behavior continues

or escalates, other alternatives should be considered.
CP 335.

Mr. Croft claimed, in this memorandum to his supervisors, to have informed Mr. Segaline to do business through the electrical supervisor Dave Whittle, and that a letter would be sent to Mr. Segaline confirming this protocol. CP 335—6. None was sent. CP 175—6.

Mr. Croft knew there was no inappropriate behavior by Mr. Segaline on June 30, when he was given the trespass notice, nor on August 22, when he was arrested CP 94—6

Mr. Croft created the notice, and he provided it to the staff supervisor, Ms. Guthrie, to use. CP 85. He had informed all of the persons in his line authority regarding this issue. CP 88—90; 98.

Mr. Croft admitted that a member of the public saying that the department is wasting his time and that they will sue the department, is not a threat. CP 83--84. He had investigated Mr. Segaline, by interviewing a former employee, and concluded Mr. Segaline was not a high risk. CP 97.

Ms. Guthrie testified that she understood that all members of the public have a right to be served in that public office. CP 102. She knew Mr. Segaline, and saw him come into the office to conduct business from the years 1992 to 2003, approximately once every 3 months, and during all those years his behavior was not an issue. CP 103; 131-132.

On June 9, 2003 she recalled a telephone call from Mr. Segaline in which he was complaining about a "bogus CD account." He was not making sense to her. CP 110-111. He told her he would bring in a tape recorder and a lot of people would be behind bars, talked about people being held accountable, and if it costs your job, "so be it"; then his voice trailed off, and she thought he hung up, so she hung up the telephone. CP 105—109. This telephone call was transferred to her from a staff person and Ms. Guthrie thought the staff member felt threatened, but does not really remember more than in her notes. No notes were produced indicating the staff member felt threatened. Mr. Segaline talked very loudly but she would not call it yelling. CP 107—109. The call lasted less than 5 minutes. CP 133.

On June 10, Mr. Segaline came to the counter in the office for 3 or 4 minutes and Ms. Guthrie was on the other side of the waist high counter. CP 111, 112. He informed her that he planned to tape record the meeting with Mr. Croft. CP 113. His voice was calm. Ms. Guthrie subjectively felt that his desire to tape record the future meeting was an "implied threat" because there could be a confrontation if he was not allowed to do so. However, Mr. Segaline did not do anything that day that was confrontational. CP 115—117. His face did not get red. He did not raise his voice. He left of his own accord. CP 120.

Ms. Guthrie also met with Mr. Segaline in June, along with Ms. Sanchez, her staff person, regarding issuing 4 permits. It lasted ½ hour. She felt that Mr. Segaline talked too loudly and was disruptive. She stated he was waving his hands, but not at her, rather, gesturing at a clock on the wall and saying that L & I was wasting his time. CP 121—126.

Ms. Guthrie observed Mr. Segaline purchase an electrical permit on August 21. He was in the office less than 5 minutes, and he did not raise his voice or do anything inappropriate that day. CP 136.

She observed him being arrested on August 22, and she does not recall him raising his voice when Mr. Hively told him the police were called. CP 137,138. There were no other times that Ms. Guthrie had any difficulties working with Mr. Segaline. CP 141.

Alice Lou Hawkins also knew Mr. Segaline since 1991, as an electrical contractor. CP 147. Prior to 2003, she never had concerns about his behavior, although she saw him approximately monthly. There were only two incidents that she related that were of concern to her. CP 148, 156. These were the same incidents as those related by Ms. Guthrie, and Ms. Sanchez had a different memory but recalled no violent activity by Mr. Segaline. CP 149—151; 159. She indicated that once she felt intimidated, but described no violence. CP 156—159.

She also testified about giving him the trespass notice on June 30,

and that he “yelled, and he told her “we” (the department) needed to get an attorney. CP 152—155. Ms. Hawkins has issued permits several times to Mr. Segaline since 2003 without incident. CP 161.

Mr. Segaline denies ever yelling or conducting himself in a threatening manner. He carefully informed the department personnel that he had a right to be in the building and conduct his business and that they needed to consult an attorney. He said that they were trampling on his rights. He informed them he had a right to tape record in the public area, per his attorney’s advice. He peacefully came into the department to do business on August 22, 2003, and was arrested without warning; CP 176.

After he was arrested, Mr. Segaline was charged with the crime of trespass, charges later voluntarily dismissed by the City of Wenatchee. CP 426. Although he had purchased a permit without incident August 21, L&I staff had confirmed with Mr. Croft later that day that the trespass ‘notice’ should be enforced the next time he came in. CP 428. Pursuant to direction by Croft, L & I arrested Segaline on August 22, 2003; (less than 3 years before the Complaint was amended to add Croft as a 42 USC 1983 defendant). Even after the charges of trespass were dismissed, Mr. Croft continued to try to obtain a legal opinion that he could exclude Mr. Segaline from the L&I offices, and he continued to brand Mr. Segaline as a law breaker in public record, informing staff that Mr. Segaline could

enter the premises if he did not break “another” law. C P 422--426.

The conclusions in the Appellate court opinion that Segaline was threatening or violent are impermissible conclusions that do not allow Mr. Segaline, as the nonmoving party, all inferences in favor of his version of the facts. Therefore, it follows that the conclusion that there is no evidence of bad faith (based upon the appellate court’s judicial resolution of the facts that there was cause to exclude Segaline from the office) is likewise a resolution of facts that should have gone to the jury.

V. ARGUMENT

A. The appellate court’s decision that “person” includes the State and grants it immunity under RCW 4.24.510 is in conflict with a Division III case interpreting the same statute.

The court below dismissed all claims against the state, except Negligent Infliction of Emotion Distress tied to the act of excluding him from the office, pursuant to RCW § 4.24.510. RCW § 4.24.510 provides:

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars.

Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

In *Gontmakher v. City of Bellevue*, 120 Wn. App. 365 (2004), Division I held that a city is considered a person under RCW § 4.24.510. The *Gontmakher* case reasoned that since RCW § 4.24.510 did not define “person”, the court should use the general definitions contained in RCW § 1.16.080;

The term “person” may be construed to include the United States, this state, or any state or territory, or any public or private corporation, as well as an individual.

However, in the case of *Skimming v. Boxer*, 119 Wn. App 748, 82 P.3d 707, rev. den 152 Wn.2d 111016 (2004), the court concluded that a county was not entitled to immunity as a “person” under this statute. The *Gontmaker* court declined to follow this conclusion because it believed the opinion was reached “without analysis”, however, statutory analysis supports the *Skimming* decision. First, construing the word “person” in this statute to include the state is not mandatory, since RCW § 1.16.080 uses the permissive term, “may. “

Secondly, in RCW § 4.24.500, the legislature expressed the purpose of the statute; if the Legislature intended to include the state, it would have or could have included the “state” in the statutory terms. Instead, it provides that the purpose of the statute is to protect “individuals”, and “citizens”. The term “person’ cannot be interpreted without considering those words. The court must not ignore unambiguous

words, and interpret the statute as a whole, so that no part of it is rendered meaningless. *State v. Delgado* 148 Wn.2d 723, 727, 63 P.3d 792 (2003); *Davis v. Dept. Licensing* 137 Wn.2d 957, 963, 977 P.2d 554 (1999), quoting *Whatcom County v. City of Bellingham*, 128 Wn. 2d 537, 546, 909 P.2d 1303 (1996)). While “persons” encompasses both “individuals” and “citizens”, to interpret that it also encompasses the state would greatly broaden the application of the statute beyond its expressed purpose.

B. Since it has been amended RCW 4.24.510 has not been interpreted as to its good faith requirement and plaintiff presented a question of fact that should have been resolved by the fact finder. Because it impacts every tort action against the State that is based upon a complaint to an enforcement agency, interpretation of this statute is an issue of substantial public interest.

Even though RCW § 4.24.510 was amended in 2002 (when a “good faith” requirement was taken out of that section), RCW § 4.24.500 and its “good faith” requirement was left intact, providing:

Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government. The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. The costs of defending against such suits can be severely burdensome. The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies.

Thus, although RCW § 4.24.510 does not contain a good faith allegation requirement, the legislature clearly applied its intent contained

in RCW § 4.24.500 to require the court to determine whether or not the defendant contacted the government on a good faith basis. The issue of good faith is a fact that should be determined by a jury, since there is a material issue of fact as to the good faith of defendants L& I and Croft: Croft knew that his “trespass notice” was violating Segaline’s rights, CP 65—67; 90—99; 419—426. he knew that Mr. Segaline was not a safety threat CP 97; 73—77; ; the exclusion from the department was arbitrary and not based upon any bad conduct on August 21 or August 22, 2003. CP 94—96, 136—138.

Furthermore, in *Reid v. Dalton*, 124 Wash. App. 113, 126, 100 P.3d 349 (2004), the court held:

The purpose of anti-SLAPP statutes is to protect the First Amendment right of citizens to petition the government for redress of grievances. Litigation that does not involve a bona fide grievance does not come within the First Amendment right to petition. See, e.g., Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 743, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983).

Therefore, if there is no bona fide grievance, then there should be not protection for a defendant via RCW § 4.24.510. Here, the department found Mr. Segaline to be an annoyance, but he was not a danger to public safety, and there was no bona fide grievance upon which the police were called. The report was in bad faith and not protected; Segaline should

have been allowed to argue that the facts and that the inferences from the facts demonstrated bad faith.

C. As applied, RCW 4.24.510 violates plaintiff's right of access to the courts, and is constitutionally overbroad.

Plaintiff's right of access to the courts will be abridged if the court grants immunity under RCW § 4.24.510. *Hough v. Stockbridge*, 113 Wash.App. 532, 539 -40, 54 P.3d 192 (2002), held:

Access to courts is a fundamental constitutional right. See *Bounds v. Smith*, 430 U.S. 817, 828, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977). The Supreme Court has grounded the right of access to the courts in several provisions of the Constitution, including the Petitions Clause of the First Amendment, the Privileges and Immunities Clause of Article IV, the Due Process Clause of the Fifth Amendment, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Christopher v. Harbury, U.S.*, 122 S. Ct. 2179, 2186-87 n.12, 153 L. Ed. 2d 413 (2002)

In *Richmond v. Thompson*, 130 Wash.2d 368, 922 P.2d 1343 (1996), the court addressed the issue of whether citizen complaints regarding police conduct are absolutely privileged under either the federal and state constitutions or common law in a defamation case. The court held:

Similarly, we are not persuaded that the petition clause of the First Amendment is a basis for affording Thompson an absolute privilege. In *McDonald v. Smith*, 472 U.S. 479, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (1985), the Supreme Court considered and flatly rejected the argument that the petition clause provides greater protection than the speech clause. . . . The defendant argued that

when a citizen communicates directly with the government about matters of public concern, the petition clause requires the court to accord an absolute privilege to such communication rather than the New York Times qualified privilege. McDonald, 472 U.S. at 481-82. The Court rejected this argument, stating "the right to petition is cut from the same cloth as the other guarantees of [the First] Amendment." McDonald, 472 U.S. at 482. It explained that the petition clause was never intended to provide absolute immunity for defamation:

To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions. McDonald, 472 U.S. at 485 (citations omitted).

Id. at 378.

In addition, the Defendant argued that the Washington petition clause, Const. art. I, sec. 4, affords greater protection than the First Amendment in the form of an absolute privilege to petition government.

The court held:

Thompson and the ACLU-W argue the use of the "being responsible" language in art. I, sec. 5 and absence of such language in art. I, sec. 4 shows the framers intended a qualified right for free speech but no such qualification on the right to petition. Thompson and amicus ACLU-W, however, overlook the "for the common good" language in art. I, sec. 4. This language does qualify the right to

petition. See State v. Gossett, 11 Wash. App. 864, 527 P.2d 91 (1974) (right to petition is subject to reasonable limitations). And, in this case, recklessly made false statements are not in the common good.

Id. at 380.

This discussion regarding the balancing of constitutional rights is instructive. The right of citizens to contact the government to seek help can not be granted an absolute immunity, rather it must be qualified with a good faith requirement, or else the right to free speech is made superior to the right to petition. Here, L&I made a bad faith report to the police partly, at least, in violation of Mr. Segaline's First Amendment right to express his political opinions, and the immunity granted in the statute, if not subject to a good faith requirement, is perverted and allows a powerful state office to trample on the first amendment rights of a citizen.

An issue similar to this was addressed by a Florida court. In *Florida Fern Growers Association, Inc. V. Concerned Citizens of Putman County*, 616 So.2d 562 (Fla. 5th DCA 1993), the court held:

A SLAPP suit has been described as "one filed by developers, unhappy with public protest over a proposed development, filed against leading critics in order to silence criticism of the proposed development." Westfield Partners, Ltd. v. Hogan, 740 F. Supp. 523, 525 (N.D. Ill. 1990). In Monia v. Parnas Corp., 227 Cal. App. 3d 1349, 278 Cal.Rptr. 426, 435 (Cal. Ct. App. 1991), Dr. Canan defined:

SLAPP suits as civil actions for damages brought against individual citizens or citizens' groups for advocating issues of public importance by contacting a public official or the electorate. SLAPP suits are characterized by an effort to punish political opponents for past behavior, an attempt to preclude their future political effectiveness, the desire to warn others that political opposition will be punished, the use of the judicial system as a part of an economic strategy. . .

. . . extending absolute immunity to such activities would seem to extend to these activities a broader protection than the Constitution itself guarantees. . .
. To extend absolute immunity to appellees for their activity in the instant case would be to deny appellant its access to the courts. This we will not do.

If the court applied this statute without requiring that there is a finding of good faith, then the statute is void on the basis of an over breadth challenge. The standard concerning overbroad application based upon the First Amendment is as follows:

In general, the First Amendment prevents the government from proscribing speech or expressive conduct. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). Over breadth analysis measures how statutes that prohibit conduct fit within the universe of constitutionally protected conduct. *City of Tacoma v. Luvane*, 118 Wn.2d 826, 839, 827 P.2d 1374 (1992). 'A law is overbroad if it sweeps within its prohibitions free speech activities protected under the First Amendment.' *State v. Halstien*, 122 Wn.2d 109, 122, 857 P.2d 270

(1993). 'The first task in over breadth analysis is to determine if a statute reaches constitutionally protected speech or expressive conduct.' *Id.* at 122-23. If the answer is 'yes,' then the court examines whether the statute prohibits a 'real and substantial' amount of protected conduct in contrast to the statute's plainly legitimate sweep. *Id.* at 123.

The state is not immune because it is not a person under this statute, and to interpret the statute without a requirement of good faith would render it unconstitutional.

D. The appellate court's decision that the Malicious prosecution claim (at 4.24.350(1)) is extinguished by RCW 4.24.510 is in conflict with numerous cases applying 350(1) and cases establishing principles of statutory interpretation; it is also an issue of substantial public policy whether or not section 510 extinguishes this common law and statutory cause of action of malicious prosecution.

Malicious prosecution is a specific statutory exception to any immunity granted in RCW 4.24.510, because it is defined as a cause of action by part of that same statute, at section 350(1):

(1) In any action for damages, whether based on tort or contract or otherwise, a claim or counterclaim for damages may be litigated in the principal action for malicious prosecution on the ground that the action was instituted with knowledge that the same was false and unfounded, malicious and without probable cause in the filing of such action, or that he same was filed as part of a conspiracy to misuse the judicial process by fling an action known to be false and unfounded.

In sum, it prohibits false, or bad faith reporting to a government agency, and specifically to a law enforcement agency.

When there are conflicting terms in statutes, statutory construction must not result in absurd results. *State v. Delgado* 148 Wn 2d 723, 63 P.3d 792 (2003). If 2 statutes conflict with each other, the more specific statute controls. *State v. Collins* 55 Wn.2d 469, 348 P.2d 214 (1960). In this case, section 510 creates immunity for reports to a government agency, but section 350 (1) allows causes of action relating to false reports to law enforcement agencies that result in arrest and prosecution. If section 510 is not interpreted to require a good faith exception, then section 350 (1) never the less forms the basis for a malicious prosecution cause of action because it is more specific than RCW § 4.24.510.

It would be an absurd result to nullify section 350 (1), along with common law Malicious Prosecution. In *Tacoma v. Taxpayers*, 108 Wn.2d 679, 743 P.2d 793 (1987), the court held that the rule that a specific statute controls over a more general statute applies when the statutes deal with the same subject-matter and cannot be harmonized. RCW § 4.24.510 cannot be harmonized with section 350(1) without implicitly repealing it.

Construing section 510 to create absolute immunity effectively obliterates the long-recognized common law cause of action for malicious prosecution; the elements are: (1) that the prosecution was instituted or

continued by the defendant; (2) that there was want of probable cause for the institution or continuation of the prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the proceedings terminated on the merits in favor of the plaintiff, or were abandoned; and (5) that the plaintiff suffered injury or damage as a result of the prosecution. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 558, 852 P.2d 295 (1993); *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 497, 125 P.2d 681 (1942). "Although all elements must be proved, malice and want of probable cause constitute the gist of a malicious prosecution action." *Hanson*, 121 Wn.2d at 558.

A dismissal or termination of the criminal proceeding may establish a prima facie case of malice. The rule is stated in *Pallett v. Thompkins*, 10 Wash. 2d 697, 699-700, 118 P.2d 190 (1941):

A prima facie case of want of probable cause (from which malice may be inferred) is made by proof that the criminal proceedings were dismissed or terminated in plaintiff's favor. . . . See also *Peasley v. Puget Sound Tug & Barge Co.*, supra at 498 (malice may be inferred from lack of probable cause). Second, in a malicious prosecution action, malice takes on a more general meaning, so that the requirement that malice be shown as part of the plaintiff's case in an action for malicious prosecution may be satisfied by proving that the prosecution complained of was undertaken from improper or wrongful motives or in reckless disregard of the rights of the plaintiff. *Peasley v. Puget Sound Tug & Barge Co.*, supra at 502. Whether Nordstrom's actions between January 6 and January 22 manifested "reckless disregard" for the appellant's rights is a factual question. See *Peterson v. Littlejohn*, 56 Wash. App. 1, 781 P.2d 1329 (1989).

Here, plaintiff has the right to present evidence to the trier of fact to draw the inference of bad faith because plaintiff was arrested although he was indisputably conducting himself peacefully; he never physically threatened any person; the court of appeals opinion that state employees felt he made “veiled threats” is a factual conclusion, and plaintiff disputes it by direct testimony and by the lack of description of any threatening acts and by inconsistent statements by state employees. The plaintiff’s case is presented by competent evidence and must be submitted to the jury.

E. The appellate decision conflicts with State and federal law by identifying June 30, 2003 instead of August 22, 2003, as the date that the 42 USC 1983 cause of action accrued; it is an important issue of public policy to establish that the State of Washington adopts federal law, which is controlling, regarding the statute of limitations for a Section 1983 action.

Segaline was handed the “no Trespass” notice on June 30, 2003, but he was not arrested until August 22, 2003. Until that date he suffered no actual damage to his liberty rights, in fact, he entered the state office on August 21, 2003 and conducted business without incident. Until August 22, he did not know he would be arrested and prosecuted for a crime. Croft, on the other hand, set in motion a series of events that culminated with the deprivation of liberty on August 22, 2003—Segaline could not have sued for that deprivation of his liberty until it had actually occurred.

Mission Springs v. City of Spokane 134 Wn. 2d 947, 954 P.2d 250 (1998), cause of action accrues at the time of the deprivation when the harm occurs ; The statute of limitations for a false arrest begins to run when the person is falsely detained *Wallace v. Kato* 127 S. Ct. 1091 (U.S. 2/21/2007); Segaline's arrest on August 22 is on point.

All of the actions prior to August 22, 2008 are part of a continuing pattern of deprivation of Mr. Segaline's rights, that culminated with the last major act on August 22, 2003; Segaline also qualifies for the continuing violation doctrine as the basis for his claims not being time barred, because his complaints involve the same actor (Croft directed the staff) and relate closely enough to the same issue. *Kimes v. Stone* 84 F.3d 1121 (9th Cir. 05/22/1996) Although it is not correct to define the cause of action as accruing on June 30, 2003, there is no dispute that the August 22 arrest was part of a series of actions that established a continuous pattern of depriving Segaline of his constitutional rights. All that is necessary to show is that the acts are related closely enough to create a continuing violation and that at least one of the acts falls within the statute of limitations. *Green v. Los Angeles County Superintendent* 883 F.2d 1472, 1480 (9th Cir. 1989) See also *Sosa v. Hiramoka* 920 F.2d 1451 (9th Cir. 03/13/1990), dismissal of case reversed because continuing acts were tied

to one theory of deprivation of rights. Accord, *Gutowsky v. County of Placer* 108 F.3d 256, 97 Cal. Daily Op. Serv. 1684 (9th Cir. 03/06/1997)

As a matter of substantial public interest, Washington State must conform to the federal law when determining date of accrual of the 1983 action.

F. The appellate decision conflicts with *Gildon v. Simon Property Group, Inc.* 158 Wn. 2d 483, fn9, 145 P.3d 1196 (2006) by limiting the relation back of the First amended complaint.

Cr 15(a) provides that a party shall amend pleadings by leave of court, and “leave shall be freely given when justice so requires”.

CR 15 (b) allows amendments that conform to the evidence. The evidence regarding the actions of Mr. Croft was transcribed for counsel only 39 days before the motion to amend was filed. This rule provides that the court shall allow pleadings to be amended “freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense.”

CR 15 (c) when the amendment arose out of the same transaction originally pled, the amendment relates back to the original pleading. This includes adding a party, even if the statute of limitations is past, if the person had actual knowledge of the pendency of the claim and knew that he could have been joined originally in the action, as in this case.

Adding Mr. Croft as a defendant in no way changes the discovery, trial preparation, or proof in this matter. There is no surprise. In fact, defendant, in its summary judgment motion, alleged that plaintiff had “sued the wrong party.” Plaintiff could not have known the extent of participation of each of the numerous L & I actors in this matter, until the depositions of state employees.

The Appeals court ruled that the third prong under *Tellinghuisen v. King*, 103 Wn.2d 221, 691 P.2d 575 (1984), “excusable neglect” should not apply in this case, preventing the amended complaint from relating back. A more recent case by the Washington Supreme court seems to opine that is not correct:

A third factor, inexcusable neglect, added by the court was not intended to alter the rule favoring relation back, but rather to prevent harmful gamesmanship. . . the purpose of CR 15 (c) is to permit amendment, provided the defendant is not prejudiced and has notice. A broad construction of the inexcusable neglect standard undermines this rule and interferes with the resolution of legitimate controversies.

Gildon v. Simon Property Group, Inc. 158 Wn. 2d 483, fn9, 145 P.3d 1196 (2006)

VI. CONCLUSION

Plaintiff raised novel Constitutional issues for the State of Washington regarding tortious harm and his liberty interest in a State

license office, and fully briefed those issues, but was not able to reach those issues because of the Court of Appeals ruling that his tort causes of action were dismissed under immunity granted under RCW 4.24.510, that malicious prosecution causes are also cancelled by that same immunity, and his 42 USC 1983 cause was outside the statute of limitations. The decisions of the court of appeals directly conflict with specific cases and with significant lines of cases; they make decisions on state grounds by resolving facts, and ignore the constitutional questions regarding the interpretation and application of RCW 4.24.510. It is an important matter of public policy that these decisions be resolved and corrected to be consistent with Constitutional law and federal law. The case should then be determined with additional briefing, or remanded for a determination on the merits regarding the liberty issues, and for trial on all claims.

DATED THIS 23d DAY OF MAY, 2008.

LAW OFFICES OF JEAN SCHIEDLER-
BROWN AND ASSOC., P.S.



Jean Schiedler-Brown, WSBA # 7753
Attorney for Mr. Segaline

Appendix 1

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL SEGALINE, a single person,

Appellant,

v.

THE STATE OF WASHINGTON,
DEPARTMENT OF LABOR AND
INDUSTRIES, Washington, ALAN CROFT,
JANE DOE CROFT and the marital
community thereof,

Respondents.

No. 35823-9-II

PUBLISHED OPINION

QUINN-BRINTNALL, J. — Michael Segaline appeals the summary judgment dismissal and award of statutory attorney fees to the Department of Labor and Industries (L&I). Segaline owns Horizon Electric, Inc., located in East Wenatchee. To conduct his business, Segaline obtained electrical permits from L&I on several occasions. After several incidents, L&I employees began to fear that Segaline would physically assault them, and L&I served him with a “no trespass” notice. After receiving the notice, Segaline went to L&I offices and L&I employees called 911. The East Wenatchee police arrested Segaline. The City of Wenatchee initially charged Segaline with criminal trespass, but it later voluntarily dismissed the charges. Thereafter, Segaline sued L&I for (1) negligent infliction of emotional distress, (2) intentional infliction of emotional distress, (3) malicious prosecution, (4) negligent supervision, and (5)

Appendix I

violation of his civil rights. On various grounds, the trial court summarily dismissed all of Segaline's claims and awarded L&I statutory damages under RCW 4.24.510.

Segaline appeals, arguing: (1) L&I is not immune from civil liability under RCW 4.24.510, (2) summary judgment was improperly granted on various grounds, and (3) the trial court abused its discretion when it refused to allow Segaline's amended claim to relate back to the original pleading date. We affirm.

FACTS

BACKGROUND

Segaline owns Horizon Electric in East Wenatchee. Horizon Electric is an electrical contractor that often obtains electrical permits from L&I. Segaline frequently obtained such permits for his corporation, and, on many occasions, he verbally threatened L&I employees. By the fall of 2002, many L&I employees were concerned that Segaline would physically assault them.

On June 9, 2003, Segaline called L&I customer service specialist Alice Lou Hawkins. He eventually demanded that she transfer the phone call to her supervisor, Jeanne Guthrie. Segaline complained to Guthrie about one of his L&I accounts and then threatened to come to the L&I offices with an audio tape recorder. According to Guthrie, Segaline claimed that "he would start legal proceedings"; "a lot of people would be behind bars"; and "if it costs you your job, so be it." 1 Clerk's Papers (CP) at 45. Segaline also made what Guthrie believed were veiled death threats.

On June 10, 2003, David Whittle, an L&I supervisor, called Segaline to try to resolve the conflict. They agreed to meet at the L&I offices on June 19, 2003. On previous occasions, Segaline had insisted on audio tape recording his conversations with L&I employees. Whittle

informed Segaline that he could bring an audio tape recorder to this meeting, but he was not sure whether Segaline would consent to recording their meeting.

Later that same day, Segaline arrived at the L&I offices and complained to Guthrie about Whittle. According to Guthrie, he demanded that she either produce a copy of the statute prohibiting him from audio tape recording his conversations with L&I employees or produce a copy of Whittle's résumé to "join the private sector." 1 CP at 45.

On June 13, 2003, Segaline again went to the L&I offices, where Jacqueline Sanchez helped him. Segaline argued and yelled, so Sanchez asked Guthrie for help. According to Guthrie, Segaline then threatened her and stated, "You had better get an attorney." 1 CP at 45.

On June 19, 2003, Whittle and Alan Croft, a L&I coordinator, met with Segaline at the L&I offices. All three participants agreed to audio tape record the meeting. But Whittle withdrew his permission to recording after the meeting yielded no progress toward resolving Segaline's complaints. Segaline then walked out of the meeting and demanded to speak to Guthrie.

Croft followed Segaline and asked him twice to leave the L&I offices. Segaline ignored him. Croft then called 911 and twice more asked Segaline to leave the L&I offices. Again, Segaline ignored him. Segaline finally left the L&I offices just as the East Wenatchee police arrived. Police talked with Segaline, then Croft.

According to Croft, the police suggested that L&I serve Segaline with a "no trespass" notice that police could enforce if Segaline returned to the offices. The police did not have a "no trespass" notice form but suggested Croft obtain one from the Wenatchee Valley Mall. Croft did so.

Croft then contacted Washington State Patrol Trooper Scott Jarmon, who was assigned to workplace violence issues at L&I. Croft explained the problems L&I was having with Segaline. According to Croft, Jarmon said that L&I could serve individuals with a "no trespass" notice to prohibit them from entering a public building and that he, Jarmon, had enforced such notices.

Croft drafted a "no trespass" notice and emailed it to Guthrie. The notice stated that Segaline was "no longer permitted, invited, licensed or otherwise privileged to enter or remain at the [East Wenatchee L&I service location]." 1 CP at 39. It also provided:

To have this notice terminated, the subject must secure the written approval of David Whittle, Electrical Supervisor, prior to re-entry of the East Wenatchee Department of Labor and Industries service location. This trespass notice remains in effect until this approval is obtained.

1 CP at 39.

On June 30, 2003, Segaline arrived at the L&I offices. Hawkins told Segaline that he "was not to be in the office," and handed him a copy of the "no trespass" notice. 1 CP at 37. After Segaline pushed the "no trespass" notice aside, somebody called 911. The East Wenatchee police found Segaline outside the L&I offices and again served him with the "no trespass" notice. According to Hawkins, Segaline refused to acknowledge the notice.

On August 21, 2003, Segaline went to the L&I offices again to obtain an electrical permit. Guthrie met Segaline because she knew he had been served with the "no trespass" notice. Jim Dixon, an L&I inspector, had approved Segaline's emergency request for an electrical permit and had told him to obtain an electrical permit. But according to Guthrie, Dixon did not tell Segaline to obtain the permit personally. Nevertheless, Dixon gave Segaline the electrical permit and Segaline left.

Segaline arrived at the L&I offices again the next day. This time, Guthrie called 911 and Larry Hively, an L&I investigator, told Segaline about the 911 call. The East Wenatchee police found Segaline in the L&I offices. Police learned from an L&I supervisor that the "no trespass" notice was still in effect and then told Segaline to leave. Segaline refused and instead argued with the police. According to Officer Daniel Dieringer, Segaline said that he could enter the L&I offices any time he wanted.

According to the police, Segaline admitted that he received the "no trespass" notice, but he claimed that it was not valid because it was not signed by a judge. The police concluded that "there was nothing more [required] to keep Segaline away from the L & I office staff," then arrested him for trespassing. 1 CP at 56.

The City of Wenatchee charged Segaline with criminal trespass, but later the City voluntarily dismissed the charges.¹

LAWSUIT

On August 8, 2005, Segaline filed a complaint against L&I for (1) negligent infliction of emotional distress, (2) intentional infliction of emotional distress, (3) malicious prosecution, (4) negligent supervision, and (5) violation of his civil rights. The trial court granted L&I's summary judgment motion and summarily dismissed all but the negligent infliction of emotional distress claim.

¹ Croft stated in an email:

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

3 CP at 426.

About a year after the lawsuit commenced, Segaline filed a motion under CR 15 to amend his complaint to name Croft as a defendant and to allow the amendment to relate back to the original filing date of August 5, 2005. The trial court determined that the amendment would not relate back but that the amendment was filed on August 3, 2006. After denying Segaline's motion for reconsideration, the trial court then dismissed his claim against Croft because the statute of limitations had expired.² Segaline timely appeals.

ANALYSIS

SUMMARY JUDGMENT STANDARD OF REVIEW

On an appeal from summary judgment, we engage in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). Our standard of review is de novo. *Hisle*, 151 Wn.2d at 860. Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We construe all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990)).

On summary judgment, the moving party bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton*, 115 Wn.2d at 516. "If the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts are in

² Alternatively, the trial court found that Croft was entitled to qualified immunity.

dispute.” *Atherton*, 115 Wn.2d at 516. The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits considered at face value. *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 848, 92 P.3d 243 (2004) (quoting *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)). If the nonmoving party fails to demonstrate that material facts are in dispute, then summary judgment is proper. *Atherton*, 115 Wn.2d at 516.

IMMUNITY UNDER RCW 4.24.510

Segaline first claims that the trial court erred when it found that L&I was immune from civil liability under RCW 4.24.510 and then summarily dismissed all of his claims against L&I except for his negligent infliction of emotional distress claim.³ We disagree.

“The Legislature enacted RCW 4.24.510 to encourage the reporting of potential wrongdoing to governmental entities.” *Gontmakher v. City of Bellevue*, 120 Wn. App. 365, 366, 85 P.3d 926 (2004). It provides in relevant part:

A person who communicates a complaint or information to any branch or agency of federal, state, or local government . . . is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization.

RCW 4.24.510 (emphasis added.)

Segaline argues that (1) L&I is not a “person” and, therefore, the statute does not apply to it; (2) the statute is unconstitutional without an implied “good faith” requirement; (3) his

³ RCW 4.24.510 protects only communications made to governmental agencies that are reasonably of concern to that agency. *Gontmakher v. City of Bellevue*, 120 Wn. App. 365, 372, 85 P.3d 926 (2004). Thus, RCW 4.24.510 does not provide immunity for any other acts, such as negligent infliction of emotional distress, that are not “based upon” the communications. See *Gontmakher*, 120 Wn. App. at 372; *Dang v. Ehredt*, 95 Wn. App. 670, 683-86, 977 P.2d 29, review denied, 139 Wn.2d 1012 (1999).

malicious prosecution claim is not “based upon” a communication to police; and (4) attorney fees and costs were improperly awarded under this statute.

A. STATE AGENCIES ARE “PERSONS” UNDER RCW 4.24.510

Segaline argues that L&I is not a “person” under RCW 4.24.510. Division One of this court held in *Gontmakher*, 120 Wn. App. at 374, that a city is a person under RCW 4.24.510.

We agree with the analysis in *Gontmakher* and accordingly hold that state agencies are “persons” under RCW 4.24.510 and, therefore, are immune from civil liability in this context.

In *Gontmakher*, ~~our~~ Supreme Court ruled that the City of Bellevue is a “person” under RCW 4.24.510. 120 Wn. App. at 374. The court first looked to RCW 1.16.080(1), which states that “[t]he term person may be construed to include the United States, this state, or any state or territory, or any public or private corporation or limited liability company, as well as an individual.” RCW 1.16.080 defines “person” for purposes of the entire Revised Code of Washington. *State v. Jeffries*, 42 Wn. App. 142, 145, 709 P.2d 819 (1985), *review denied*, 105 Wn.2d 1013 (1986). The court then noted that both the Washington Court of Appeals and Supreme Court had applied RCW 4.24.510 to a community council and a bank. *Gontmakher*, 120 Wn. App. at 370 n.7 (citing *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 384, 46 P.3d 789 (2002); *Dang v. Ehredt*, 95 Wn. App. 670, 683-86, 977 P.2d 29, *review denied*, 139 Wn.2d 1012 (1999)). Finally, the court concluded that no compelling policy reason existed to restrict the application of RCW 4.24.510 to nongovernmental entities.⁴

⁴ The *Gontmakher* court also discussed a recent Division Three opinion that addressed, in passing, whether a governmental entity was a “person” under RCW 4.24.510. 120 Wn. App. at 372-73 (quoting *Skimming v. Boxer*, 119 Wn. App. 748, 82 P.3d 707, *review denied*, 152 Wn.2d 1016 (2004)). In *Skimming*, Division Three concluded, in dicta, that a county was not entitled to immunity under RCW 4.24.510. *Gontmakher*, 120 Wn. App. at 372; *Skimming*, 119 Wn. App. at 757. Division One declined to follow *Skimming* because the statement was “made without analysis, and the conclusion is not central to the court’s holding.” *Gontmakher*, 120 Wn. App. at 373. We agree.

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Gontmakher, 120 Wn. App. at 371-72. Accordingly, it rejected the appellants' argument that the plain meaning of "person" is limited to citizens with rights under the state and federal constitution. *Gontmakher*, 120 Wn. App. at 370-71.

L&I is a state agency and hence a person for purposes of making a request for protection to a law enforcement agency. *Jeffries*, 42 Wn. App. at 145 (state agency is a person under RCW 1.16.080). Accordingly, the trial court did not err in finding that RCW 4.24.510 applies in this context.

B. NO EVIDENCE OF BAD FAITH

Segaline argues that, even if RCW 4.24.510 applies to L&I, the statute does not grant absolute immunity because it contains an implicit requirement of good faith, without which it would be unconstitutional under the First Amendment. But we do not reach a constitutional issue if we can decide the case on nonconstitutional grounds. *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 752-53, 49 P.3d 867 (2002). Because there is no evidence in this record that L&I's communication was not in good faith, we affirm on nonconstitutional grounds.

Former RCW 4.24.510 (1999) required that the communication was made in good faith. In 2002, the legislature deleted the phrase "in good faith" preceding "communicates a complaint or information" in the first sentence of the statute. RCW 4.24.510; former RCW 4.24.510. And the legislature added, "Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith." RCW 4.24.510. Thus, RCW 4.24.510 placed the burden on Segaline to prove that L&I made the communications in bad faith or without an honest belief in the statements. *Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 657, 717 P.2d 1371 (1986); *Gilman v. MacDonald*, 74 Wn. App. 733, 738-39, 875 P.2d 697, review denied, 125 Wn.2d 1010 (1994). Segaline then had to show by clear and convincing evidence that L&I abused its

qualified immunity, i.e., that L&I knew or recklessly disregarded the falsity of its communications. *Lillig*, 105 Wn.2d at 658; *Bender v. City of Seattle*, 99 Wn.2d 582, 601, 664 P.2d 492 (1983); *Gilman*, 74 Wn. App. at 738.

Segaline claims that L&I knew that he was not a safety threat. Segaline also claims that his "exclusion from the department was arbitrary and not based upon whether or not he was conducting himself properly." Br. of Appellant at 17. But a party's self-serving statements of conclusions and opinions are insufficient to defeat a summary judgment motion. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-61, 753 P.2d 517 (1988). And other than the opinions in his appellate brief and his conclusory statements of fact in his declaration in opposition to summary judgment, Segaline has not provided "some showing that related evidence was available which would justify a trial on the issue" of bad faith. *See Reed v. Streib*, 65 Wn.2d 700, 707, 399 P.2d 338 (1965). Moreover, ample evidence, detailed above, supports L&I's concern that Segaline was abusive and disruptive to its employees and that its employees feared him. Accordingly, the trial court did not err when it refused to require L&I to prove it acted in good faith.

C. RCW 4.24.510 APPLIES TO MALICIOUS PROSECUTION CLAIM

Segaline further argues that RCW 4.24.510 does not apply to his ~~claim~~ for malicious prosecution. Again, we disagree.⁵

⁵ We note that the malicious prosecution claim seems to be moot because the State dropped Segaline's trespassing charge, but we address the issue because Segaline still has a no-contact order preventing him from entering L&I property. *See Asarco, Inc. v. Dep't of Ecology*, 145 Wn.2d 750, 760, 43 P.3d 471 (2002) (ruling that appellate courts do not generally rule on issues for which there is no real and live controversy) (quoting *First United Methodist Church of Seattle v. Hearing Exam'r*, 129 Wn.2d 238, 245, 916 P.2d 374 (1996)).

On its face, RCW 4.24.510 allows immunity for claims “*based upon* the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization.” (Emphasis added.) Clearly, claims challenging the communications itself, here to 911 and police, are “based upon” the communication.

In *Dang*, Division One held that immunity under RCW 4.24.510 is not limited solely to communications. 95 Wn. App. at 683-84. The court noted that “allowing a cause of action for the events surrounding the communication to the police, while immunizing the communication itself, would thwart the policies and goals underlying the immunity statute.” *Dang*, 95 Wn. App. at 683 (citing *Devis v. Bank of Am.*, 65 Cal. App. 4th 1002, 77 Cal. Rptr. 2d 238, 242 (1998)). “Moreover . . . no meaningful distinction can be drawn between the cause of action based on the . . . communication to the police and a cause of action based on the method of arriving at the content of the communication.” *Dang*, 95 Wn. App. at 683. We agree.

Here, the trial court properly found that Segaline’s negligent supervision claim was “based upon,” or was the result of, L&I’s communications to the police. *See* RCW 4.24.510. Thus, the trial court did not err in summarily dismissing these claims because Segaline failed to raise an issue of material fact regarding L&I’s immunity under RCW 4.24.510.

D. ATTORNEY FEES AND COSTS

Segaline also challenges the trial court’s award of attorney fees and costs to L&I under RCW 4.24.510. RCW 4.24.510 provides:

A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys’ fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

L&I prevailed in its RCW 4.24.510 defense and there was no evidence of bad faith. Thus, the trial court did not err when it followed this statute's mandatory authority to award attorney fees and costs.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Segaline next argues that the trial court erred when it summarily dismissed his negligent infliction of emotional distress claim because his damages were not sufficiently foreseeable. Segaline argues, "In this case, the State was aware that excluding a member of the public from purchasing permits to further his own business would be likely to cause emotional distress."⁶ Br. of Appellant at 41. We disagree.

A plaintiff can recover for negligent infliction of emotional distress if he proves: (1) negligence, i.e., duty, breach, proximate cause, and injury; and (2) the additional requirement of objective symptomatology. *Kloepfel v. Bokor*, 149 Wn.2d 192, 199, 66 P.3d 630 (2003); see also *Snyder v. Med. Serv. Corp.*, 145 Wn.2d 233, 243-46, 35 P.3d 1158 (2001). But our Supreme Court has cautioned: "Not every act which causes harm results in legal liability." *Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976).

Under traditional negligence principles, whether a defendant owes a duty to a plaintiff is a question of law and depends on mixed considerations of "logic, common sense, justice, policy, and precedent." *Keates v. City of Vancouver*, 73 Wn. App. 257, 265, 869 P.2d 88, review denied, 124 Wn.2d 1026 (1994) (quotations and citations omitted). In large part, foreseeability

⁶ L&I argues that its conduct, serving of a no trespass notice, was not unreasonably dangerous to Segaline. Thus, relying on *Keates v. City of Vancouver*, 73 Wn. App. 257, 869 P.2d 88, review denied, 124 Wn.2d 1026 (1994), L&I essentially claims that it owed no duty to use reasonable care to avoid negligent infliction of emotional distress when it served Segaline with the no trespass notice. L&I's argument is an over-simplification of negligence law; this argument actually addresses the *scope* of L&I's duty and whether it *breached* that duty.

determines the scope of a defendant's duty. *Hunsley*, 87 Wn.2d at 435. Specifically, "the defendant's obligation to refrain from particular conduct is owed only to those who are *foreseeably* endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous." *Snyder*, 145 Wn.2d at 245 (quoting *Hunsley*, 87 Wn.2d at 436). Thus, if a defendant could not reasonably foresee any injury as the result of his act, or if a defendant's conduct was reasonable in light of what he could anticipate, then there is no actionable negligence. *Hunsley*, 87 Wn.2d at 435.

A defendant breaches a duty owed to a plaintiff when his conduct "falls below the standard established by law for the protection of others against unreasonable risk." *Hunsley*, 87 Wn.2d at 435 (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 43, at 250 (4th ed. 1971)). Necessarily, a breach of this duty involves a foreseeable risk, a threatened danger of injury, and conduct unreasonable in proportion to the danger. *Hunsley*, 87 Wn.2d at 436.

We agree with the trial court that the emotional harm Segaline complains of was not foreseeable. Where reasonable minds cannot differ, we decide the issue of foreseeability as a matter of law. *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 477, 951 P.2d 749 (1998). To be foreseeable, "the harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant." *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989) (quoting *Maltman v. Sauer*, 84 Wn.2d 975, 981, 530 P.2d 254 (1975)). And we assess the risk as it would affect a person of ordinary sensibilities. *Hunsley*, 87 Wn.2d at 436; *Keates*, 73 Wn. App. at 266.

The chance is slight that a person of ordinary sensibilities who had engaged in numerous heated verbal confrontations with L&I staff would develop objective symptoms of emotional

distress from being served a no trespass notice and removed from the L&I property.⁷ And the chance that any such harm would be grave is even less.

Thus, regardless of L&I's duty to Segaline, we hold that as a matter of law any emotional distress resulting from L&I's conduct to protect its employees was not reasonably foreseeable. Therefore, the trial court did not err when it granted summary judgment to L&I on this claim. See *Hunsley*, 87 Wn.2d at 435. We hold that summary judgment was proper.

CIVIL RIGHTS VIOLATIONS

Segaline appears to argue that the trial court erred when it summarily dismissed his 42 U.S.C. § 1983 civil rights claims. We disagree. L&I is immune to § 1983 lawsuits.

Under 42 U.S.C. § 1983,⁸ a plaintiff may recover money damages if he can show that he has been deprived of some federal right. *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 11, 829 P.2d 765, cert. denied sub nom., 506 U.S. 1028 (1992). To state a cause of action under § 1983, a plaintiff must demonstrate that (1) a person deprived him of a federal constitutional or legal right and (2) that person acted under color of state law. *Sintra*, 119 Wn.2d at 11-12.

But the State is immune to lawsuits under 42 U.S.C. § 1983 for acts of its agents that allegedly deprive the plaintiff of his civil rights. *Hontz v. State*, 105 Wn.2d 302, 309, 714 P.2d

⁷ Segaline argues that emotional distress is a foreseeable harm when one's constitutional rights are violated. But the cases he relies on do not support his position: *See Birchler v. Castello Land Co.*, 133 Wn.2d 106, 942 P.2d 968 (1997); *Dean v. Mun. of Metro. Seattle*, 104 Wn.2d 627, 641, 708 P.2d 393 (1985); *Miles v. F.E.R.M. Enters., Inc.*, 29 Wn. App. 61, 627 P.2d 564 (1981).

⁸ 42 U.S.C. § 1983 reads:

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.

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1176 (1986) (citing *Edgar v. State*, 92 Wn.2d 217, 222, 595 P.2d 534 (1979), *cert. denied*, 444 U.S. 1077 (1980); *Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979) (states are immune from 42 U.S.C. § 1983 damage suits in federal court under the Eleventh Amendment)). Because L&I is a state agency, Segaline's § 1983 suit is in legal effect a suit against the state and cannot, therefore, be maintained. See *Hontz*, 105 Wn.2d at 311. Thus, the trial court did not err in summarily dismissing Segaline's civil rights claims.

CR 15(C) RELATION BACK

Segaline further argues that the trial court abused its discretion when it refused to allow his amendment, which added Croft as a defendant, to relate back to the date of the original complaint. We affirm because Segaline has not shown that the trial court's ruling was an abuse of discretion.

CR 15(c)⁹ rulings rest within the trial court's sound discretion. *Foothills Dev. Co. v. Clark County Bd. of County Comm'rs*, 46 Wn. App. 369, 374, 730 P.2d 1369 (1986), *review denied*, 108 Wn.2d 1004 (1987). We will not disturb such rulings absent a manifest abuse of that discretion. *Foothills Dev. Co.*, 46 Wn. App. at 374.

An amendment adding a party relates back to the date of the original pleading only if three conditions are met: (1) the added party had notice of the original pleading; (2) the added

⁹ CR 15(c) reads:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

party had actual or constructive knowledge that, but for a mistake concerning the proper party, the action would have been brought against him; and (3) the plaintiff's failure to timely name the correct party was not "due to inexcusable neglect." CR 15(c); *Tellinghuisen v. King County Council*, 103 Wn.2d 221, 223, 691 P.2d 575 (1984) (citation omitted).

The burden of proof is on the party seeking the relation back of the amendment to prove the conditions precedent under CR 15(c). *Foothills Dev. Co.*, 46 Wn. App. at 375. This party also has the burden of proving that the mistake in failing to amend in a timely fashion was excusable. *Foothills Dev. Co.*, 46 Wn. App. at 375. "When no reason for the omission appears from the record, the omission will be characterized as inexcusable." *Foothills Dev. Co.*, 46 Wn. App. at 375.

Segaline had the burden of proof on all issues and he failed to show that his failure to amend in a timely fashion was excusable. As of December 2005, Segaline knew that Croft had "drafted and designed" the "no trespass" notice. 2 CP at 220. When Segaline deposed Croft on June 9, 2006, Croft clearly stated, "I ended up creating [the "no trespass" notice] and providing the template . . . to use." 2 CP at 235. Yet for no stated or apparent reason, Segaline waited until August 3, 2006, to amend his complaint to name Croft as a defendant and seek damages under 42 U.S.C. § 1983. When "the parties are apparent, or are ascertainable upon reasonable investigation, the failure to name them will be held to be inexcusable." *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 174, 744 P.2d 1032, 750 P.2d 254 (1987). Thus, the trial court did not err when it ruled that Segaline's amendment would not relate back to the date of the original pleading.

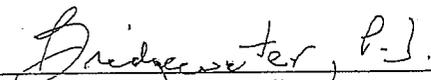
Moreover, the trial court correctly concluded that the statute of limitations barred Segaline's 42 U.S.C. § 1983 claim against Croft. The general three-year limitation period for

personal injuries under Washington law applies to § 1983 claims. *Robinson v. City of Seattle*, 119 Wn.2d 34, 86, 830 P.2d 318, *cert. denied*, 506 U.S. 1028 (1992). Segaline's claim against Croft accrued when Segaline knew or had reason to know of the injury that is the basis of his claim. *Cloud v. Summers*, 98 Wn. App. 724, 731, 991 P.2d 1169 (1999). This discovery rule is objective; thus, "it is of no moment that [the moving party] lacked actual subjective knowledge." *Ernstes v. Warner*, 860 F. Supp. 1338, 1341 (S.D. Ind. 1994); *see Cloud*, 98 Wn. App. at 731. In other words, Segaline's claim against Croft accrued, at the very latest, when the police served Segaline with L&I's "no trespass" notice on June 30, 2003.¹⁰ ~~But Segaline's amended claim~~ against Croft related back only to August 3, 2006, the date Segaline filed the amendment, rather than the date of the original complaint, August 8, 2005. Therefore, the three-year statute of limitations had already expired for Segaline's 42 U.S.C. § 1983 claim against Croft.¹¹

We affirm.


QUINN-BRINTNALL, J.

We concur:


BRIDGEWATER, P.J.


HUNT, J.

¹⁰ Although Croft "drafted and designed" the "no trespass" notice, he was not present when the police arrested Segaline. 2 CP at 220. Croft did not learn of Segaline's arrest until after it had occurred.

¹¹ Because of this holding, we do not need to decide whether Croft had qualified immunity.