

NO. 674501

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION ONE

FRANK LOUIS ZAMFINO,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS and
KING COUNTY DEPARTMENT OF ADULT AND JUVENILE
DETENTION,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

The Honorable Ronald Kessler, Judge

BRIEF OF APPELLANT

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ORIGINAL

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ASSIGNMENT OF ERROR

1. The trial court erred in not giving the Plaintiff a jury trial.
2. The trial court erred in granting only nominal damages of \$1,000 for the negligent incarceration of appellant for 185 days beyond his lawful sentence.
3. The trial court erred in dismissing Plaintiff's 42 USC Section 1983 suit.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the court err in not allowing Plaintiff a jury trial on factual issues?
2. Did the court err in granting only nominal damages for the negligent incarceration of the appellant for 185 days beyond his lawful sentence?
3. Did the court err in dismissing Plaintiff's 42 USC Section 1983 suit?

B. STATEMENT OF CASE

Appellant Zamfino was sentenced on April 20, 2001 in King County Superior Court (cause number 00 1 05260 6 KNT) to 45 months (1369 days) incarceration with credit for 286 days served. Appellant served time under this cause number at various institutions so that the 1369th day of incarceration occurred no later than April 10, 2006. Despite

being notified on numerous occasions by Appellant that his date of release had been passed, Respondent Department of Corrections did not release Plaintiff until October 11, 2006, or 185 days beyond his lawful release date. (CP 38 and CP 37)

Appellant filed suit in King County Superior Court (cause number 09-2-08032-1) against Respondents seeking damages based on civil rights violations under 42 USC Sec. 1983, and negligent failure to accurately calculate time served on the part of Respondent Department of Corrections resulting in his being incarcerated beyond his date of release. (CP 1)

Respondents both filed motions for summary judgment. Respondent King County Department of Adult and Juvenile Detention's motion was granted with prejudice and there is no issue being raised herein regarding this decision. Respondent Department of Corrections motion was granted with respect to the defense characterized claim for false imprisonment and for 42 USC 1983 damages, penalties and costs and was granted as to the claim for negligence, except for a claim for nominal damages proximately caused by the negligence of Respondent Department of Corrections. (CP 31)

Respondent Department of Corrections moved to reconsider the granting of nominal damages but the motion was denied. Ultimately the court granted an award of nominal damages of \$1,000.00 plus costs of

\$250.00. (CP 55). A jury demand was filed (King County Sub #6, a true copy of which is attached hereto and will be part of a supplemental designation of Clerk's Papers) and Plaintiff objected to a jury trial not being convened (CP 52).

C. ARGUMENT

**1. DID THE COURT ERR IN NOT ALLOWING PLAINTIFF
A JURY TRIAL ON FACTUAL ISSUES ?**

Once a jury demand has been filed, as in this case, the parties have an absolute right to have all issues of fact decided by a jury. Sofie v. Fibreboard Corp. 112 Wn.2d 636, 771 P.2d 711 (1989) states, at pp. 645-646,

If our state constitution is to protect as inviolate the right to a jury trial at least to the extent as it existed in 1889, the Baker's holding provides clear evidence that the jury's factfinding function included the determination of damages. This evidence can only lead to the conclusion that our constitution, in article 1, section 21, protects the jury's role to determine damages.

The court goes on to say, p.646, "The jury's role in determining noneconomic damages is perhaps even more essential."

In Martini v. Boeing Co. 137 Wn.2d 356, 971 P.2d 45 (1999) the court said, at p. 367,

"Actual damages" is a term used to denote the type of damage award as well as the nature of injury for which recovery is allowed; thus, actual damages flowing from injury in fact are to be distinguished from

damages which are nominal, exemplary or punitive. ... “Actual damages” are synonymous with compensatory damages.(citation omitted)

Plaintiff asked in his complaint, (CP 1, paragraph 6), for damages for, “...losing income, losing enjoyment of life and suffering great mental anguish.” In Defendant’s Motion for Summary Judgment neither income nor enjoyment of life were addressed but the entire action was sought to be dismissed on the allegation that no medical support had been alleged for mental anguish (to be addressed at greater length below) and summary judgment issued finding negligence but only nominal damages.

Thus the court found liability, which was disputed, and found an amount of damages which was never alleged as a matter of law. This resulted in the loss of the right to a jury trial on both the issues of liability and damages.

2. DID THE COURT ERR IN GRANTING ONLY NOMINAL DAMAGES FOR THE NEGLIGENT INCARCERATION OF THE APPELLANT?

Although it wasn’t addressed in Defendant’s Motion for Summary Judgment the Judgment issued by the court denied the Plaintiff his right to trial for the pled damages of lost income and loss of the enjoyment of life.

Kirk v. Washington State University, 109 Wn.2d 448, 746 P.2d 285

(1987) states, at p. 461, "...qualitative loss of life's pleasures is a separate element of damages apart from pain and suffering."

The plaintiff should have been granted the right to trial on the damage issue of mental anguish. Summary Judgment isn't intended to supplant trial and there is no need to present evidence to support the allegations in the complaint prior to trial. Had there been depositions, interrogatories, request for admissions showing no basis for Plaintiff's claim for mental anguish then perhaps summary judgment could issue but there should be no need for the plaintiff to prove his case prior to trial when the defendant makes no allegation in his motion that there can be no such evidence.

The purpose of summary judgment isn't to try the case but to decide on unquestioned facts whether one party is entitled to judgment as a matter of law. The moving party alleged no facts whatsoever on this issue so they can't be heard to say that their position is undisputed. Their Statement of Facts didn't even discuss the issue. The burden is on moving party, 2 Court Rules Annotated 2d Ed (Thomson-West, 2008) at 574.

The cases they cited in their motion for summary judgment didn't support their position.

Strong v. Terrell, 147 Wn. App. 376, 195 P.3d 977 (2008) isn't a case dealing with the negligent cause of mental anguish but deals with a special

circumstance as to what the plaintiff must allege and prove to prevail, p. 385, “...the tort of intentional infliction of emotional distress, also known as outrage....” which does require pleading special things.

At p. 387 the Strong court says,

A plaintiff may recover for negligent infliction of emotional distress if she proves negligence—that is, duty, breach of the standard of care, proximate cause, and damage—and proves the additional requirement of objective symptomatology. ... Each of these issues is a question of fact for the jury to resolve.

In moving party’s cited case of Haubry v. Snow, 106 Wn. App. 666, 31 P.3d 186 (2001) once again the case didn’t involve the negligent cause of mental anguish but rather a case of sexual harassment. At p. 678 the court says,

An employee may recover damages for emotional distress in an employment context but only if the factual basis for the claim is distinct from the factual basis for the discrimination claim. Here, there is no separate compensable claim because the factual basis for the emotional distress claim is the same as the sexual harassment or discrimination claim.

Thus the moving party’s purported authority is not applicable to the circumstances in the instant case.

In this case the trial court ruled that, due to the negligence of the Respondent Department of Corrections, Appellant was wrongfully incarcerated for 185 days. As compensation for this wrongful

incarceration, the trial court awarded \$1,000 in damages, or \$5.41 cents a day. The issue before this court is whether substantial justice has been done in awarding appellant \$5.41 cents for each day he was incarcerated due to the established negligence of the Respondent.

It is well established that the measure of damages in a tort action is that indemnity that will afford an adequate compensation to a person for the loss suffered. *Dyal et al. v. Fire Companies Adjustment Bureau, Inc.*, 23 Wn2d 515 (1945). It is further established that lost enjoyment of life's pleasures is a component of damages for pain and suffering. *Blodgett v. Olympic Savings & Loan Ass'n*, 32 Wash. App. 116 (1983). In situation where, because of the nature of damages suffered, precise measurement is not possible, the trial judge must exercise sound discretion in awarding damages. *Huzzy v. Culbert Construction Company, Inc.*, 5 Wash. App. 581 (1971). Furthermore, the trier of fact must exercise a large measure of responsible and informed discretion where the fact issue of damages is proven. *VC Edwards Contracting Company, Inc., v. Port of Tacoma*, 83 Wn2d 7 (1973).

In this case Appellant testified that as a result of his unlawful incarceration he suffered from depression, anxiety and sleep deprivation during the 6 months during which he was unlawfully held and for 6 months afterwards. He required anti-anxiety drugs and has continued to

receive psychiatric counseling for depression and post traumatic stress disorder. (Declaration of Frank Zamfino CP 38). Even if he had not suffered these objective damages he suffered from the loss of enjoyment of life which is implicit in the fact of incarceration.

The Washington state legislature has not assigned a value to the injury caused by negligent incarceration and there is little in the courts to provide a sound basis for assigning such value. However, a number of state legislatures have recently addressed this issue to deal with DNA-exonerated convicts. The results of these legislative actions should be used by the trial court to help it make a responsible and informed decision in assessing damages due to negligent incarceration. These legislative acts include: Alabama provides for minimum compensation of \$50,000 for each year of incarceration (AL Act # 2001 659); California provides maximum compensation of \$100 per day (California Penal Code Sections 4900-4906); Iowa provides attorney's fees, \$50 per day of incarceration, and lost wages up to \$25,000 a year (Iowa Code Ann. Section 663A.1); Maine provides maximum compensation of \$300,000 (14 Me. Stat. Ann Sections 241-8244); North Carolina provides \$20,000 per year of incarceration, total not to exceed \$500,000 (N.C. Gen. Stat. Section 148-82 to 148-84); Texas provides \$25,000 per year of incarceration to a

maximum total of \$500,000 (Tex. Stat. Ann. Sections 103.001-103.002; 103.051-103.052).

What all of these legislative acts have in common is that they assign a value to unlawful incarceration that is far in excess of the \$5.41 a day assigned in this case. Furthermore it should be considered that the Respondent in this case has been found to have engaged in negligent conduct, whereas in each of the statutes quoted above the damages are awarded even though there is no finding of fault against the State. For these reasons this matter should be remanded to the superior court for a re-determination of damages by a jury.

3. DID THE COURT ERR IN DISMISSING PLAINTIFF'S
42 USC SECTION 1983 SUIT?

The basis submitted by Defendant in their motion for Summary Judgment was that the State of Washington wasn't properly named as a party in the caption of the complaint (CP 16, p. 6). In their motion they cited no authority authority for the proposition that the caption governs what entities are being sued.

CR 10(a)(1) states that, "In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties."

The caption should have contained the names of the parties which, had it been more artfully drafted, it would have but didn't. This does not mean that the parties are set in stone as being whatever entity is named in the caption. 2 Court Rules Annotated, Second Edition 101 (Thomson-West, 2008) states in the commentary, at p.101, "Failure to comply with Rule 10(a)'s requirements for the caption of a complaint is not a jurisdictional error."

Citing CR 8(f), "All pleadings shall be so construed as to do substantial justice." the court in Quality Rock v. Thuston County, 126 Wn. App. 250, 108 P.3d 805 (2005) stated, "Over-emphasis on a summons caption violates the civil rules' emphasis that substance trumps formality."

In that case the county argued that there was no jurisdiction because the caption didn't comply with the rules, at p. 264-265 the court said,

This interpretation too narrowly interprets Overhulse; instead, we interpret Overhulse's language regarding strict compliance with RCW 36.70C.040 to hold that an error in the caption, coupled with proper identification of all necessary parties in the body of the petition and service on those parties, does not dictate the conclusion that a petition has failed to invoke the superior court's appellate jurisdiction under RCW 36.70C.040.

As pointed out above in plaintiff's first paragraph of the complaint, usually considered the jurisdictional paragraph, he names as parties the State of Washington and King County and points out that the agencies

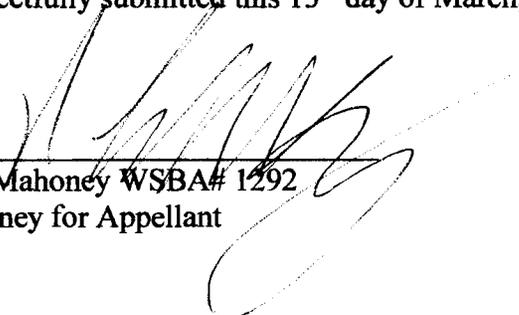
named in the caption are “departments” of those parties. Thus, despite being inartfully drafted, the caption doesn’t govern who is named as a party, the body of the complaint does.

Therefore a viable body was being sued and there is no justification for dismissing the federal civil rights claim.

CONCLUSION

For the reasons stated above the judgment herein should be reversed and the cause remanded to Superior Court for trial.

Respectfully submitted this 13th day of March, 2012,



Phil Mahoney WSBA# 1292
Attorney for Appellant

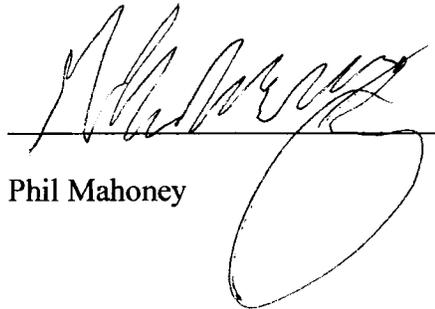
EXHIBIT 1

DECLARATION OF PHIL MAHONEY

Phil Mahoney declares, subject the penalties of perjury of the State of Washington, as follows:

Attached hereto and hereby incorporated by reference is a true copy of King County Superior Court sub number 6 in this cause.

Signed March 13, 2012, at Seattle, Washington,

A handwritten signature in black ink, appearing to read 'Phil Mahoney', is written over a horizontal line. The signature is stylized and cursive. Below the line, the name 'Phil Mahoney' is printed in a simple, sans-serif font.

Phil Mahoney

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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

Honorable Michael Fox

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

FRANK LOUIS ZAMFINO,

Plaintiff,

vs.

WASHINGTON STATE DEPARTMENT OF
CORRECTIONS, and KING COUNTY
DEPARTMENT OF ADULT AND JUVENILE
DETENTION,

Defendants.

No. 09-2-08032-1 SEA

DEMAND FOR JURY OF TWELVE

Defendant King County demands this case be tried to a jury of twelve persons.

DATED this 13 day of March, 2009.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: C. Craig Parker
C. CRAIG PARKER, WSBA #7725
Senior Deputy Prosecuting Attorney
Attorneys for Defendant, King County DAJD

CERTIFICATE OF SERVICE

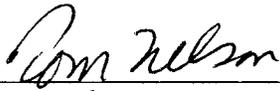
I certify that on the 13th day of March, 2012 I caused to be served a copy of the Brief of Appellant by first class US Mail to:

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Dated this 13th day of March, 2012 in Seattle, Washington.



Tom Nelson