IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL SEGALINE, a single person, Petitioner, v. THE STATE OF WASHINGTON, DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	)	No. 81931-9 En Banc Filed August 19, 2010

SANDERS, J.—We are asked to decide whether a government agency qualifies as a "person" under RCW 4.24.510. Because the purpose of RCW 4.24.510 is to protect free speech rights and a government agency has no such rights to protect, the Washington State Department of Labor and Industries (L&I) is not immune to suit under RCW 4.24.510.

We are also asked to determine whether Michael Segaline's claim in the amended complaint against Alan Croft is time barred. It is.

Facts

Michael Segaline, an electrical contractor, procured electrical permits in person on a regular basis from the L&I at its East Wenatchee building. On several occasions Segaline conducted himself in a coarse manner. The degree of this coarseness is disputed. Segaline contends he did not yell or threaten physical harm. Employees of L&I state Segaline yelled, shouted, threatened that he would sue them, threatened that he would have them fired, and the extent of his agitation caused them at times to fear for their physical safety.

On June 19, 2003, representatives of L&I, David Whittle, and Alan Croft, met with Segaline concerning his behavior. The meeting was not successful. Although Whittle attempted to discuss how Segaline and L&I's employees could conduct transactions with less conflict in the future, Segaline refused to participate and instead repeatedly demanded Whittle tell him (a) what RCW provision precluded Segaline from tape-recording the meeting—even though Whittle had agreed Segaline could record the meeting and it was being recorded; and (b) for which branch of the government Whittle worked. Segaline then ended the meeting by accusing Whittle of breaking the law by preventing him from talking to Jeanne Guthrie, the field service coordinator for L&I who had been previously unsuccessful with resolving Segaline's complaints. Segaline

went to Guthrie's closed office door and started knocking. Unbeknownst to Segaline, Croft eventually called the police. It is disputed whether and to what extent Croft asked Segaline to leave the premises at this point and whether Croft called the police before or after such request. Segaline left as the police arrived.

As suggested by the responding police officer, Croft drafted a "no trespass" notice that stated Segaline was prohibited from entering the L&I building. On June 30, 2003 Alice Hawkins, an L&I employee, presented Segaline with the notice when he came into the office. Segaline pushed the notice aside and stated he could be in the office whenever he wanted. Someone at L&I telephoned the police. The police also provided Segaline a copy of the notice.

On August 21, 2003 Segaline came to the building and was allowed to purchase an electrical permit, but was told the remainder of the paperwork would be mailed to him because he was not allowed on the premises. The next day Segaline came to the office. The police were called; Segaline refused to leave; and he was arrested. The prosecutor ultimately dropped the charges for criminal trespass.

Segaline sued L&I, alleging that barring him from the office and his subsequent arrest constituted (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.[1] Segaline subsequently moved to amend his complaint to include a 42 U.S.C. § 1983 claim against Croft. The motion was granted.

The trial court dismissed all his claims. The court held RCW 4.24.510 granted L&I immunity from the majority of Segaline's claims, dismissed his negligent infliction of emotional distress claim as inadequate as a matter of law,[2] and dismissed his 42 U.S.C. § 1983 claim against Croft as untimely. The Court of Appeals affirmed, *Segaline v. Dep't of Labor & Indus*., 144 Wn. App. 312, 182 P.3d 480 (2008), and we granted review, 165 Wn.2d 1044, 205 P.3d 132 (2009).

ANALYSIS

Segaline obtained review to determine whether (1) immunity under RCW 4.24.510 applies to L&I and (2) whether his 42 U.S.C. § 1983 claim against Croft is untimely.

I. Does a government agency qualify as a "person" under RCW

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[1] Segaline's civil rights claim was an alleged violation by L&I of his constitutional rights under 42 U.S.C. § 1983. The trial court dismissed this claim, reasoning L&I was immune as a state agency under the Eleventh Amendment to the United States Constitution. The Court of Appeals affirmed. *Segaline v. Dep't of Labor & Indus*., 144 Wn. App. 312, 328-30, 182 P.3d 480 (2008). Segaline did not seek review of that holding.

[2] Segaline did not seek review of his negligent infliction of emotional distress claim in his motion for discretionary review, so it is not before this court now. *See* RAP 13.7(b).

4.24.510?[3]

RCW 4.24.510 immunizes a "person" who communicates a complaint or information to a branch or agency of the federal, state, or local government from civil liability. The legislature was concerned with civil lawsuits that were being used to intimidate citizens from exercising their First Amendment rights and rights under article I, section 5 of the Washington State Constitution ("strategic lawsuits against public participation," or SLAPP suits), particularly when that speech involved reporting potential wrongdoing to government agencies. *See* RCWA 4.24.510, Historical and Statutory Notes; *see also* RCW 4.24.500.

The narrow issue before the court is whether a government agency that reports information to another government agency is a "person" under RCW 4.24.510. "Person" is ambiguous in the statute and its meaning varies within the RCW. "Person" may include government agencies, *see, e.g., State v. Jeffries*, 42 Wn. App. 142, 145, 709 P.2d 819 (1985) (interpreting "person" to include government agencies in the context of restitution payments under former RCW 9.92.060 (1982)); corporations, *see, e.g., In re Brazier Forest Prods., Inc.*, 106 Wn.2d 588, 595, 724 P.2d 970 (1986) (interpreting "person" to include

[3] The court reviews statutory interpretation de novo. *State v. Williams*, 158 Wn.2d 904, 908, 148 P.3d 993 (2006) (citing *Am. Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004)).

corporations in the context of logging liens under RCW 60.24.020); or only human beings, *see, e.g.,* RCW 9A.32.030-.070 ("person" used to identify the perpetrator of a homicide).

Here, a government agency is not a "person" under RCW 4.24.510. The purpose of the statute is to protect the exercise of individuals' First Amendment rights under the United States Constitution and rights under article I, section 5 of the Washington State Constitution. RCW 4.24.510, Historical and Statutory Notes. A government agency does not have free speech rights. It makes little sense to interpret "person" here so that an immunity, which the legislature enacted to protect one's free speech rights, extends to a government agency that has no such rights to protect. L&I is not privy to the RCW 4.24.510 immunity.

This analysis is consistent with our previous case law. In *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 384, 46 P.3d 789 (2002), this court held two citizens' groups, exercising the free speech rights of their members, were privy to the immunity under RCW 4.24.510. The State's assertion that our decision there opened the floodgates for any entity to claim immunity under RCW 4.24.510 ignores the intent of the statute, which is to protect free speech rights. Where the citizens' groups there had free speech rights to protect, L&I here does not.[4]

The State argues RCW 1.16.080(1) requires state agencies to be included as a "person" under RCW 4.24.510. *See also Gontmakher v. City of Bellevue*, 120 Wn. App. 365, 370-71, 85 P.3d 926 (2004).[5] RCW 1.16.080(1) states, "The 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." This provision does not *compel* the court to broadly construe "person," but rather the use of "may" *permits* the court to interpret "person" to include such entities. *In re Brazier Forest Prods., Inc.*, 106 Wn.2d at 595 (RCW 1.16.080(1) "only allows, but does not require," a broad construction of "person"). This permissive language demonstrates the legislature intended "person" to be defined in specific provisions of the RCW in accordance with the nature and purpose of those provisions. If RCW 1.16.080(1) *compelled* a broad interpretation of "person" throughout the RCW, it would produce absurd results. For instance, government agencies or corporations could be charged with

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[4] The Court of Appeals in *Skimming v. Boxer*, 119 Wn. App. 748, 758, 82 P.3d 707 (2004), correctly held RCW 4.24.510 granted immunity only to "a non-government individual or organization." That court, however, did not further discuss its holding.

[5] The Court of Appeals in this case mistakenly cited *Gontmakher* as an opinion of *this* court. *See Segaline*, 144 Wn. App. at 323 ("In *Gontmakher*, our Supreme Court ruled that the City of Bellevue is a 'person' under RCW 4.24.510."). *Gontmakher* was decided by Division One of the Court of Appeals. *See* 120 Wn. App. 365.

murder. *See* RCW 9A.32.030.

Dismissal of Segaline's claims via RCW 4.24.510 was improper and those claims are remanded to the trial court.[6] Since RCW 4.24.510 does not apply here, attorney fees, costs, and statutory damages awarded under that provision are vacated.

II. Did the trial court err when it dismissed Segaline's 42 U.S.C. § 1983 claim as untimely?

a. Did the trial court use the incorrect date from which the statute of limitations ran for Segaline's 42 U.S.C. § 1983 claim?

Section 1983 provides citizens who are deprived of their rights as secured under a federal statute or the United States Constitution a cause of action against a person acting under color of governmental authority. The statute of limitations for Segaline's § 1983 claim is three years from the time the claimant knows or has reason to know of the injury that is the basis of the action. *Robinson v. City of Seattle*, 119 Wn.2d 34, 86, 830 P.2d 318 (1992). The Court of Appeals held

[6] Because the immunity under RCW 4.24.510 does not apply to L&I, we need not address Segaline's arguments based upon good faith and the statute's relation to malicious prosecution. Furthermore, we decline to address for the first time the additional arguments left unaddressed by the lower courts concerning Segaline's intentional infliction of emotional distress, malicious prosecution, and negligent supervision claims.

Segaline's claim against Croft was time barred because Segaline knew or should have known of the claimed injury resulting from the no trespass notice on June 30, 2003 when Segaline was served the notice. *Segaline*, 144 Wn. App. at 332.

Segaline's representations of the nature and timing of his injury are muddled and contradictory. Segaline provides perhaps the clearest identification of his injury in his opposition to summary judgment: "[T]he decision by [L&I] to deprive plaintiff of his constitutional rights is the crux of his case—not his right to personal liberty from confinement, but his right to be present in a public place." Clerk's Papers (CP) at 199. Segaline asserts this liberty interest—to be present in a public place—and any attendant due process rights were infringed when he was served the no trespass notice and, even prior, when he was characterized as someone for whom such a notice was necessary. Reply Br. of Appellant at 15 ("[t]he service of the trespass notice—merely handing it to him on June 30" violated due process); *accord id.* at 8 (discussing his negligent infliction of emotional distress claim, "his due process and liberty interests were violated" when he "was unfairly *characterized* as being dangerous without a basis" (emphasis added)); *id*. at 12 (arguing his liberty and due process rights were "negatively impacted by the no trespass notice *and* his removal from the office on August 22, 2003" (emphasis added)).[7]

The statute of limitations accrued when Segaline knew or had reason to know that his alleged liberty interest to be in a public place and any attendant due process rights were infringed. *See Robinson*, 119 Wn.2d at 86. Segaline knew of Croft's no trespass notice, which informed Segaline he was no longer permitted to enter the L&I office, when he was served the notice on June 30, 2003. The Court of Appeals used the correct accrual date for Segaline's 42 U.S.C. § 1983 claim. *See Segaline*, 144 Wn. App. at 332.[8] Unless Segaline's amendment to his complaint adding Croft as a defendant relates back to the date of his original filing, his § 1983 claim is time barred.

b. Should Segaline's amended complaint, adding another party, relate back to the time his original complaint was filed?

When a party is added or substituted upon amendment of a complaint, the amended complaint relates back to the date of the original pleading for purposes of a statute of limitations *if* (1) the new party received notice of the institution of

[7] When seeking review before this court, Segaline contradicts his earlier representations and argues that until his arrest "he suffered no actual damage to his liberty rights . . . ." Pet. for Review by Appellant at 21. However, Segaline is bound by his previous factual representations.

[8] For the first time on appeal Segaline argues that his claim is timely under the continuing violation doctrine. Neither the trial court nor the Court of Appeals addressed this argument. This court has no record upon which to address it now and declines to do so. *See* RAP 2.5(a).

the action so that he or she will not be prejudiced in making a defense on the merits, CR 15(c); (2) the new party knew or should have known that, but for a mistake concerning identity of the proper party, the plaintiff would have brought the action against him or her, *id.*; and (3) the plaintiff's delay in adding the new party was not due to "inexcusable neglect," *Stansfield v. Douglas County*, 146 Wn.2d 116, 122, 43 P.3d 498 (2002).[9] The party seeking to amend its complaint has the burden to prove these three conditions were satisfied. *Foothills Dev. Co. v. Clark County Bd. of County Comm'rs*, 46 Wn. App. 369, 375, 730 P.2d 1369 (1986). Whether this burden is satisfied is a factual determination. We review a trial court's determination for abuse of discretion. *Kommavongsa v. Haskell*, 149 Wn.2d 288, 295, 67 P.3d 1068 (2003); *Foothills Dev. Co.*, 46 Wn. App. at 375.

The only issue disputed here is the third condition—whether the delay was due to inexcusable neglect. "Inexcusable neglect exists when no reason for the initial failure to name the party appears in the record." *Stansfield*, 146 Wn.2d at 122 (citing *S. Hollywood Hills Citizens Ass'n for Pres. of Neighborhood Safety &*

[9] Adding a new party requires a showing that it was not due to "inexcusable neglect" because amendment of a complaint is not intended to serve as a mechanism to circumvent or extend a statute of limitations. This requirement stems from the historical view that the addition of a new party by amending the complaint constituted a new cause of action, so commencement of a "new" cause of action did not relate back to the filing of an earlier action. *Hill v. Withers*, 55 Wn.2d 462, 467, 348 P.2d 218 (1960).

Env't, 101 Wn.2d 68, 78, 677 P.2d 114 (1984)). We have held delay due to "a conscious decision, strategy or tactic" constitutes inexcusable neglect. *Id*. at 121.[1]

Segaline moved to amend his complaint, adding Croft as a party, on August 3, 2006. As justification for the delay, Segaline stated he "could not have known the specific participation of each of the numerous L&I actors in the act of excluding Mr. Selaline [sic] from the L&I premises, until the deposition of key witnesses was completed." CP at 222. The trial court held this did not qualify as excusable neglect and the amendment would therefore not relate back to the original filing date. The Court of Appeals affirmed. *Segaline*, 144 Wn. App. at 330-32.

The trial court did not abuse its discretion by refusing to permit Segaline's amended complaint to relate back to the original filing date because Segaline did not establish excusable neglect. Croft was added to the complaint because he drafted the no trespass notice. On December 5, 2005 Segaline knew Croft drafted the notice when L&I provided that information in its response to

[1] We have also found inexcusable neglect when a party did not know the identity of the additional party, but could have discovered it from an available source. *See Tellinghuisen v. King County Council*, 103 Wn.2d 221, 224, 691 P.2d 575 (1984) (citing *S. Hollywood Hills Citizens Ass'n*, 101 Wn.2d at 77) (inexcusable neglect where plaintiff could have discovered the identities of the additional parties from public records).

Segaline's interrogatories. Yet Segaline did not seek to amend his complaint to add Croft until August 3, 2006—nine months later.

Segaline argues the delay was necessary to confirm Croft drafted the notice in his June 9, 2006 deposition and further delay occurred because the deposition was not transcribed until June 25, 2006. The interrogatory response states that "Alan Croft drafted and designed the notice." CP at 290. Segaline fails to show why this statement required Croft to confirm it in person before Segaline could add him as a party.

Furthermore Segaline fails to explain why, after Croft verbally confirmed that he designed and drafted the notice, Segaline did not seek then to amend the complaint. Segaline argues he further delayed so he could obtain the deposition transcript. He does not explain why such a delay was necessary since he already had written (the interrogatory response) and verbal (Croft's deposition) confirmation that Croft designed and drafted the notice. Segaline received the transcript at the end of June and then waited another month—until August 3, 2006—to file his motion to add Croft as a party. The trial court did not abuse its discretion when it found the delay inexcusable.

CONCLUSION

Immunity under RCW 4.24.510 does not extend to government agencies.

We reverse the decision of the Court of Appeals to the contrary and also vacate the award of attorney fees and costs to L&I under RCW 4.24.510. We affirm the dismissal of Segaline's 42 U.S.C. § 1983 claim against Croft as untimely.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR:

Justice James M. Johnson

Justice Debra L. Stephens

Justice Tom Chambers