No. 42774-5-II

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

DEREK E. GRONQUIST,

Appellant/Plaintiff,

V.

DEPARTMENT OF CORRECTIONS,

Respondent/Defendant.

REPLY BRIEF

Derek E. Gronquist
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Monroe Correctional Complex
P.O. Box 888/TRU
Monroe, WA 98272

pm 5/29/12

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Appellant Derek E. Gronquist files this reply to Respondent's Answering Brief (Respondent's Brief).

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. GRONQUIST'S MOTION TO VACATE

The Department contends that that Mr. Gronquist failed to present any evidence establishing that it misrepresented or withheld facts relevant to this case. Respondent's Brief at 12. This assertion is false. Mr. Gronquist presented the Court with specific, detailed, and uncontroverted evidence establishing that the Department and its attorneys withheld and misrepresented the facts of this case. See Corrected Opening Brief at 3-7 (identifying the evidence establishing the Department's misrepresentations and withheld facts) and 15-17 (explaining how the withheld and misrepresented facts denied a fair presentation of this case). Contrary to DOC's conclusory allegations, Mr. Gronquist presented clear and direct evidence of its misconduct.

The Department also asserts that "the trial court's December 19, 2009, order was not based on any facts asserted by Mr. Gronquist."

Respondent's Brief at 12. However, Mr. Gronquist does not need to prove that the trial court's order was based upon the misconduct. When a party withholds facts or evidence relevant to a proceeding, vacation is required if the withheld facts "prejudiced the opponent's ability to prepare for trial":

> A new trial based upon the prevailing party's misconduct does not require a showing the new evidence would have materially affected the outcome of the first trial.

Roberson v. Perez, 123 Wn.App. 320, ___, 96 P.3d 420 (2005) (citing Taylor v. Cessna Aircraft Co., 39 Wn.App. 828, 836, 696 P.2d 28 (1985)).

The Department's withholding and misrepresentations regarding its failure to search for, locate, review, identify, explain, and preserve the requested public records is no different than the husband who withheld the value of a business relevant to a dissolution action in Marriage of Maddix, 41 Wn.App. 248, 703 P.2d 1062 (1985), or the City officials who withheld personnel and investigative files relevant to a civil suit in Roberson, supra. In each case the prevailing party engaged in misconduct that prevented his opponents from a fair presentation

of their case. In such cases, the malfeasant cannot be heard to claim that the withheld or misrepresented facts had no effect on the underlying judgment. As the Taylor court aptly emphasized:

> It cannot be stated with certainty that all of this would have changed the result of the case. But, . . . a litigant who has engaged in misconduct is not entitled to "the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent."

Taylor, 39 Wn.App. at 836-837 (quoting Seaboldt v. Penn. R.R., 290 F.2d 296, 300 (3rd Cir. 1961)).

In the present case, we know the impact of the Department's misconduct on the underlying proceedings: It deprived Mr. Gronquist of a judgment in his favor, and the award of costs and substantial penalties, for the Department's failure to search for, locate, identify, disclose, and preserve requested public records. It also compelled the trial court to enter an order that rests entirely upon a sham statutory exemption defense.

It is important to remember that it is not just Mr. Gronquist's rights and interests at stake in this action. In every Public Records Act lawsuit, courts are required to take into account

and protect the vital public interests advanced by the Act. RCW 42.56.030 & 42.56.550(3). Permitting an agency to escape liability for some of the most fundamental violations of the Act through the use of deception does not discharge these mandatory duties, nor protect the vital public interests underlying the Public Records Act.

The trial court's December 19, 2009, order should be vacated, and this case remanded for a full and fair presentation of the real facts of this case.

II. THIS APPEAL IS NOT PREMATURE

The Department asserts that this appeal is premature because "[a]t the time of filing his opening brief, Mr. Gronquist had not provided a final judgment for all his claims or an order satisfying the requirements of CR 54(b)." Respondent's Brief at 8-9. Like the merits of this appeal, the Department's statements withhold relevant facts and are intentionally misleading.

CR 60(b) authorizes superior court's to vacate any order. RAP 2.2(a)(10) authorizes an appeal from an order denying a motion to vacate. Mr. Gronquist's appeal from the order denying his

motion to vacate is proper.

Even if we assume for the sake of argument that this appeal was **initially** premature, it is not now. A final judgment was entered on all claims on **February 27, 2012** -- two weeks before service of the Opening Brief; a month-and-a-half before service of the Corrected Opening Brief; and more than two months prior to service of Respondent's Brief. Reconsideration of that order was denied on April 25, 2012, and a Notice of Appeal was filed on all claims in this case on May 23, 2012. That notice should be on file with this Court. Thus, a final appealable judgment has been entered in this case. The Department's claim to the contrary is, once again, completely false and tendered with the intention to commit a fraud.

Mr. Gronquist specifically requested the Court to stay this appeal so that all claims could be decided in a single opinion. See Motion to Stay. On January 30, 2012, Commissioner Schmidt denied that motion. Therefore, the procedural posture of this case is nothing new or concealed; and the only reason the case is proceeding in this manner is because the Court wishes it so. If the Court wishes to modify that course to facilitate a

decision upon all the claims in this case in a single opinion, Mr. Gronquist will not object.

To conclude: The undisputed evidence before the Court establishes a stunning assault upon the integrity of judicial process. Officials employed by the Department of Corrections and the Washington State Attorney General intentionally misrepresented and withheld the real facts at issue in this case from Mr. Gronquist and the trial court. In furtherance of that misconduct, those officials obtained an order that rests entirely upon a fictitious statutory exemption defense. If there is any semblance of justice or fairness still alive in the Washington judiciary, the Department's misconduct would be strongly condemned and the trial court's order vacated. This Court should grant such basic and fundamental relief; and allow this case to proceed upon its real merits.

Submitted this 28th day of May, 2012.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day I deposited a properly addressed envelope in the internal mail system of the Monroe Correctional Complex, and made arrangements for postage, containing: Reply Brief. Said envelope(s) was addressed to:

Brian J. Considine
Assistant Attorney General
P.O. Box 40116
Olympia, WA 98504; and

Clerk
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Tacoma, WA 98402-4454

Dated this 28th day of May, 2012.

Derek E. Gronquist