

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 39014-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WIVES AND MOTHERS OF PRISONERS OF THE STATE
Appellant;

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
PIERCE COUNTY

The Honorable Ronald Culpepper
No. 08-2-05790-4

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Appellant, Wives and Mothers of Prisoners of the State (WMPS) assigned five issues pertaining to the order dismissing the lawsuit. The first argument was procedural in nature, the next three were substantive and the last one was for reasonable attorney fees and costs.

The first argument was based upon the undisputed fact that the Department of Social and Health Services (DSHS) failed to cite to one legal argument to support its motion to dismiss. DSHS totally ignored this argument by submitting superfluous facts in its response to try to muddy the waters and WMPS will show this argument must prevail.

If the procedural argument prevails, this case must be remanded. If not, the substantive arguments must be addressed. DSHS choose to offer a defense to Appellant's CR 41 argument, an argument WMPS made at the trial court level to show that the original motion was substantively flawed because *it had not been based on law*. WMPS will show that nothing has changed and the substantive argument is still flawed, whether presented below or before this Court.

Finally, WMPS will show that attorney's fees and costs are appropriate. It will also be shown that this appeal is not frivolous, only DSHS's original motion was.

B. ARGUMENT

1. DSHS COMPLETELY IGNORED WMPS'S PROCEDURAL ARGUMENT THAT IT VIOLATED CR 11(a) BY FILING A MOTION WITHOUT LEGAL AUTHORITY.

The first argument WMPS presented in its opening brief was that DSHS's motion to dismiss lacked legal authority, in violation of CR 11(a). CP 9-11. DSHS has not disputed this basic fact and it must be considered a verity for the purposes of this appeal. *State v. Hilyard*, 63 Wn. App. 413, 819 P.2d 809 (1991). Because DSHS failed to cite legal authority in its motion, the trial court should not have ruled in favor of DSHS. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (citing RAP 10.3(a)(5) and *McKee v. American Home Prods. Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989)).

WMPS pointed out that such a motion could also be considered frivolous because of the lack of any legal citation. All of this supports WMPS's assertion that DSHS violated CR 11(a) when it failed to support its motion with existing law or make a good faith effort to change the present law, no matter how meritorious any underlying claim may be.¹

¹In its opening brief, WMPS argued this procedural issue first. The substantive issues involving authority for motions to dismiss were made subsequent to this argument. The procedural argument must proceed before the substantive argument because one does not get to the substantive

The decision of DSHS to ignore this procedural argument can only lead to one conclusion – this argument controls. As such, this Court need not hear the substantive questions and should remand to the trial court.

2. IT IS UNREASONABLE TO PENALIZE ANY PARTY FOR FAILURE TO FOLLOW A WRITTEN ORDER WHEN THE UNDERLYING ORAL RULING MUST BE USED TO CLARIFY THE WRITTEN ORDER.

DSHS's response belabors the point that Mr. Scott had not personally paid the sanctions. So what. As previously pointed out, such language was not specifically in the written order.

If Director Scott violated the written order, why was it necessary to try to enlarge the record to include the transcript of the hearing? This singular fact proves that the written ruling was anything but clear and as such, WMPS cannot be penalized.² The order must be extremely clear before a party can be punished for violating it. See *Johnston v. Beneficial Mgmt. Corp.*, 96 Wn.2d 708, 712-13, 638 P.2d 1201 (1982) (As pointed out in the opening brief, a party cannot be punished unless precisely

argument if the procedural argument made by WMPS is affirmed.

²This is why oral rulings are not relied upon. Personal memories are flawed. This is also why oral rulings are always reduced to writing by the successful party and then signed by the trial court. See *Hubbard v. Scroggin*, 68 Wn. App. 833, 846 P.2d 580 (1993) (an oral ruling is not final until reduced to writing).

informed of improper behavior). This comports with the concept of notice.

3. IF A STATUTE DOES NOT PUT A PARTY ON NOTICE, CERTAINLY AN ORDER WITHOUT SET LIMITS DOES NOT PUT A PARTY ON NOTICE.

DSHS argued that it was the failure to comply with a court order that resulted in the dismissal of the lawsuit. However, as previously explained, the language on the order is not as well defined as DSHS would like.³ There is no time period set forth in which the order had to be obeyed. There is no language specifying the payee. This is the fault of the drafter of this order, DSHS, not WMPS. To claim otherwise is to try to shift the burden of drafting an order to the loser.

There is a policy reason that oral rulings are reduced to writing – to avoid confusion and to provide clarity. It is not a party's obligation to memorize a ruling from the bench and if a party desires to make sure all bases are covered, it is a simple matter to obtain a transcript.

³Even if the word "personal" was in the order, what does that mean? It is entirely possible that another person could gift monies to Director Scott. What if he received an inheritance? The monies would definitely be personally his. And if it was limited to work, any work must be provided by the entity that was being sued due to Director Scott being a resident at the Special Commitment Center.

Furthermore, an order should provide sufficient information to inform a party the terms of the order. As previously noted, no time line was provided in the order drafted by DSHS and signed by the trial court. DSHS waited four months? Why not two – or ten?

Notice before dismissal is critical. See *Johnson v. Horizon Fisheries, LLC.*, 148 Wn. App. 628, 201 P.3d 346 (2009). In *Johnson*, the Plaintiff was sanctioned costs after refileing a lawsuit. The lawsuit was stayed pending payment of the costs. *Id.* at 631-32. Nine months after an order was entered, Horizon moved for dismissal. It was granted. *Id.* at 632-33.

When examining the facts for dismissal, the *Johnson* Court pointed directly at the local rules which provided authority for dismissal.

CR 41(b) authorizes a trial court to dismiss an action for noncompliance with court orders. King County Local Rule 4(g) provides that “[f]ailure to comply with the Case Schedule may be grounds for the imposition of sanctions, including dismissal.”

Id. at 638 (citing *Apostolis v. City of Seattle*, 101 Wn. App. 300, 304, 3 P.3d 198 (2000)). The focus was on Johnson’s failure to follow the case schedule which gave the court the authority to dismiss. Here, there is no cite to any court rule which provides explicit authority to dismiss.

Instead, Director Scott was provided an order without any specificity – there was no time frame to pay nor any requirement to pay “personally.”

4. DSHS FAILED TO SHOW IT HAS BEEN PREJUDICED BY THE ACTIONS OF THIS CASE THUS ITS RELIANCE ON CR 41(b)(2)(D) IS MISPLACED.

Appellee DSHS has argued in its brief that CR 41(b)(1) was not applicable to this case and instead CR 41(b)(2) controls.⁴ However, this argument contradicts DSHS’s argument that it has been prejudiced by the actions in this case. The *Johnson* court acknowledged that dismissal is disfavored and only “justified when a party's refusal to obey the trial court's order was willful or deliberate and substantially prejudiced the other party.” *Johnson v. Horizon Fisheries*, 148 Wn. App. at 638 (citing *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002)).

There was no argument below that DSHS had been prejudiced. Appellee has tried to muddy the waters in their response by claiming that other lawsuits are somehow part of this lawsuit and thus this suit has

⁴At the trial court level, DSHS argued legal issues only in its reply to WMPS’s response. As pointed out in the opening brief, this argument cannot be considered by the trial court as providing legal justification for a ruling on the merits. These arguments must be procedurally rejected. *Browning v. Johnson*, 70 Wn.2d 145, 152, 422 P.2d 314 (1967).

prejudiced DSHS.⁵ Response Brief, p. 18. Nothing could be further from the truth. This Court must examine the facts of this case that support WMPS's legal arguments. Nowhere has DSHS alleged that it would have been prejudiced *in this case* if it had not obtained the obtain quick dismissal *in this case*. (Emphasis added.)

5. CR 11 SANCTIONS DO NOT APPLY TO NON-FRIVOLOUS APPEALS.

DSHS has made the argument that the appeal lacked a factual and legal basis, meriting sanctions for the costs of defending.⁶ This argument is not made in good faith. Every argument advanced was based on written orders and legal authority. If there was no factual basis for an appeal, DSHS would not have tried to augment the record with copies of the lower court's transcripts. DSHS would not have had to advance a new legal argument providing a legal basis under CR 41 for the court to dismiss. DSHS would not have tried to bring in irrelevant materials of

⁵Throughout its brief, DSHS presents alleged facts to put WMPS Director Scott in a bad light as a vexatious litigator. Such an argument is being presented for one reason – to appeal to passion and prejudice, not reason. It certainly has nothing to do with this case – there has been no claim that the underlying lawsuit is frivolous.

⁶Contrast this argument to DSHS's original argument without any citation to legal authority. This argument is only appropriately applied against the party making it – DSHS.

actions that took place after the ruling in question was ordered. There is no justifiable basis in law or fact for sanctions against WMPS for this appeal because it is not frivolous. *Pillsbury Co. v. Labor & Industries*, 69 Wn. App. 828, 851 P.2d 698 (1993) (a nonfrivolous appeal does not subject an attorney to CR 11 Sanctions).

6. THIS COURT MUST GRANT ATTORNEY FEES AND COSTS ON APPEAL BECAUSE PUBLIC POLICY IS THE BASIS OF THE PUBLIC RECORDS ACT.

Any litigant faces a heavy burden when trying to litigate against a state agency that prevailed at the trial court level without an attorney. Because of the critical importance given the Public Records Act to monitor governmental actions, public policy dictates that the citizen requestor be given all assistance. The Public Records Act is quite explicit:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

RCW 42.56.030.

If reasonable attorney fees and costs are not awarded on appeal, this would have the chilling effect of taking away a critical means for the

I certify under the penalty of perjury under the laws of the State of Washington that on August 10, 2009, in Seattle, County of King, State of Washington, I emailed and deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

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STATE OF WASHINGTON
BY _____
PERJURY

By: 
MICHAEL C. KAHR

Date: 8/10/09

citizen requestor to monitor her government. The whole structure of penalties, attorneys fees and costs supports this goal.

The policy of the act allows for award of fees and fines, where appropriate. Strict enforcement of these provisions where warranted should discourage improper denial of access to public records and adherence to the goals and procedures dictated by the statute.

Hearst Corp. v. Hoppe, 90 Wn.2d 123, 140, 580 P.2d 246 (1978). An award of reasonable attorney fees and costs is always appropriate when the citizen-requester has had to assert her rights under the Public Records Act on appeal.

C. CONCLUSION

For the reasons set forth above, appellant WMPS respectfully asks this Court to grant the relief requested by WMPS in its opening brief.

DATED this 10th day of August, 2009.

Respectfully submitted,



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Attorney for Appellant WMPS

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STATE OF WASHINGTON

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