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No. 50570-3-II

COURT OF APPEALS DIVISION II OF THE STATE OF  
WASHINGTON

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In the Matter of

BRETT HAMILTON

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BRETT HAMILTON

Plaintiff - Appellant,

v.

KITSAP COUNTY,

Defendant - Respondent.

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**REPLY BRIEF OF APPELLANT**

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Law Office of Rodney R. Moody  
Rodney Moody, WSBA # 17416  
Attorney for Appellant  
2707 Colby Ave., Ste. 603  
Everett, WA 98201  
(425) 740-2940

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## I. ARGUMENT

### Administrative Violation of Appendix D

Throughout their Response Brief the County continues to argue the investigation into Hamilton's actions were criminal in nature and therefore the rights afforded to him under the Collective Bargaining Agreement, Appendix D did not apply. Throughout these proceedings Hamilton has repeatedly reminded the various Courts that the County has failed to provide any authority to support the contention that Hamilton's rights under Appendix D were somehow suspended because the Chief of Corrections determined that this investigation was criminal in nature. In their Response Brief the County again fails to provide any authority to support this argument.

Appendix D, paragraph 2 clearly states that in administrative matters in which an employee will be interviewed concerning an act, which, if proven, could *reasonably* result in disciplinary action involving loss of pay the employee *will be afforded the safeguards set forth in this Appendix*. Appendix D, paragraph 3, states that whenever the employer decides to initiate an investigation that *may* lead to disciplinary action involving the loss of pay, the employer *shall* promptly provide the employee notice of the investigation.

Nowhere within the Collective Bargaining Agreement is there any statement that a member's rights which were bargained for and included in Appendix D are suspended or delayed in their application if the employee/member is suspected of engaging in criminal behavior.

The County states, "When a KCSO employee's conduct is subject to both criminal and in the administrative investigations, KCSO's practice is to postpone its administrative investigation until the criminal investigation is substantially completed." Res. Br. pg. 16-17. The stated reason behind this practice "is to avoid interfering with or compromising the criminal investigation." Res. Br. pg.17. No authority justifying this "practice" is presented.

The County continues to remain silent as to the source of any authority for this "practice." This is a specious argument made which the County hopes this Court will simply accept without challenge. The member's rights under Appendix D were negotiated and included in the CBA specifically to provide these rights and benefits to the member regardless of whether the allegations against him/her also included a potential criminal act. Nowhere within the CBA is there even any suggestion that these bargained for rights are somehow subject to suspension at the whim of the Chief of Corrections simply because

he/she decides that there is a potential criminal component to the employee/member's conduct.

Under the Rules of Appellate Procedure, "an appellants' brief must include argument supporting the issues presented for review and citation to legal authority." *Bercier v. Kiga*, 127 Wn.App. 809, 824, 103 P.3d 232 (2004); *see* RAP 10.3(a)(6). Without supporting argument or authority, "an appellant waves an assignment of error; and the appellate court need not consider arguments that are not developed in the briefs for which a party has not cited authority. *Id.* at 824.

The argument that Hamilton's rights under Appendix D were suspended, delayed, or not applicable because Chief Newlin decided that a criminal investigation should be conducted is made without citation to any authority in the form of a statute, administrative regulation, case law authority, city code, or contractual provision and should be disregarded by this Court.

### **Claim Preclusion**

The County states in the Procedural History section of its Response Brief that at the time the present lawsuit was filed Hamilton had another lawsuit pending against Kitsap County in the United States District Court of Western Washington alleging a 42 USC § 1983 and breach of contract claim arising from the same factual basis as the

present lawsuit. Res. Br. pg. 8. What the County fails to advise this Court is that the lawsuit discussed that was pending in the United States District Court was originally filed in the Kitsap County Superior Court and removed to the District Court by the County. This Lawsuit originally filed in the Superior Court included the causes of action for negligent supervision, negligent infliction of emotional distress, and retaliation.

These state law claims for negligent supervision, negligent infliction of emotional distress, and retaliation were dismissed by Judge Settle without prejudice because of a claimed violation of RCW 4.96.020 (4). This violation itself occurred because the Kitsap County Superior Court Clerk's office provided incorrect information as to the proper party for service. Regardless, the dismissals of these state tort law claims had nothing to do with their merit, but were dismissed without prejudice because of a perceived procedural violation.

The causes of action for negligent supervision, negligent infliction of emotional distress, and retaliation also are completely separate causes of action from the breach of contract claim. As outlined in the Opening Brief the cause of action for negligent supervision addresses the actions of Chief Newlin, Lt. Elton, and Sgt. McDonough which were outside the scope of their authority. Whether a supervisor

acted in or outside the scope of their authority is legally separate from a claim that a contract was breached.

The cause of action for negligent infliction of emotional distress addresses Hamilton's emotional reaction to being unable to pursue a career in law enforcement because of the actions of the County which resulted in his termination from the Bremerton Police Department Reserve and career in law enforcement. Once again, this has nothing to do with a breach of contract. Finally, the cause of action for retaliation has to do with Chief Newlin's actions that resulted in the termination of Hamilton's employment because Hamilton engaged in safety related activities protected by the Washington Industrial Safety Health Act. This has nothing to do with the cause of action for breach of contract.

These causes of action are not simply repackaged claims for breach of contract. The prior dismissal by Judge Settle of these causes of action without prejudice in no way precludes Hamilton from varying these cause of action in the Superior Court.

### **Negligent Supervision**

### **Statute Of Limitations**

First, the County argues the dismissal of the negligent supervision claim should be sustained because of a violation of the statute of limitations. Hamilton's response to the statute limitations

argument is fully outlined in the original Opening Brief and will not be repeated. The statute of limitations was not violated because the statute does not start until a plaintiff is afforded a remedy when he knows all the essential elements of his cause of action or when each element of the action is “susceptible of proof.” *Haslund v. Seattle*, 86 Wn.2d 607, 619, 547 P.2d 1221 (1976). As noted in the Opening Brief, Hamilton did not even have knowledge of the actions of the supervisors until after the litigation was initially filed. He was terminated March 26, 2013, and this cause of action filed March 24, 2016. This is within the three-year statute of limitations.

#### **Factual Allegations Unsupported**

The County then argues “Hamilton’s negligent supervision claims fails on a fundamental level because the factual assertions which form the basis of his claim are unsupported and incorrect.” Res. Br. pg. 24. Further argument is made, “There is no evidence Lieutenant Elton or Chief Newlin “directed” the criminal investigation.” Res. Br. pg. 24. The standard on summary judgment is clear however that it is the duty of the trial court to consider all evidence and all reasonable inferences therefrom most favorable to the nonmoving party. *Messner v. Simpson Timber Co.*, 69 Wn.2d 949, 951, 421 P.2d 674 (1966). It is not the function of the trial court to weigh the evidence to be considered, and

summary judgment must be denied if a right of recovery is indicated under any provable set of facts. *Fleming v. Smith*, 64 Wn.2d 181, 390 P.2d 990 (1964).

Despite these long standing principles of summary judgment the County, wrongfully, asks both the Trial Court and this Appellate Court to disregard these principles and weigh the factual evidence. That is not the correct function of either Court. Judges decide questions of law, juries decide questions of fact.

As outlined in the Opening Brief there is ample evidence that Lt. Elton directed this “criminal” investigation when she for example consulted with Detective Martin and told him that it would be preferable that he not contact Hamilton during work hours. A reasonable trier of fact could certainly determine from this evidence that Chief Newlin, Lt. Elton, and to a lesser extent Sgt. McDonough through their actions influenced the conduct of Detective Martin and also directly violated Hamilton’s bargained for rights under Appendix D of the CBA. These administrative officers of the Corrections Department all acted outside the scope of their authority when they took these actions and virtually ignored every one of Hamilton’s rights under the CBA and specifically Appendix D.

These administrative officers were not authorized to unilaterally ignore the contractual provisions of Appendix D. Yet that is exactly what they did as a reasonable factfinder could conclude. As such there is a material issue of fact that is clearly in dispute and summary judgment is inappropriate.

If the County wishes to make these arguments at the conclusion of presentation of evidence to the factfinder when Hamilton's burden is one of persuasion, not production, these arguments may have merit. But Hamilton's burden on summary judgment is a burden of production, not persuasion.

The County then proceeds to argue on page 26-27 that there is no evidence to support the elements of a negligent supervision claim. Once again however the County is asking the Trial Court and this Appellate Court to weigh the evidence which explicitly is not the Court's function on summary judgment. The Appellant's Opening Brief fully outlines the factual evidence present and will not be repeated.

Finally, the County argues that the negligent supervision claim should be dismissed because there is no evidence to support the contention that the actions of Chief Newlin, Lt. Elton, and Sgt. McDonough posed a risk to any other employee. Res. Br. pg. 27. This contention fails because the evidence demonstrates that virtually every

employee of the Corrections Division who was also a member of this guild was placed at risk when the Chief of Corrections unilaterally and without any authority decided to virtually ignore the bargained for rights contained in Appendix D. Quite literally every member/employee is at risk. If Chief Newlin is permitted to do this to Hamilton what is to stop them from engaging in the same conduct with any other member/employee?

The granting of summary judgment by Judge Houser was legal error.

#### **Negligent Infliction of Emotional Distress**

The elements of the cause of action for negligent infliction of emotional distress were fully outlined in the Appellant's Open Brief and will not be repeated. The County essentially argues this cause of action should be dismissed because Hamilton has demonstrated no "negligent" act committed by the County.

Of course the County's contacting the Bremerton Police Department to notify them of Hamilton's termination from employment was an intentional act. This action was also a breach of the duty that the County owed to Hamilton not to inflict emotional distress upon him. The result of this call was Hamilton's dismissal from the Reserve. The further result was Hamilton's preclusion from being able to pursue his

chosen career, that of law enforcement. It is these acts which cause the emotional distress to Hamilton and demonstrate the negligent breach of the duty that was owed by the County to Hamilton.

The County had no requirement to contact the Bremerton Police Department and notify them of Hamilton's termination. This should have been handled by Hamilton directly, not by the administration of the Kitsap County Corrections Department. This however is exactly what the County through its administrators did with the resulting emotional and pragmatic impact to Hamilton by his inability to pursue a career in law enforcement.

The argument made by the County that because these acts are "intentional" this cause of action should be dismissed is, once again, unsupported by any authority. As established earlier, this Court is free to disregard any argument made without citation to authority. This argument should be dismissed without consideration.

#### **Statute of Limitations**

The County argues the statute of limitation expired precluding this cause of action. The County argues, "The factual basis for Hamilton's negligent infliction of emotional distress claim is not fully articulated by Hamilton." "Nonetheless this claim appears to arise from the alleged violations of Appendix D resulting from the alleged failure to

receive advance notice of Detective Martin's criminal investigation." Res. Br. pg. 34.

Unfortunately the County attempts once again to mislead this Court through its argument. As has been stated at the Trial Court level as well as in the Opening Brief, "This cause of action involves in part Hamilton's dismissal from the Bremerton Police Department Reserve." "It was Hamilton's desire to have a career in law enforcement which has now been denied to him because of the actions of the County through their agents." App. Op. Br., pg. 35. This cause of action has *nothing* to do with the clear violation of Appendix D as committed by the County through its agents.

Hamilton filed this lawsuit prior to the expiration of three years from his termination by the County which itself occurred prior to his removal from the Bremerton Police Department Reserve. The statute of limitations was met.

Hamilton's termination from the Bremerton Police Department Reserve is also clearly outside the scope of his employment by the County as a corrections officer. As such this cause of action has nothing to do with any disciplinary act imposed against Hamilton by the County.

## **Retaliation**

Hamilton will rely upon his argument in the Opening Brief addressing the elements of the cause of action of retaliation as well as the proof presented. The County makes no new argument but does demonstrate a continuing disregard for the proper standards on summary judgment.

The County argues, “Contrary to Hamilton’s assertions, there is no evidence Chief Newlin knew about Hamilton’s role in creating the “Emergency Injunction[s].” Res. Br., pg. 38. Once again: “In ruling upon such motion, it is the duty of the trial court to consider all evidence and all reasonable inferences therefrom most favorable to the nonmoving party.” *Reed v. Streib*, 65 Wn.2d 700, 399 P.2d 338 (1965)

The County continues to wrongfully argue that there are facts insufficient to support this cause of action. That is not the function of either the Trial Court or this Appellate Court. Hamilton has demonstrated through the sworn testimony of Chief Newlin his claim that he had no knowledge of Hamilton’s activities regarding the Emergency Injunction. The declaration under penalty of perjury from Terry Cousins, the acting Guild President at the time, is that she personally gave a copy of the Emergency Injunction to the

administration which of course through established agency principles means that Chief Newlin had knowledge of the Emergency Injunction.

Ms. Cousins also stated directly in her declaration that she personally discussed this Emergency Injunction with Chief Newlin. The argument by the County that because Ms. Cousins did not specifically state that she informed Chief Newlin that the Emergency Injunction was prepared by Hamilton prevents the Trial Court from reasonably concluding that Chief Newlin possessed knowledge that Hamilton was the party who drafted the Emergency Injunctions is an absurd stretch that utterly disregards the authority stating that the court is to consider *all* evidence and *all reasonable inferences* in a light most favorable to Hamilton.

As stated in the Opening Brief, if an employee establishes that he participated in statutorily protected activity (a factor which the County does not argue and in fact states it does not challenge the cause of action based upon this element), the employer knew about the opposition activity, and the employee was then discharged, a rebuttable presumption of retaliation arises that precludes summary judgment of the case. *Currier v. Northland Servs., Inc.*, 182 Wn.2d 733 747, 332 P.3d 1006 (2014).

The only two challenges made to any element of this cause of action by the County are the claims that Chief Newlin was not aware of Hamilton's safety related activities, and there is no causal connection because of the passage of time. The argument that Chief Newlin lacked knowledge of Hamilton's activities is an argument made in bad faith and completely disregards the standards on summary judgment. The argument that there is too lengthy of a period of time between Hamilton's activities and his termination was fully addressed in the Appellants' Opening Brief and will not be repeated. This is also a baseless argument given the totality of the evidence that has been presented in response to the motion for summary judgment.

### **Conclusion**

Judge Houser following argument on both motions for summary judgment refused to provide any commentary regarding his thoughts and took both matters "under advisement." The two respective orders on summary judgment both fail to articulate any reasoning for his granting the motions for summary judgment. On the Motion for Reconsideration regarding the retaliation claim Judge Houser was specifically asked to further explain his reasoning. He declined to do so.

Judge Houser has chosen to hide behind his silence when granting these two motions for summary judgment. In light of the strong

evidence presented which as a matter of law should preclude the granting of summary judgment Judge Houser's silence is telling.

The County also chooses to hide behind silence and refuses to articulate any authority supporting its argument that Hamilton's bargained for rights under Appendix D do not apply because Chief Newlin decided that he would call this investigation a "criminal investigation." Despite being directly requested to provide authority supporting this argument on multiple occasions the County steadfastly refuses to do so. The silence of the County on this point is also quite telling.

Finally, the County in the Response Brief misstates the facts and consistently fails to argue the proper standard on summary judgment. The refusal of the County to frame their responsive argument in light of the correct legal standard on summary judgment is, also, quite telling.

The Trial court committed significant legal error and these decisions should be reversed.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of January 2018.

s/ Rodney R. Moody  
Rodney R. Moody, WSBA #17416  
Attorney for Appellant

**CERTIFICATION OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington that on January 22, 2018, I caused to be delivered via US Mail and Email Service the foregoing to:

Counsel for Defendant

Christine Palmer  
Kitsap County Civil Division  
614 Division St., Stop 35A  
Port Orchard, WA 98366

DATED this 22<sup>nd</sup> day of January, 2018.

s/ Rodney R. Moody  
Rodney R. Moody, WSBA #17416  
Attorney for Appellant

**LAW OFFICE OF RODNEY R. MOODY**

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