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No. 31560-6-III

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

BURT, et al.

Plaintiffs/Respondents;

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,

Defendant/Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
WALLA WALLA COUNTY

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

In this Public Records Act (“PRA”) case, the Department of Corrections argues in its response that the Superior Court ruled appropriately because neither party had clean hands. This argument misses several critical factors. First, the injunction was never upheld. Second, the trial court relied upon information provided by the employees that Mr. Parmelee never had the chance to object or respond to the negative characterization before the trial court.

II. ARGUMENT

1. THE DEPARTMENT OF CORRECTIONS FAILED TO REINSTATE THE INJUNCTION THAT WAS DISMISSED BY THE SUPREME COURT SO MR. PARMELEE IS ENTITLED TO HIS ATTORNEY FEES.

In his opening brief, Mr. Parmelee stated that he was entitled to reasonable attorneys fees and costs because the wrongful injunctions were never reimposed. In opposing this argument, the Department of Corrections claimed that since the injunctions were issued without Mr. Parmelee’s participation, it was not wrongfully issued. In support of its argument, the Department cited to *Emmerson v. Wellep* to support its proposition. 126 Wn. App. 930, 941, 110 P.3d 214 (2005). However, a closer look shows that *Emmerson* is not applicable to a PRA case.

In *Emmerson*, a temporary anti-harassment protection order was obtained pursuant to chapter 10.14. After dissolution of the temporary

order of protection, Wellep sought attorneys fees. This request was denied because the injunction was not sought under chapter 7.40. *Id.* The court went on to clarify that

allowing an award of attorney fees to those who successfully defend against a permanent order of protection would deter private parties from seeking temporary and immediate relief from harassment. This is contrary to the legislature's expressed intent to prevent unlawful harassment.

Id. (citing RCW 10.14.010). Finally, the court stated the trial court acted well within its discretion by issuing the temporary protection order. Contrast that to this case where a final injunction was ordered. The Supreme Court found the trial court did not properly act within its discretion when it did not permit Mr. Parmelee to oppose the permanent injunction.

The injunctions were wrongfully issued because Mr. Parmelee was not a necessary party. That it might later be reinstated is irrelevant to the particular actions for which Mr. Parmelee has sought fees. Subsequent mootness is irrelevant to the work done to get Mr. Parmelee named as a necessary party.¹ At a minimum, Mr. Parmelee is entitled to all the fees necessary to get the original injunctions overturned.

¹This applies to the work done on both the *Abbott* and *Burt* appeals. *Burt v. Dept. of Corrections*, 168 Wn.2d 828, 231 P.3d 191 (2010); *Abbott v. Dept. of Corrections*, No. 25880-7-III (April 21, 2011).

2. THE DEPARTMENT OF CORRECTIONS WILFULLY ACTED IN BAD FAITH BY ARGUING FOR WITHHOLDING WITHOUT A STATUTORY EXEMPTION AND KNOWINGLY CITING BAD CASE LAW.

It is the apogee of a trial court's abuse of discretion when it equates the actions of a lawyer with that of an inmate. This is especially true when that inmate had no opportunity to argue against the Department's besmirching him as justification for its position.

Attorneys are officers of the court and have an obligation of truthfulness to the tribunal before which they appear. Counsel for the Department showed flagrant disregard for this cannon of trust when he knowingly cited to an 11 year old, out of date case in its Response. Our courts rely heavily on the arguments presented them because they have jurisdiction over so many types of legal issues. In any hearing, the court presumes the parties are citing to relevant case law. This is especially important when the hearing is non-confrontational like it was in *Abbott* and *Burt*. The trial court had no option but to assume the law to be as was presented and that is what happened here. For the trial court to claim that the nature and extent of either parties' "clean hands" are equivalent ignores the critical fact that an attorney has these obligations to the court

not only because of CR 11(a) but also through RPC 3.3(a)(3).² Yet the trial court compared the responsibilities of an attorney to the court to those of a pro se litigant. For these reasons, the trial court abused its discretion in refusing to grant attorney fees.

3. THE DISSENT IN BURT WHICH THE TRIAL COURT DEPEND ON WAS BASED ON A ONE-SIDED PRESENTATION.

In its deliberation, the trial court cited the dissent in the *Burt* decision as justification to find Mr. Parmelee sought personal information. *Burt v. Dept. of Corrections*, 168 Wn.2d at 844-845. The Department makes the same claim here. Balderdash! The complaint filed by the employees in *Burt* listed what he requested. It was the following:

- (a) Produce a copy of the latest photograph image of each listed person above;
- (b) Produce any and all employment, income, retirement, expense, and/or disability type document related to each above listed person;
- (c) Produce any and all administrative grievance, internal investigation type or related document, complaint or related document that may involved or include a complaint against any of the above listed person(s);
- (d) Produce any documents, not previously listed above, related to the persons listed above.

CP 109-114. As can be seen, he sought absolutely no prohibited personal information. He sought no home addresses, phone numbers, social

²The Department is incorrect in stating that Mr. Parmelee was seeking CR 11 sanctions. Although he could have sought such sanctions, he chose not to do so in part because the original attorney passed away in 2010.

security numbers, or birth dates.³ Mr. Parmelee was an experienced PRA litigator. He was well aware of what was disclosable and what was not. The dissent in *Burt* was clearly wrong. The dissent also failed to consider that because Mr. Parmelee was never made a party to the original injunction, he never had a chance to challenge the statements made by the employees and the Department labeling him a troublemaker.⁴ When he was finally provided the order on the injunction he immediately filed to try to join the lawsuit. This attempt was denied by the trial court. The record that was considered on appeal consisted entirely of what was filed by the employees and the Department and absolutely nothing in response by Mr. Parmelee. Therefore, the trial court abused its discretion by relying exclusively on a one-sided presentation of “facts” by employees of the Department and the Department submitted for the record. Mr.

³The claim he sought personal information was that the pleadings had to have an address on them. CR 11(a). However, that address could have been the employees’ work address but this fact was not addressed by the various courts that have reviewed this matter.

⁴Mr. Parmelee was continually harassed by staff and was subject to “diesel therapy” which means he was continually transferred from prison to prison with the express purpose of interfering with his legal work. *See e.g. Silva v. Di Vittorio*, 658 F3d 1090, 1104 (2011) (the Ninth Circuit found that Silva’s complaint “that the Defendants repeatedly transferred Silva between different prison facilities in order to hinder his ability to litigate his pending civil lawsuits,” including several other acts of retaliation required reversal of his access to courts claim.)

Parmelee is entitled to his attorney fees and costs for his *Abbott* and *Burt* appeals.

III. CONCLUSION

For the reasons set forth above, Mr. Parmelee respectfully asks this Court to reverse the trial court's decisions and grant Mr. Parmelee reasonable attorney fees and costs for his appeal of the trial court's decisions in *Abbott* and *Burt*.

DATED this 20th day of October.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on the date listed below in Seattle, County of King, State of Washington, I deposited this document with the United States Mail, postage prepaid and 1st class on the following parties:

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By: 
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Date: 10/29/14