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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 315606-III

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 OPENING BRIEF

MICHAEL C. KAHRIS, WSBA #27085
Attorney for Allan Parmelee
5215 Ballard Ave. NW, Ste. 2
Seattle, WA 98107
(206) 264-0643

ORIGINAL

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I. INTRODUCTION

The trial court initially granted an injunction to the Petitioners against the Department of Corrections denying Mr. Parmelee records under the Public Disclosure Act, now the Public Records Act. Mr. Parmelee successfully challenged both the trial court's ruling and the Court of Appeals' denial of his appeal to the Washington Supreme Court. *Burt v. Dept. of Corrections*, 168 Wn.2d 828, 231 P.3d 191 (2010). After this decision, the Supreme Court remanded *Burt* to the trial court. Subsequently, this Court remanded a companion case stayed pending resolution of *Burt*. *Abbott v. Dept. of Corrections*, No. 25880-7-III (April 21, 2011). After the Department moved to dismiss both cases in the trial court, Plaintiff moved to dismiss and for attorney fees. Mr. Parmelee's motion was denied and a timely appeal was filed. This appeal is only challenging the trial court's denial of Mr. Parmelee's attorneys fees in *Abbott* and *Burt*.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court erred on its March 4, 2013 order by denying Mr. Parmelee his reasonable attorney fees and costs for his successful appeal to the Washington Supreme Court in *Burt*.

2. The trial court erred on its March 4, 2013 order by denying Mr. Parmelee his reasonable attorney fees and costs for his successful appeal to the Court of Appeals, Division III, in *Abbott*.

B. Issues Pertaining to Assignments of Error.

1. Should Mr. Parmelee be granted reasonable attorney fees and costs in *Abbott* and *Burt* because the Petitioners failed to reestablish the injunction as required by the law of the case?¹

2. Should Mr. Parmelee be granted reasonable attorney fees and costs in *Abbot* and *Burt* because the Department of Corrections deliberately mislead the trial court in *Burt* by citing overturned case law and failed to cite controlling case law in both *Abbott* and *Burt*?

III. STATEMENT OF THE CASE

Mr. Parmelee made requests under the Public Disclosure Act, now the Public Records Act. In response to the requests, employees of the Department of Corrections enjoined the Department from disclosing the records in both *Abbott* and *Burt*. Mr. Parmelee moved to intervene. His motion was denied.

After the trial court's decision was affirmed by this Court, a Petition for Review was filed and accepted in *Burt*. This Court stayed

¹Mr. Parmelee passed away while in custody of the Department of Corrections. This action is being pursued by the estate of Mr. Parmelee. For convenience, Mr. Parmelee will continue to be named the appellant.

Abbot pending the decision in *Burt*. In its decision in *Burt*, the Supreme Court remanded the case back to the trial court because it determined that a records requester is a necessary party to an injunction. *Burt v. Dept. of Corrections*, 168 Wn.2d 828. The plurality of the majority stated that awarding fees and costs would be premature because an injunction hearing had not been held with all necessary parties present. *Id.*, at 838.² The concurring majority stated that attorney fees and costs should be granted. *Id.* at 840-41.³ In *Abbott*, this Court remanded the case back to the trial court. It cited the *Burt* plurality that no attorney fees could be awarded because no wrongful determination had yet been made. *Abbott*, p. 3.

At the trial court in both cases, both parties moved to dismiss. In Mr. Parmelee's motion in both *Abbott* and *Burt*, he asked for reasonable attorney fees pursuant to equitable considerations. 1CP 1-9, 2CP 1-8.⁴ The Department of Corrections responded (1CP 10-37, 2CP 9-36) and Mr. Parmelee replied. 1CP 38-47. The trial court denied Plaintiff's Motion to

²The *Burt* majority consisted of a four person plurality authored by C. Johnson, J. The concurring opinion was by Sanders, J.

³In the *Burt* appeal, there was no question that the Department would have to pay attorney fees and costs if an order was issued. This, of course, was reasonable because it was the Department which provided the hearing lifting by filed the necessary pleadings and arguments in both this Court and the Supreme Court.

⁴To keep the clerk's papers separate, the papers in *Burt* are signified by a 1CP and the papers in *Abbott* by a 2CP.

Dismiss as moot and denied Mr. Parmelee his attorney fees. This denial was based on the award being discretionary and such an award was to “deter plaintiffs from seeking relief prior to a trial on the merits.” 1CP 48-49, 2CP 37-38. It also stated the rule would not be served where injunctive relief prior to trial is necessary to preserve a party’s rights pending resolution of the action.” It then “balanced the equities” and denied attorneys fees and costs. *Id.* Timely notices of appeal were filed. 1CP 50-53, 2CP 39-42.

IV. SUMMARY OF ARGUMENT

Mr. Parmelee argues that because the injunction was not refiled by the Petitioners, this Court must grant reasonable attorney fees and costs. He also argues he is entitled to them on an equitable basis.

1. MR. PARMELEE IS ENTITLED TO REASONABLE ATTORNEY FEES AND COSTS BECAUSE THE PETITIONERS FAILED TO REINSTATE THE INJUNCTION THAT WAS DISMISSED BY THE SUPREME COURT.

In *Burt*, Mr. Parmelee tried to intervene and claimed he was an indispensable party because he was not part of the original trial court proceeding and the subject of that proceeding was his requests for records under the then Public Disclosure Act. While the trial and appellate courts disagreed, the Supreme Court agreed and reversed the prior rulings. As part of the ruling, the plurality and concurrence addressed attorney fees.

In *Burt*, the four person plurality acknowledged that attorney fees are appropriate for dissolving a wrongful injunction. *Burt*, 168 Wn.2d at 838 (citing *Cecil v. Dominy*, 69 Wn.2d 289, 418 P.2d 233 (1966)). It then stated why it was not awarding fees at this time:

Although we are dissolving the injunction here, we are not determining whether the injunction was wrongful; rather, we are remanding the case to the trial court for a proper injunction proceeding that includes all necessary parties. As such, it would be premature to award costs and attorney fees based on equity.

Id.

The concurring decision by Justice Sanders took a different approach, concluding that Mr. Parmelee was entitled to reasonable expenses and attorney fees.

If it is fair to assess substantial reasonable attorney fees against nude dancers who obtained an injunction against the city of Bellevue's enforcement of an ordinance allegedly violating their constitutional free speech rights, then I think it is equally appropriate to award Mr. Parmelee his reasonable attorney fees against the individual plaintiffs in this proceeding.

Id., at 840-41 (citing *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 937 P.2d 154 (1997) (en banc)).

In both *Abbott* and *Burt*, the Petitioners did not participate after remand. The Department of Corrections sought dismissal and the Petitioners took no position because they did not file a response to any of the motions post-appeal.

Mr. Parmelee asked for attorney fees because neither the Petitioners nor the Department pursued the injunction upon remand. Both *Abbott* and *Burt* were declared moot because of an injunction sought by the Department of Corrections in Thurston County, not the Petitioners. There was no injunction proceeding in either case with all parties present that the plurality stated was required to determine if the injunction was wrongfully issued. Because the Petitioners did not serve Mr. Parmelee the petition and renote it for an injunction hearing with all parties present, the only conclusion that this Court must draw is that the injunctions were wrongfully issued. A wrongfully issued injunction entitles Mr. Parmelee to reasonable attorney fees and costs.

2. THE DEPARTMENT OF CORRECTIONS DELIBERATELY MISLED THE TRIAL COURT INTO GRANTING THE INJUNCTION AND IN EQUITY, MR. PARMELEE IS ENTITLED TO ATTORNEY FEES.

In *Burt*, the Department of Corrections deliberately misled the trial court by citing overturned case law and failing to draw the trial court's attention to controlling case law. The Department cited to *Dawson v. Daly* in its response to the petition for an injunction. *Dawson* was cited for the proposition that an injunction under the Public Records Act was did not require a citation to a specific statutory exemption. *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993). In *Abbott*, the Department of Corrections deliberately mislead the trial court by failing to cite

controlling case law. See *Progressive Animal Welfare Soc’y v. Univ. of Washington*, 125 Wn.2d 243, 251, 88 P.2d 592 (1994) (“PAWS”).

PAWS has been the controlling law after the Supreme Court overruled *Dawson* and is still good law. *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 596, 243 P.3d 919 (2010) (citing RCW 42.56.070(1) and *PAWS*, 125 Wn.2d at 251). The court in *Serko* reiterated, with emphasis, that RCW 42.56.540

is simply an injunction statute. It is a *procedural* provision which allows a superior court to enjoin the release of *specific* public records if they fall within *specific* exemptions found elsewhere in the Act.”

Id. (quoting *PAWS*, 125 Wn.2d at 257 (“discussing predecessor statute codified as RCW 42.17.330”) (emphasis in the original)).

To be absolutely clear, *Dawson* was cited by the Department in *Burt* 11 years after the decision in *PAWS* as the proper basis for granting the injunction to the Petitioners. In *Abbott*, the Department failed to cite to *PAWS*, the controlling case law. These actions were in violation of CR 11. CR 11(a) is quite specific that when an attorney signs a pleading after a reasonable inquiry, s/he is certifying to the court that the argument “is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law.” The Department violated CR 11(a) precisely because its arguments made in collusion with the Petitioners were neither warranted by existing law

nor a good faith argument for the extension. The Department was directly responsible for the trial court's initial ruling in *Abbott* and *Burt* because it deliberately misled the trial court to believe it did not require a specific exemption to grant the injunction.

Mr. Parmelee is also entitled to attorney fees and costs in *Abbott* and *Burt* because the Department has unclean hands.

It is one of the fundamental principles upon which equity jurisprudence is founded, that before a complainant can have a standing in court he must first show that not only has he a good and meritorious cause of action, but he must come into the court with clean hands. He must be frank and fair with the court, nothing about the case under consideration should be guarded, but everything that tends to a full and fair determination of the matter in controversy should be placed before the court.

J. L. Cooper & Co. v. Anchor Securities Co., 9 Wn.2d 45, 71-72, 113 P.2d 845 (1941). Where the government is the actor, the reasons for applying it are even more persuasive. *Olmstead v. United States*, 277 U.S. 438, 483-84, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting). In this case, the State of Washington through the Department of Corrections has acted with unclean hands by lying to the trial court through an act of omission. It presented an argument that used 11 year out-of-date case law and it failed to cite the relevant case law providing the proper standard by which a trial court reviews a requested injunction under the Public Records Act. As a consequence of these deliberate misrepresentations to

the trial court, two injunctions were granted. Once these injunctions were granted, Mr. Parmelee was not permitted to intervene.

What if the Court had not been misled? The trial courts would most likely not have granted the injunction as drafted. Mr. Parmelee would have had the opportunity to argue that many of the records sought were standard records and contained no personal information. A decision would have been made based on the merits. However, this is only an assumption because this issue was not litigated due to the CR 11(a) violations by the Department of Corrections.⁵ Equitable considerations require this Court grant reasonable attorney fees and costs.

V. CONCLUSION

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

DATED this 26th day of September.

Respectfully submitted,

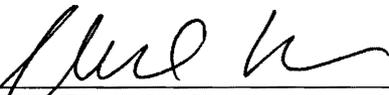

MICHAEL C. KAHRs, WSBA #27085
Attorney for Appellant Parmelee

⁵Mr. Parmelee may or may not have been entitled to some or all of the records he requested but we must assume the trial court would have ruled appropriately had the Department provided it the proper case law.

CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on September 2, 2014, 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:

Cassie vanRoojen
Corrections Division
Attorney General's Office
P.O. Box 40116
Olympia, WA 98504-0116

By: 

MICHAEL C. KAHRIS

Date: 9/2/14