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Court of Appeals
Division III
State of Washington

NO. 31560-6-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

BURT, et al.,

Appellants-Plaintiffs,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent-Defendants.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Allan Parmelee¹ had a long history of using public records requests to harass law enforcement officials and prison employees. Here, Parmelee made a public records request for the personal information of hundreds of Department of Corrections' employees, expressly for the purpose of using the information to harass the employees. The employees sued the Department to enjoin disclosure of the information. The superior court granted injunctive relief. On appeal, the Supreme Court found Parmelee should have been first joined as a necessary party. Without ruling on the propriety of the injunctive relief, the Supreme Court vacated the injunction and remanded for further proceedings. On remand, Parmelee requested equitable attorney fees for terminating the allegedly wrongfully issued injunction. The superior court dismissed the action as moot, determined Parmelee had not acted with clean hands, and denied the requested fees.

Parmelee now appeals the denial of fees. But the superior court did not abuse its discretion in denying the fees. Because the superior court did not find the injunctive relief had been wrongfully issued, denied the action as moot, and found Parmelee did not act with clean hands, the court properly denied the request for equitable attorney fees.

¹ Parmelee, a former prisoner, passed away during the pendency of this appeal. For clarity sake, Respondent refers to Appellant as Parmelee.

II. STATEMENT OF ISSUES

Parmelee seeks equitable attorney fees for terminating an allegedly wrongfully issued injunction. Is Parmelee entitled to such fees where the superior dismissed the underlying action as moot, did not find the injunction was wrongfully issued, and found Parmelee had acted with unclean hands.

III. STATEMENT OF THE CASE

Parmelee was an inmate in the custody of the Department of Corrections with long history of harassing law enforcement and prison employees. CP 25-37. As part of his campaign of harassment, Parmelee made well over 1,000 public records requests to state and local law enforcement agencies seeking personal information about agency employees. CP 27. Parmelee frequently used the information he obtained through public records requests to threaten employees by communicating or suggesting his knowledge of their home addresses, family circumstances, or other personal information unrelated to their official duties. CP 28. For example, Parmelee told staff he would send sex offenders to their homes in the middle of the night to serve legal papers. CP 30. Parmelee went as far as to draft flyers with photos of Department of Corrections' employees on them, labeling the depicted staff as "sexual predators" or "homosexual predators." CP 29.

After Parmelee filed public records requests seeking personal information regarding hundreds of Department of Corrections' employees, those employees sued the Department to enjoin the release of their personal information to Parmelee. CP 11-13. The Walla Walla Superior Court issued orders enjoining the release of the records. CP ____, Docket Sub No. 12, Findings of Fact, Conclusion of Law and Order; CP ____, Docket Sub No. 12, Amended Stipulated Order on Permanent Injunction. The superior court cited Parmelee's history of harassment, intimidation, and slander as well as Parmelee's stated intent to use the information to have "some big ugly dudes come to Walla Walla for some late night service of these punks." CP ____, Docket Sub No. 12, Findings of Fact, Conclusion of Law and Order. The superior court denied Parmelee's motions to intervene. CP 12, CP 65.

Parmelee appealed, arguing, among other things, that his joinder was mandatory. This court rejected Parmelee's argument, holding Parmelee was not an indispensable party. *Burt v. Dept. of Corrections*, 141 Wn. App 573, 170 P.3d 608 (2007). The Supreme Court granted review, and reversed. *Burt v. Dept. of Corrections*, 168 Wn.2d 828, 231 P.3d 191 (2010). The Supreme Court held that Parmelee, as the requester, was a necessary party to the injunction proceedings. *Id.* at 837-838. The Supreme Court vacated the superior court's orders and remanded for

further proceedings. *Id.* at 837-839. The Supreme Court, however, did not rule on the merits of the injunctive relief, or on Parmelee's request for attorney fees, finding the request premature. *Id.* at 838.

In accordance with the *Burt* opinion, this Court also declined to rule on Parmelee's premature request for attorney fees. *See Parmelee v. Dept. of Corrections*, 161 Wn. App 1015, 2011 WL 1631722 (2011) ("But no wrongful determination has yet been made. Thus, an award of fees in equity is premature."). In accordance with the Supreme Court decision, the matter was remanded to the superior court for further proceedings.

On remand, Parmelee moved to dismiss the request for injunctive relief, and also sought equitable attorney fees, arguing he was entitled to the fees because the injunctions were wrongfully issued. CP 1-9; 54-61. The Department moved to dismiss the actions entirely, arguing that the request for injunctive relief was now moot because a separate injunction, issued by the Thurston County Superior Court, barred Parmelee from requesting or receiving any records from any state agencies. CP 10-37; CP 62-89. The Department also argued Parmelee was not entitled to equitable attorney fees for reversing the injunctions because the injunctions, although vacated on appeal due to the failure to join Parmelee, had not been wrongfully issued. CP 10-37; CP 62-89.

The superior court denied Parmelee's motion to dismiss and his motion for attorney fees. RP at 1-13. The court dismissed the actions as moot in light of the Thurston County injunction that prohibited Parmelee from seeking any public records. RP at 3; CP 48-49; CP 90-91. The superior court further weighed the equities, and denied Parmelee's request for attorney fees. In doing so, the superior court noted "Parmelee's stated reason for obtaining the requested record was so he could find a couple of big ugly dudes to come to Walla Walla for some late night service on these punks." RP at 12; CP 49; CP 91. Finding Parmelee had not acted with clean hands, the court found Parmelee was not entitled to equitable attorney fees. CP 48-49, 90-91. Parmelee appealed. CP 50-51; CP 92-94. Parmelee challenges only the denial of his equitable attorney fees.

IV. STANDARD OF REVIEW

This Court reviews the denial of attorney fees for dissolving of an injunction under an abuse of discretion standard. *Morgan v. City of Federal Way*, 166 Wn.2d 747, 757-58, 213 P.3d 596 (2009).

V. ARGUMENT

A. **The Superior Court Did Not Abuse Its Discretion In Denying Equitable Attorney Fees Where The Court Dismissed The Action As Moot And Did Not Find The Prior Injunctions Had Been Wrongfully Issued**

Parmelee essentially argues that he is entitled to equitable attorney fees because the Supreme Court vacated the injunctions on appeal, and the Department did not seek to reinstate the injunctions on remand. But Parmelee’s argument fails to apply the correct standard. Parmelee is entitled to fees only if the injunctions were “wrongfully issued.”

“The applicable equitable rule is that attorney fees *may* be awarded to a party who prevails in dissolving a wrongfully issued injunction. . . .” *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 758, 958 P.2d 260 (1998) (citing *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 143, 937 P.2d 154 (1997)). The award of fees is discretionary. *Johnson*, 135 Wn.2d at 758. To overturn the denial of fees, the appellant must show the superior court abused its discretion. *Id.* “A trial court has abused its discretion if its decision is manifestly unreasonable or based on untenable grounds.” *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007). A decision is manifestly unreasonable if it is outside the range of acceptable choices, and a decision is based on untenable grounds if the factual findings are unsupported by the record, or

it is based on an incorrect legal standard. *In re Marriage of Fiorito*, 112 Wn. App. 657, 663–64, 50 P.3d 298 (2002).

The purpose of the rule allowing equitable attorney fees for dissolving a wrongfully issued injunction is to deter plaintiffs from seeking unnecessary injunctive relief prior to a resolution of the merits. *Johnson*, 135 Wn.2d at 758. The purpose of the rule is not served where the requested injunctive relief, even if later terminated, was necessary at the time to preserve a party’s rights. *Id.*; *Cornell Pump Co. v. City of Bellingham*, 123 Wn. App. 226, 233-35, 98 P.3d 84 (2004). This is especially true where the injunctive relief was not only necessary to preserve the party’s rights, but was the only remedy available on the merits of the action. *Quinn Const. Co. v. King Cnty. Fire Prot. Dist. No. 26*, 111 Wn. App. 19, 35, 44 P.3d 865, 873 (2002). “The purpose of the equitable rule allowing attorney fees for wrongful injunction is to encourage plaintiffs to prove the merits of their cases before seeking relief. That purpose would not be served by deterring plaintiff from seeking the only relief available to them under law.” *Id.*

Thus, in determining whether to award equitable attorney fees, the court “cannot simply look at whether the [injunction] was subsequently dissolved. Rather, the court must determine whether it was reasonable for the [party] to seek injunctive relief initially.” *Cornell Pump Co.*, 123

Wn.2d at 236. Only if the court determines the party should not have sought injunctive relief would the court award equitable attorney fees. *Id.*; *Gander v. Yeager*, 167 Wn. App. 638, 649-50, 282 P.3d 1100 (2012). The mere fact that an injunction is terminated does not entitle a party to equitable attorney fees. *Emmerson v. Weilep*, 126 Wn. App. 930, 941, 110 P.3d 214 (2005) (fact that court declined to issue permanent injunction does not show TRO was wrongfully issued).

Here, the Supreme Court vacated the injunctions, not because they had been wrongfully issued, but because the superior court had not joined Parmelee as a necessary party. *Burt*, 168 Wn.2d 837-839. The Supreme Court expressly declined to rule on whether the court should grant injunctive relief. *Id.* The Supreme Court also declined to rule on the request for attorney fees, finding the request premature as Parmelee had not shown the injunctions were wrongfully issued. *Id.* On remand, the superior court dismissed the underlying action as moot. The dismissal of the action as moot does not show the prior injunctions were wrongfully issued; it only showed that the case was moot. Because Parmelee did not show the injunctions were wrongfully issued, the superior court did not abuse its discretion in denying attorney fees.

B. The Superior Court Did Not Abuse Its Discretion In Denying Equitable Attorney Fees Where The Court Found Parmelee Did Not Act With Clean Hands

Parmelee also argues he is entitled to equitable attorney fees because the Department allegedly misrepresented the law to the court, and this misrepresentation resulted in the issuance of the prior injunctions. The superior court did not abuse its discretion in denying the equitable attorney fees after it found Parmelee had not acted with clean hands.

Bad faith or misconduct may be a basis for equitable attorney fees. *Gander*, 167 Wn. App. at 647. However, as with fees associated with the termination of a wrongfully issued injunction, the decision to award fees for such misconduct rests in equity and falls within the discretion of the superior court. *Gander*, 167 Wn. App. at 647. Here, the superior court correctly determined that the award of fees was based on equity, and was within its discretion. Balancing the equities, the court determined that fees were not appropriate. Although the court recognized that the Department did not have clean hands and “clearly maybe messed up,” the court reached its decision because it determined that Parmelee also did not have clean hands. *See* RP 11-12. The Court weighed the fact that Parmelee was seeking the personal information of Department employees to harass, intimidate, threaten, and slander those employees. *See* RP 11-12, CP 48-49, CP 90-91; *see also Burt v. Wash. Dep’t of Corrs.*, (Alexander dissent).

Determining that Parmelee did not act with clean hands, the superior court properly exercised its discretion and denied the equitable attorney fees.

Parmelee also alleges that the Department of Corrections should be liable for CR 11 sanctions. However, this Court should not consider this issue because it was not adequately raised in the proceedings below and is not properly presented in this court. RAP 2.5; *See* CP 1-10, 54-61. Parmelee raised the issue of CR 11 sanctions for the first time in his reply, did not attempt to confer as required by CR 11, and never formally moved for sanctions in the superior court. *See* CP 41. Based on Parmelee's failure to adequately and clearly raise the issue, the superior court's order does not address the issue. Parmelee did not properly preserve the issue for appeal. In fact, it is unclear whether Parmelee is making an argument based on CR 11, or simply relying on CR 11 as part of his argument about the equities in this case. CP 48-49; 95-96. Therefore, to the extent that Parmelee is attempting to raise the issue of fees for a CR 11 violation, Parmelee failed to adequately raise the issue and the Court should deem it waived.

Because the record demonstrates that the superior court carefully considered the equities between the parties and applied the proper legal standard, the superior court did not abuse its discretion in denying the requested equitable attorney fees.

VI. CONCLUSION

For the foregoing reasons, the Department respectfully requests that Parmelee's appeal be denied and that the lower court's orders denying his requests for attorney's fees be affirmed.

RESPECTFULLY SUBMITTED this 3rd day of October, 2014.

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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 below I caused to be electronically filed the BRIEF OF RESPONDENT with the Clerk of the Court using the CM/ECF system and I hereby certify that I mailed by United States Postal Service the document to the following:

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