No. 44222-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SHAWN GREENHALGH and JAMES PFAFF, Appellants

v.

DEPARTMENT OF CORRECTIONS et al., Respondents

REPLY BRIEF OF APPELLANTS

LaDonna Jones, Attorney for Appellants
WSBA #25427
520 East Denny Way
Seattle, WA 98122
(206) 725-6940

Russell Odell, Attorney for Appellants
WSBA #31287
251 – 153rd Place Southeast
Bellevue, WA 98007
(425) 653-3693

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington State Supreme Court Cases

Statutes

Rules

Regulations

A. Argument

1. GREENHALGH'S AND PFAFF'S PERSONAL CLOTHING WERE RECEIVED BY THEM PRIOR TO JANUARY 1, 2010, WERE NON-CONTRABAND ITEMS UPON RECEIPT, AND THEREFORE REQUIRED STORAGE UNDER 72.02.045(3).

The respondents do not dispute that Greenhalgh's and Pfaff's personal clothing were authorized non-contraband items prior to the new DOC Policy going into effect on January 1, 2010. See Brief of Respondents at 3. Because Greenhalgh's and Pfaff's personal clothing were received as authorized non-contraband items, the Washington State Department of Corrections (WDOC), under RCW 72.02.045(3), was the custodian of their personal clothing and was required to store these items until Greenhalgh's and Pfaff's release from custody. Greenhalgh and Pfaff had a vested right in the future enjoyment of their clothing upon release. "'A vested right . . . must be something more than the **mere expectation** based upon an anticipated continuance of the existing law; **it must have become a title,** legal or equitable, **to the present or future** enjoyment of property . . . .'" Willoughby v. Dept. of Labor and Industries, 147 Wn.2d 725, 733, 57 P.3d 611 (2002) (citations omitted) (The Supreme Court held that the respondent inmates had a vested interest in Labor and Industry disability payments.).

"Where statutory language is plain and unambiguous, a court . . . will glean the legislative intent from the words of the statute itself, regardless of a contrary interpretation by an administrative agency." Burton v. Lehman 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). Burton explains further that "[f]or purposes of RCW 72.02.045 (3), the phrase 'all . . . valuable personal property in the possession of the superintendent belonging to such convicted persons shall be delivered to them' cannot be artificially limited. Nothing in the statute indicates that only **some** of an inmate's property shall be delivered, nor does it state that the property shall be delivered **at such convicted person's expense**. Yet this is clearly the effect of DOC Policy 440.000." Id. at 425.

The Supreme Court has made it clear that it "will give great deference to an agency's interpretation of [statutes], 'absent a compelling indication' that the agency's [statutory] interpretation **conflicts with legislative intent or is in excess of the agency's authority**. Silverstreak, Inc. v. Washington State Dept. of Labor and Industries 159 Wn.2d 868, 884, 154 P.3d 891 (2007)(emphasis added). The Respondents argue that RCW 72.01.050(2) gives the secretary of corrections an "extraordinarily broad grant of authority." See Brief of Respondents at 7. First, respondents are reading too much into this statutory provision. If there are

"limitations contained in the law relating to the management of such institutions," the secretary of corrections' authority/power is narrowed. RCW 72.01.050(2). As has been argued in their opening appellate brief, Greenhalgh and Pfaff contend that RCW 72.02.045(3) set limitations on WDOC authority/power by requiring them to store, and not dispose of, their previously authorized non-contraband personal clothing. As stated by the respondents, under 72.02.045(3), WDOC only has the authority to determine the types and amounts of property that convicted persons may possess while incarcerated, the types and amounts of property that will be transported at the department's expense when a convicted person is transferred between institutions or to other jurisdictions, and to disburse funds from inmates' accounts. See Brief of Respondents at 6. This is not a case about the physical possession of Greenhalgh's and Pfaff's personal clothing, the transfer of their personal clothing from one institution to another or to another jurisdiction, or the unlawful disbursal of funds from their inmate accounts.

Second, a policy change that allows WDOC to re-characterize or convert an inmate's non-contraband personal clothing into contraband is a violation of RCW 72.02.045(3). The statutory custodial provisions of RCW 72.02.045(3) and the duties that go along with these provisions are

clearly meant to attach at the time the personal property is received by the inmate as an allowable/approved non-contraband item.

As pointed out by the respondents in their brief:

> "Contraband" means any object or communication the secretary determines shall not be allowed to be: (a) brought into; (b) possessed while on the grounds of; or (c) sent from any institution under the control of the secretary.

RCW 72.09.015(5). See Brief of Respondents at 11. Thus, it stands to reason that non-contraband would be any object the secretary determines shall be allowed to be brought into, possessed while on the grounds, or sent from any institution under the control of the secretary. RCW 72.02.045(3) states in relevant part:

> The superintendent shall be the custodian of all funds and valuable personal property of convicted persons **as may be in their possession upon admission to the institution, or which may be sent or brought in to such persons, or earned by them while in custody, or which shall be forwarded to the superintendent on behalf of convicted persons.**

RCW 72.02.045(3) (emphasis added). CP 181. The fact that the Washington State Legislature explicitly included five examples in the statutory language that fit the definition of non-contraband is irrefutable proof that it intended for the WDOC's custodial responsibilities under this statute to attach the moment Greenhalgh's and Pfaff's personal clothing

was brought in as allowable/approved non-contraband items and to stay attached until their release from custody.

Finally, if WDOC is given the unfettered right to make policy changes that unlawfully allow it to re-characterize or convert previously allowed/ non-contraband personal property into contraband personal property and to dispose of said personal property, it would abrogate its obligation under RCW 72.02.045(3) and WAC 137-36-060 to return, at the time of release from custody, all inmate personal property in its custody. Based on the aforementioned arguments and the arguments in the Greenhalgh and Pfaff's opening brief, this Court should find that RCW 72.02.045(3) required the WDOC to store Greenhalgh's and Pfaff's previously authorized non-contraband personal clothing.

2. GREENHALGH AND PFAFF DID NOT RAISE PROXIMATE CAUSE AS AN ISSUE FOR REVIEW IN THEIR OPENING BRIEF.

Pursuant to RAP 10.3(b), the respondent's brief should answer the brief of the appellant. Greenhalgh and Pfaff did not raise an issue related to proximate cause in their opening appellate brief; moreover, there was not a finding by the trial court that "[a]ppellants' damage claims for the alleged violation of RCW 72.02.045(3) fail[ed] as a matter of law for lack of proximate causation of Appellants' damages." See Brief of Respondents at 17; RP 16-18. For the

aforementioned reasons, this Court must decline to consider the issue of proximate cause and pursuant to RAP 10.7, strike it.

Assuming, arguendo, this Court decides to consider this issue despite the violations of RAP 10.3(b), first, the respondents admit in their response brief that implementation of the January 1, 2010 DOC Policy 440.000 produced or was the proximate cause of the damages complained of by Greenhalgh and Pfaff, and "but for" the implementation of this new policy, the damages complained of by Greenhalgh and Pfaff would not have happened:

> Inmates were also advised in this policy that beginning January 1, 2010, they would have 30 days to dispose of clothing items identified as excess or unauthorized, and that if an inmate failed to pay the costs of sending out non-allowable property, the property could be donated to a charity or thrown away pursuant to WAC 137-36-040. CP 54.

See Brief of Respondents at 3. "Inmates Greenhalgh, DOC #701558, and Pfaff, DOC #278724, had personal clothing items after December 31, 2009, that were no longer allowable . . . . CP 77 and 151." See Brief of Respondents at 3.

Second, the respondents allege that the "[a]ppellants themselves are the sole cause of their damages in this case." See Brief of Respondents at 20. CR 12(b) requires that every defense be asserted in the responsive pleading. The respondents did not assert the defense of intervening cause, superseding cause, and/or contributory fault in the Answer and affirmative Defenses to Amended

Class Action Complaint. CP 36-37. Thus, Greenhalgh and Pfaff object to these defenses being raised, and this Court must decline to consider these defenses.

B. Conclusion

Based on the foregoing reasons, this Court should reverse the trial court's dismissal of Greenhalgh's and Pfaff's individual Complaint and remand the matter back to the trial court.

Respectfully submitted 4th day of June, 2013

THE LAW OFFICE OF L. M. JONES, LLC

By: LaDonna Jones
Attorney for Appellants
WSBA #25427

By: Russell Odell
Attorney for Appellants
WSBA #31287

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SHAWN GREENHALGH and JAMES PFAFF, on behalf of themselves and all others similarly situated, Appellants, Vs. DEPARTMENT OF CORRECTIONS, ELDON VAIL, and the STATE OF WASHINGTON, Respondents.	Case No.: 44222-1-II CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and laws of the State of Washington that on the date indicated below I caused service of a copy of the Reply Brief of Appellants by US mail postage prepaid to:

Douglas Carr
Assistant Attorney General
1125 Washington St. SE, Olympia, WA 98504

DATED this 4th day of June, 2013, at Seattle, Washington.

LaDonna Jones

THE LAW OFFICE OF L. M. JONES, LLC
520 East Denny Way
Seattle, WA 98122
Telephone: (206) 725-6940
Facsimile: (206) 725-7018