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No. 68975-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

FILED IN THE
COURT OF APPEALS
DIVISION I
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HECTOR L. RESSY,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS
("DOC"); STEVEN BURRISS and JANE DOE BURRISS and the marital
community composed thereof, in his personal capacity and in his capacity
as a Community Corrections Officer of the DOC; CAROLE I. RIGNEY
and JOHN DOE RIGNEY and the marital community composed thereof,
in her personal capacity and in her capacity as a Community Corrections
Supervisor; and DOES 1-10,

Respondents.

REPLY BRIEF OF APPELLANT

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I. APPELLANT'S REPLY

A. Summary of Reply Argument.

In arguing for collateral estoppel and the “probable cause” defense as bars to Appellant’s claims, Respondents’ brief largely ignores what they are required to prove: prong 1 (issue identity), prong 2 (final decision on the merits), and prong 4 (application of the doctrine must not work an injustice) as set forth in the *Christensen*¹ case cited at page 34 of Respondents’ brief.

Appellant Mr. Ressay did not and could not have raised his current civil claims in his probation review hearings in 2008. His current civil claims are based in part on determining the actual basis for the “failure to report” allegation that placed him in jail. This issue was not addressed or determined in 2008, and Respondents have not established in their brief the requirement of issue identity.

Respondents also seek to merge both 2008 hearings into one to try and preclude Appellant’s right to pursue his civil claims. In doing so, Respondents ignore the requirement that they establish prong 2 as to the

¹ *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306-309 (2004).

April 17, 2008 hearing, and ignore prong 4 as to both 2008 hearings. The *Christensen* case provides further pertinent guidance on these issues.²

Prong 4 also deserves much attention here as case law makes clear that neither collateral estoppel nor the “probable cause” bar to civil claims (in malicious prosecution actions) apply when the record shows fraud, perjury or other corrupt practices. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 560 (1993).

Appellant has shown in the record that Respondent Mr. Burriss allowed a false declaration to stand, sending Mr. Ressay to jail. While issue identity does not exist, the fraud, perjury or other corrupt practices at work in 2008 provides yet a second basis for denying Respondents’ request for collateral estoppel and “probable cause” defenses.

It is also important to note that immunity does not apply because defendants failed to provide all material information to the court. *Estate of Jones v. State*, 107 Wn. App. 510, 520 (2000).

² “[T]he party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the first forum. Accordingly, applying collateral estoppel may be improper where the issue is first determined after an informal, expedited hearing with relaxed evidentiary standards. *Vasquez*, 148 Wash.2d 303, 59 P.3d 648; *Williams*, 132 Wash.2d 248, 937 P.2d 1052. In addition, disparity of relief may be so great that a party would be unlikely to have vigorously litigated the crucial issues in the first forum and so it would be unfair to preclude relitigation of the issues in a second forum. *Reninger*, 134 Wash.2d at 453, 951 P.2d 782.” *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wash. 2d 299, 309, 96 P.3d 957, 962 (2004).

Respondents' position on chronology and the facts amounts to a moving target (as it was in April and May 2008). First, Respondents want to shift and keep the focus on Notice of Violation ("NOV") allegations not at issue. Second, Respondents blur the timeline and the factual basis for the failure to report allegation at issue.

While all three of the NOV violations were false when made, Appellant's claims arise from NOV#1 (CP 280-282) - Mr. Burriss' April 3, 2008 allegation that Mr. Ressay had failed to respond to any of his messages, amounting to a "failure to report":

Q. So what constituted Mr. Ressay's failure to report?

A. Mr. Ressay failed to report to me when I directed him to do so.

Q. When did you direct him to report to you?

A. There was no specific date.

[...]

Q. So the failure to report is that he didn't return your voice mail messages or contact you after receiving written messages; is that correct?

A. Correct.³

³ CP 350 (lines 23-25), CP 351 (lines 1-8 and 22-25) (Burriss deposition transcript excerpts).

At the conclusion of the April 17, 2008 hearing, Judge Spector was asked point blank by Mr. Ressay what he did in violation of probation. CP 198, lines 11-16. Judge Spector replied, “[y]ou didn’t report.” *Id.* Judge’s Spector’s reliance on Mr. Burriss’ false failure to report allegation is the reason why Mr. Ressay was sent to jail. CP 198.

The failure to report allegation was false because Mr. Ressay did in fact return Mr. Burriss’ messages when he received them on April 3, 2008. CP 163, lines 16-20; *see also*, CP 153, lines 8-9. After speaking with Mr. Ressay on April 3, 2008, Mr. Burriss failed to correct his declaration before submitting it to the court. The April 3rd failure to report allegation was not (and could not have been) based on Mr. Ressay having missed the April 4th meeting, as that date had not yet arrived.

Mr. Ressay reported in person to the DOC on April 8, 2008 (his written required report date, as acknowledged by Mr. Burriss in his deposition testimony – CP 358, lines 1-11). Respondents’ ongoing argument that Mr. Ressay was intentionally trying to avoid reporting obligations makes no sense.

If it were true that Mr. Ressay was trying to avoid reporting in March and April 2008, then he would not have returned Mr. Burriss’ calls and messages on April 3rd, and he certainly would not have gone into the DOC office on April 8th to report.

Mr. Ressay was accompanied to the DOC office on April 8th to report by his attorney Patricia Todd (who now works as an AAG). CP 339-341. Ms. Todd provided a declaration for submittal to the trial court in the instant matter. *Id.* The Todd declaration states in pertinent part:

2. [...] The first time I met Mr. Ressay was in Mr. Berneburg's office [her employer-attorney]. Mr. Ressay expressed concerns over what he perceived as heavy-handed treatment from his Community Corrections Officer ("CCO"). Mr. Ressay sought legal assistance in dealing with his assigned CCO, and with supervisors within the Community Corrections office, after Mr. Ressay made grievances about his CCO.

3. Following Mr. Ressay's grievance against his assigned CCO Mr. Kuczynski, I understood that another CCO or CCO supervisor (Mr. Burriss) requested a meeting with Mr. Ressay. Mr. Ressay was advised by our office not to meet with Mr. Burriss because it appeared that Mr. Burriss and/or Mr. Kuczynski were making up their own rules and being heavy handed which was not linked to any condition of release or valid conditions of supervision.

[...]

5. On April 8, 2008, I met Mr. Ressay at the probation office in Puyallup, Washington for his regularly scheduled reporting date. Mr. Ressay checked in at the kiosk desk at the probation office, as appeared customary, and received a receipt for his check-in. The receipt contained no message, which I interpreted to mean that Mr. Ressay was free to leave following check-in. [...]

Id. (with excerpts from CP 340, lines 3-24).

Mr. Burriss remained quiet at the April 17th hearing when he knew his declaration forming the basis for NOV#1 was no longer true. Mr.

Burriss also clearly knew at that point in time that the Court was sending Mr. Ressay to jail based on his failure to report allegation.

Q. At the end of the hearing, do you know what it was the court relied on to decide to keep him in jail?

A. I believe it was a failure to report.

CP 349, lines 12-15.

Mr. Burriss further muddied the waters at the May 6, 2008 hearing by again staying quiet on the basis for the April 3, 2008 failure to report allegation, and by providing misleading testimony as to instructions given to Mr. Ressay. CP 159, lines 7-12.⁴ Mr. Burriss' testimony on May 6, 2008 is also inconsistent with what is contained in the DOC Chronos log (CP 274-278), and with his deposition testimony obtained in 2011.

Setting aside the direct evidence of retaliation and abuse of process against Mr. Ressay for presenting grievances concerning a DOC employee, the timeline and sequence of events provide strong inferential evidence in support of Mr. Ressay's claims.

Each of Respondents five argument sections in their brief rely on the incorrect premise that the April 3rd Burriss declaration was not false. The record and the timeline show that the April 3rd declaration was false at the time of the April 17th hearing. The record and Mr. Burriss' own

⁴ Q: And you asked him to report on April 4th; is that correct?
A: Yes, I did several times in person and by notes[.]”

deposition testimony show that the court relied on the false failure to report allegation in sending Mr. Ressay to jail. Burriss' false allegation constitutes fraud, perjury, or other corrupt practices for purposes of precluding both the collateral estoppel and "probable cause" defenses.

B. Problems with Respondents' Counterstatement of Facts.

Respondents' "Counterstatement of Facts" contains argument and factual assertions without reference to the record as required by RAP 10.3(a)(5). Respondents' brief appears to improperly inject "facts" not part of the record. *Bartel v. Zuckriegel*, 112 Wn. App. 55, 61 (2002) (Court of Appeals will not consider allegations outside of the record.)

i. Inclusion of "facts" not part of the record.

Respondents' brief cites to and discusses in great detail an unpublished opinion (beginning at page 2 of their brief) that is also contained in an appendix ("Appendix A") to Respondents' brief. While Respondents did cite the unpublished opinion to the Trial Court for the proposition that Mr. Ressay's criminal conviction was upheld on appeal, the unpublished opinion is not otherwise contained in the record on review. Respondents appear to have cited and discussed the case for purposes of character assassination.

ii. Respondents' speculation (presented as fact) on other reasons Judge Spector might have remanded Mr. Ressay to jail (Respondents' footnote 2).

Respondents reference CP 188 and 197 for the "facts" presented at footnote 2. The record does not support Respondents' assertion of facts. Such "facts" should be disregarded or viewed as argument. Either way, the argument that Respondents appear to be getting at ignores the fact that Mr. Ressay was put in jail based on the false failure to report allegation (CP 198, lines 11-16), and also ignores the bases for preclusion of the collateral estoppel doctrine discussed herein.

iii. Respondents present argument as fact at footnote 5.

Respondents assert that Mr. Ressay was required to submit a written request to his assigned CCO within 24 hours of being served with a DOC imposed condition if he wished to appeal the condition, citing CP 266. Respondents further argue that this statement described Mr. Ressay's "avenue of appeal" if he wanted to appeal the change in CCO. This assertion is not supported by anything cited to in the record, and is argument.

Respondents' argument further requires the assumption that Mr. Ressay was actually "served" with notice of the change in CCO. The record and Respondent Burriss' own testimony show that Mr. Ressay was not provided with such notice, which provides support for another

inference of retaliatory motive along with the other facts and chronology discussed in Appellant's opening brief. CP 352, lines 14-18.

iv. Respondents' footnote 6 at page 7 presents argument as fact without reference to the record, or a basis in the record.

Respondents' argument at footnote 6 of their brief highlights one of the genuine issues of disputed material fact overlooked by the trial court. The record shows that Mr. Ressay was put in jail based on NOV#1 (failure to report allegation, *see* CP 198), not NOV#2 (the alleged NCO violation discussed at length by Respondents).

Respondents' argument and unsupported assumptions as to the motivations of persons discussed in footnote 6 of Respondents' brief highlights additional genuine issues of material fact. While Respondents would surely argue the purity of Mr. Burriss' motives to a jury, they are not entitled to such a presumption at summary judgment (discussed in Appellant's opening brief at pages 23-24).⁵

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⁵ Where material facts are particularly within the knowledge of the moving party, courts have been reluctant to grant summary judgment. In such cases, "it is advisable that the cause proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying." *Brawley v. Rouhfar*, 162 Wn. App. 1058 (2011), *citing Riley v. Andrew*, 107 Wn. App. 391, 395 (2001) (*quoting Mich, Nat'l Bank v. Olson*, 44 Wn. App. 898, 905 (1986)).

v. Respondents misstate the facts and the timeline again with the claim that Mr. Ressay had notice of NOV#1 prior to the April 17, 2008 hearing.

Respondents falsely contend in their brief at Page 12, lines 1-2 and footnote 8, that “Mr. Burriss faxed the violation report and new police report to Ms. Todd [Mr. Ressay’s attorney on April 4, 2008]”, citing CP 276. CP 276 does not support Respondents’ factual statement and argument that the NOV was served or faxed by Mr. Burriss on April 4, 2008, or on any other day, to Mr. Ressay or his attorney.

The document at CP 276 contains an entry by Mr. Burriss that says “WILL FAX HER THE VIOLATION REPORT[.]” *Id.* There is no indication in the record that Mr. Burriss or anyone else at the DOC ever faxed or otherwise served Mr. Ressay with the NOV prior to the April 17, 2008 hearing.

The note entry below the entry referenced above indicates a fax was sent to the “D.P.A.” later that day by noting “FAX’ED”. The record at CP 276 only suggests that Mr. Burriss faxed the violation report and new police report to Deputy Prosecuting Attorney Jamila Taylor, per her request. *Id.*

Respondents’ misrepresentation of the record is further established by looking at Mr. Burriss’ deposition excerpts from this case. Burriss

testified under oath that the NOV was not provided to Mr. Ressay until the April 17th hearing. CP 352, lines 4-18.

As stated in Appellant's opening brief, Mr. Ressay was essentially ambushed with the failure to report allegation at the April 17, 2008 review hearing. There was nothing Mr. Ressay could say or do at that point to convince Judge Spector to take his word over the sworn declaration of a DOC employee. From the record it is clear that Judge Spector took the April 3, 2008 declaration on the "failure to report" allegation at face value in sending Mr. Ressay to jail.

vi. Respondents' again misrepresent the record at Page 14 of their brief with regards to Mr. Burriss having "corrected" violation #1 of the NOV at the May 6, 2008 hearing.

Respondents in footnote 9 contend that Mr. Burriss corrected his allegations contained in violation #1 at the May 6, 2008 hearing. This is false. The transcript from the hearing makes clear that Mr. Burriss at no time clarified for the court that his failure to report allegation was based on Mr. Ressay not returning messages and calls quickly enough. CP 150-184.

vii. Respondents suggest that Appellant's claims are barred because he did not raise retaliation in May 2008.

Respondents' brief at pages 18-19 (section "13") suggests that Mr. Ressay's claims should be barred because he did not raise retaliation at his

review hearing in April 2008 or the arraignment/violation hearings in May 2008, and that his attorney was skillful and well-prepared.

Respondents' assertions have no bearing on whether Mr. Ressay has valid claims for relief. The assertions are also unsupported by the record, as a review of the May 2008 transcript shows (1) Mr. Ressay informed the court he was frightened by Mr. Burriss' threat to violate his probation (CP 163, lines 16-25, and CP 164, lines 1-8); and (2) his attorney was ill-prepared (CP 156, Lines 12-25), did not know how to properly introduce evidence (*Id.*), and failed to question Mr. Burriss on the most significant inconsistencies in his testimony. CP 157-160.

viii. Respondents ask this Court to focus only on the alleged March 22, 2008 NCO violation when examining the chronology and the parties' motivations.

Section 14 of Respondents' brief, at pages 19-20, asks the Court in viewing this appeal to focus primarily on the alleged NCO violation and the impact this had once it was made. Even if one were to accept the existence of these factors as having some impact on how events developed thereafter, this does not change the fact that Mr. Burriss submitted a false declaration alleging "failure to report," and that Mr. Burriss' failure to report claim is what landed Mr. Ressay in jail. CP 198.

Mr. Ressay understands that he has no claim against Burriss or the DOC for the reporting of an alleged NCO violation (the charge was later

dismissed after it was determined Antonia Thomas was lying⁶), because such reporting was legitimately a statutory obligation. This is not the case with regards to Burriss' own false statements made against Mr. Ressay in his capacity as a complaining witness.

C. Respondents' first argument regarding the May 6, 2008 hearing and Judge Carey's credibility determination.

As an initial matter, Respondents assert that the trial Judge correctly determined a prior credibility determination ends the inquiry in the instant case. See Page 22 of Respondents' brief. Setting aside for a moment the *de novo* review standard, there is nothing in the record to tell us what Judge Doyle's thoughts were on this point other than counsel's assumptions. Regardless, the argument is a shining example of a *non sequitur*.⁷

⁶ CP 325-338.

⁷ Respondents seem to be hinting at a *res judicata* or collateral estoppel argument. Mr. Ressay could not have possibly asserted his civil claims for relief in a probation review matter. To say that Mr. Ressay is prohibited from asserting civil claims for relief after his community supervision has ended is ridiculous. Plaintiff Mr. Ressay should not be collaterally estopped from seeking justice in this matter as he did not have an unencumbered, full and fair opportunity to litigate his claims at either hearing. *Allen v. McCurry*, 449 U.S. 90, 100-01 (1980). Following the April 17th hearing, Mr. Ressay was left sitting in jail; he did not have a civil attorney at that time reviewing potential claims, nor did he file any civil action until well after being released from supervision. While Mr. Ressay may have felt that he was unjustly railroaded and retaliated against, he was under the ongoing supervision of the DOC. At some point Mr. Ressay just accepted the fact that speaking up would probably result in additional jail time and prolonged supervision. Defendants at all times pertinent to Mr. Ressay's supervision had the upper hand, and there is no reason to think that Mr. Ressay could have changed the tide. One fact that evidences this plain circumstance, is

If Respondents take on the law were accurate, then there would be no need for exceptions to the collateral estoppel doctrine such as those discussed in the case of *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561-562 852 P.2d 295 (1993). Respondents' argument also seems to suggest that the April 17th and May 6th hearings should be merged for purposes of precluding Mr. Ressay's civil claims at issue. The law is not aligned with Respondents' arguments on this point. *Hanson*, 121 Wn.2d at pages 556, and 561-562 (application of the doctrine must not work an injustice, such as where fraud, perjury or other corrupt means deprive a person of a fair hearing); *see also Christensen v. Grant County, supra*, at pages 306-309.

Respondents' arguments also require the assumption that the April 3rd failure to report allegation remained true on April 17th. The record and Mr. Burriss' own testimony shows this assumption is not warranted.

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that it took Mr. Ressay many months to get his public defenders to obtain the evidence to show that the "having contact with the victim" allegation ("Violation #2") was false. Once it was established that Ms. Thomas was lying to the law enforcement officer (detective Sampson), the charges against Mr. Ressay were promptly dropped. CP 325-338.

D. Respondents second argument regarding statutory duty and the justification defense.

As noted above, each of Respondents' arguments requires the assumption that the April 3rd failure to report allegation remained true on April 17th. The record and Mr. Burriss' own testimony shows this assumption is not warranted. CP 280-282, and CP 350-351.

Respondents argue in the alternative that the failure to report allegation is not what put Mr. Ressay in jail on April 17th.⁸ The record shows otherwise. CP 198.

E. Respondents' third argument – collateral estoppel.

Collateral estoppel does not apply where fraud, perjury or other corrupt means have deprived a person of a fair hearing. *Hanson*, 121 Wn.2d 552, 556, 561-562 (1993) (application of the doctrine must not work an injustice). Mr. Burriss' false failure to report allegation and the absence of issue identity provide the bases for setting aside the collateral estoppel doctrine.

Respondents' third argument again relies on the assumption that there existed no wrongdoing on the part of Mr. Burriss. As noted above,

⁸ Respondents' citation to *Carey v. Phipps*, 435 U.S. 247 (1978), and *Texas v. Lesage*, 528 U.S. 18 (1999), assumes that the failure to report allegation was true on April 17, 2008. Appellant does not agree that jailing him on April 17th was justified based on Mr. Burriss false declaration. Respondents' citation to these cases further assumes that Mr. Ressay was put in jail based on the alleged

this assumption is flawed. Respondent also incorrectly asserts want of malice and the existence of probable cause as bars to relief.⁹ Respondents' argument ignores the fact that this is not a retaliatory prosecution case. *See* the Amended Complaint, CP 85-95.

Appellant's claims were based in part on abuse of process; he has not sued any police officers for making an arrest. Abuse of process is the misuse or misapplication of the process, after the initiation of the legal proceeding, for an end other than that which the process was designed to accomplish. *Loeffelholz v. Citizens for Leaders With Ethics & Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 699–700, 82 P.3d 1199 (trial court properly dismissed an abuse of process counterclaim because plaintiff failed to present evidence of any improper actions following the issuance of process), *review denied*, 152 Wn.2d 1023, 101 P.3d 107 (2004). In contrast to the *Loeffelholz* case, Mr. Ressay presented evidence of improper actions by Respondent Burriss following the issuance of process, and in support of his claims.

To prove the tort of abuse of process, the party must show both “(1) the existence of an ulterior purpose to accomplish an object not within the proper scope of the process, and (2) an act in the use of legal

NCO violation. This assumption is also shown to be unsupported by the record. CP 198, lines 11-16.

⁹ *See* Section E, pages 29-34 of Respondents' brief.

process not proper in the regular prosecution of the proceedings.” *Mark v. Williams*, 45 Wn. App. 182, 191, 724 P.2d 428, *review denied*, 107 Wash.2d 1015 (1986). There must be an act after filing suit using legal process empowered by that suit to accomplish an end not within the purview of the suit. *Saldivar v. Momah*, 145 Wn. App. 365, 388-89, 186 P.3d 1117, 1130 (2008), *citing*, *Batten v. Abrams*, 28 Wn. App. 737, 749, 626 P.2d 984, *review denied*, 95 Wn.2d 1033 (1981). As discussed at pages 26-27 of Appellant’s Opening Brief, the presence or absence of probable cause is irrelevant to this matter.

The cases cited by Respondents at pages 30-31 of their brief provide further support for relief in favor of Appellant Mr. Ressay:

First, and in contrast to Mr. Ressay’s case, the *Hanson* case was based on false arrest and imprisonment claims brought against the police (Hanson’s civil rights claims were predicated on his State law claims against the police). *Hanson*, 121 Wn.2d at 563-564; *see also*, *Dang v. Ehredt*, 95 Wn. App. 670, 678-679 (1990) (involving *claims against police* barred by the existence of probable cause); *Owen v. City of Independence, Mo.*, 445 U.S. 622, 637-638 (1980) (*claims against police* may be barred by the “good faith and probable cause” defense in *false arrest actions*). Mr. Ressay has not sued the police for false arrest or

imprisonment; his claims are based in part on the abuse of process, not retaliatory prosecution.

Second, “the ‘malice’ element [...] can be supplied *either* by 1) reckless disregard for the rights of the plaintiff; or 2) improper or wrongful motive.” *Peterson v. Littlejohn*, 56 Wn. App. 1, 14-17(1989) (deliberate indifference, gross negligence or recklessness will suffice to establish a prima facie case under §1983).

Third, Respondents citation to the case of *Burno v. Town of LaConner*, 65 Wn. App. 218, 226 (1992), appears to suggest an acting in “good faith” defense similar to what police officers are sometimes afforded. However, Appellant has provided evidence in the record to support retaliation by Mr. Burriss’ in violation of Mr. Ressay’s First Amendment right to make grievances against State actors. Such rights are clearly established constitutional rights of which a reasonable person would have known, and Burriss’ acts and omissions in presenting and standing on a false declaration cannot be said to amount to “good faith” execution of his duties as a CCO or a good faith exercise of discretion.

F. Respondents fourth argument – State immunity under §1983.

Respondents for the first time on appeal argue that dismissal of all claims against the State is warranted based on Sovereign Immunity. Mr.

Ressy's Amended Complaint asserted intentional infliction of emotional distress and *respondeat superior* claims in addition to §1983 claims. Respondents' brief does not address these claims.

Appellant does not disagree with the proposition that the State has not waived its Sovereign Immunity, however such immunity has no bearing on the infliction of emotional distress and *respondeat superior* claims.

The Washington State Supreme Court decision of *Robel v. Roundup Corp.*, provides the following analysis of claims also raised by Appellant herein:

To prevail on a claim for outrage, a plaintiff must prove three elements: "(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress on the part of the plaintiff."⁷ [note 7 - *Reid v. Pierce County*, 136 Wash.2d 195, 202, 961 P.2d 333 (1998) *citing Dicomes*, 113 Wash.2d at 630, 782 P.2d 1002; Restatement (Second) of Torts §46 (1965). Robel's complaint alleges intentional infliction of emotional distress; outrage encompasses causes of action based on reckless and intentional conduct.] The first element requires proof that the conduct was " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Dicomes v. State*, 113 Wash.2d 612, 630, 782 P.2d 1002 (1989) (quoting *Grimsby v. Samson*, 85 Wash.2d 52, 59, 530 P.2d 291 (1975)). Although the three elements are fact questions for the jury, this first element of the test goes to the jury only after the court "determine [s] if reasonable minds could differ on

whether the conduct was sufficiently extreme to result in liability.”

[...]

Our case law makes clear that, once an employee's *53 underlying tort is established, the employer will be held vicariously liable if “the employee was acting within the scope of his employment.” *Dickinson v. Edwards*, 105 Wash.2d 457, 469, 716 P.2d 814 (1986). An employer can defeat a claim of vicarious liability by showing that the employee's conduct was (1) “intentional or criminal” and (2) “outside the scope of employment.” *Niece v. Elmview Group Home*, 131 Wash.2d 39, 56, 929 P.2d 420 (1997) (emphasis added), *quoted with approval in Snyder v. Med. Servs. Corp. of E. Wash.*, 145 Wash.2d 233, 242-43, 35 P.3d 1158 (2001). *Niece* and, by extension, *Snyder* simply do not stand for the proposition that intentional or criminal conduct is per se outside the scope of employment. [note 8 omitted]

Robel v. Roundup Corp., 148 Wn. 2d 35, 51-53, 59 P.3d 611, 619 (2002).

Respondents’ retaliation against Mr. Ressay in violation of his constitutional rights was extreme and outrageous conduct. Based on the record and argument herein, and on the status of proceedings at the time of summary judgment dismissal, Appellant Mr. Ressay respectfully requests this Court deny Respondents’ request for a ruling that the State Department of Corrections is immune from suit.

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G. Respondents' fifth and final argument regarding qualified immunity.

Respondents did not argue qualified immunity in their underlying motion for summary judgment (CP 105-130); defendants, at that time, argued instead for absolute immunity. CP 124-125.

Respondents in their brief state a portion of the applicable law on qualified immunity. Where disputed facts exist, however, the court's determination of whether qualified immunity applies should be made by assuming that the version of the material facts asserted by the non-moving party (Appellant Mr. Ressay) is correct. *Jeffers v. Gomez*, 267 F.3d 895, 903 (9th Cir.2001), *citing Behrens v. Pelletier*, 516 U.S. 299, 312, 116 S.Ct. 834 (1996).

Mr. Ressay's pleadings, his evidence submitted to the trial court, and now the record on appeal, all show conduct that violated Mr. Ressay's constitutional rights. The next step is to ask whether such rights were clearly established, and whether a reasonable official could have believed the conduct at issue was lawful. *Jeffers*, 267 F.3d at 910.

1. Retaliation is prohibited as a matter of clearly established law.

The prohibition against retaliatory punishment is clearly established law for qualified immunity purposes. *Rhodes v. Robinson*, 408 F.3d 559, 569 (9th Cir.2005); *Pratt v. Rowland*, 65 F.3d 802 (9th

Cir.1995); *Schroeder v. McDonald*, 55 F.3d 454, 461 (9th Cir.1995); *Barnett v. Centoni*, 31 F.3d 813, 815-816 (9th Cir.1994); *see also*, *Rizzo v. Dawson*, 778 F.2d 527 (9th Cir.1985) (prison officials could not transfer an inmate to another prison in retaliation for the inmate's exercise of his First Amendment right to pursue federal civil rights litigation).

2. Respondents can have no reasonable belief qualified immunity would protect them from having submitted false allegations and from omitting exculpatory information.

Instead of following the inquiry laid out in U.S. Supreme Court precedent, and setting forth the full analysis, Respondents suggest this Court should ignore Appellant Mr. Ressay's evidence and claims and assume their version of facts is supported by the record and correct. This approach is not consistent with precedent on the issue at hand.

In short, Respondents are not entitled to qualified immunity for intentional constitutional violations. *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034 (1987); *Harrell v. State*, 170 Wn. App. 386, 406 (2012), *citing Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092 (1986).

Where a warrant application is based on evidence fabricated by the officer seeking the warrant, the officer can have no reasonable belief that the application is based on probable cause and immunity is unavailable. *See Olson v. Tyler*, 825 F.2d 1116, 1121 (7th Cir.1987) (finding no

qualified immunity where the officer intentionally omitted exculpatory evidence from the warrant application). In such cases, the fact that a magistrate issued an arrest warrant based on the fabricated evidence does not release the officers from liability. *See Malley v. Briggs*, 475 U.S. 335, 345, 346 n. 9, 106 S.Ct. 1092 (1986); *Olson*, 825 F.2d at 1121; *see also Smiddy v. Varney*, 665 F.2d 261, 267 (9th Cir.1981) (ruling that “the presentation by the officers to the district attorney of information known by them to be false will rebut the presumption” of qualified immunity).

The record, the timeline, and Respondent Burriss’ own testimony all demonstrate that retaliation likely occurred as punishment for Mr. Ressay presenting grievances against the DOC and its employees.

Appellant has identified affirmative evidence from which a jury could find that Mr. Ressay as plaintiff carried his burden of proving retaliatory motive and acts/omissions committed in response to Mr. Ressay’s grievances against DOC employees.

Respondents argue the probable cause determination as a bar to any and all claims regardless of any wrongdoing. This argument puts the cart before the horse by ignoring requirements for application of collateral estoppel, by improperly assuming Respondent Burriss’ motives were pure, and by ignoring the fact that Appellant Mr. Ressay was put in jail and kept

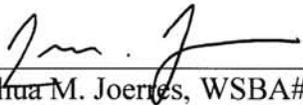
in jail as a result of being hamstrung by the initial false failure to report allegation.

Based on the record and the argument and authority presented herein, Respondents should not be permitted to hide behind the qualified immunity defense to avoid civil claims arising from Respondents having intentionally violated Mr. Ressay's constitutional rights.

II. CONCLUSION

Appellant respectfully requests that the order and judgment of the trial court dismissing the case be reversed, and that the case be remanded for further proceedings.

Respectfully submitted this 18th day of December, 2012.



Joshua M. Joeres, WSBA# 32716
Attorney for Appellant

AFFIDAVIT OF SERVICE

On this 18th day of December 2012, I filed the foregoing Reply Brief of Appellant with the Court of Appeals, Division I. The foregoing Reply Brief was served on all parties as follows: HAND DELIVERED to counsel for Respondents, by leaving a copy with the receptionist at the Attorney General's Seattle Office:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

By: 
Joshua M. Jøerres