

NO. 29212-6 III

FILED

AUG 05 2011

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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By _____

AARON DOYLE,

Appellant/Cross-Respondent,

v.

DEREK ANGUS LEE, GRANT COUNTY PROSECUTING
ATTORNEY, A DIVISION OF GRANT COUNTY,

Respondent/Cross-Appellant.

APPELLANT/CROSS-RESPONDENT'S REPLY TO
RESPONDENT GRANT COUNTY'S OPENING BRIEF

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I. ADDITIONAL STATEMENT OF THE CASE

A. Appellant/Cross-Respondent Aaron Doyle (Doyle) Adopts his Statement of the Case from his Opening Brief and Objects to Respondent/Cross-Appellant Lee's Mischaracterization of the Facts

Doyle adopts his statement of the case set forth in his opening brief and disputes Lee's characterization of the case as set forth in his opening brief. Doyle more fully sets forth Lee's misrepresentation of the facts and poetic legal writing in his Motion to Strike and his Motion to Supplement the Record, and respectfully asks the court take notice of said motions in consideration when reading this brief.

B. Lee's Distortion of the Facts and What this Case is Really About

"The magician and the politician have much in common: they both have to draw our attention away from what they are really doing." *Ben Okri* (1959).

Magic really is no secret or mystery. Magic is a form of distraction. Metaphorically, this case is no different. Ms. Loginsky and her client, Derek Lee, want to distract this court with irrelevant facts, legal arguments, and poetic legal writing to distract this court from all the things that this case is really about.

This case is *not* about a police officer trying to "hide his past" as Lee contends. This case *is* about the sealing of official

records in the State of California after administrative charges against an officer (Doyle) were withdrawn by a mutual settlement agreement, the terms of which were to remain confidential. This case *is* about whether full faith and credit should be given to a California Court order sealing the records wrongfully possessed by the Grant County Prosecutor. This case *is* about whether the Appellant had been cleared of wrongdoing by the execution of a mutual settlement agreement between him and his former employer after proposed discipline was overturned. This case *is* about whether Kittitas County Superior Court Judge Sparks viewed the evidence in the light most favorable to Doyle when he granted Grant County's Motion for Summary Judgment. And, most importantly, this case is about Grant County Prosecuting Attorney Derek Lee's vindictive and politically motivated misconduct.

Throughout their brief, Lee begs this court to clarify that a prosecutor may not be ordered to withhold potentially helpful impeachment information to protect a police officer's reputation or employment under the *Brady*¹ doctrine. But as said before, this is not what this case is about. This court cannot even reach that argument because Doyle was never afforded a trial or the ability to present his case and demonstrate to the trier of fact that he never committed misconduct – and that the charges of misconduct against

¹ *Brady v. Maryland*, 373 US 83, 83 5ct 1194, 10 L.ED.21 215 (1963)

him were withdrawn. Moreover, piecemeal records that do not show the whole picture – or the complete outcome of an administrative proceeding – are not conclusory under the *Agurs*² analysis.

2. ADDITIONAL RESPONSE AND SUMMARY OF REPLY

Lee's reliance on *Brady* as his platform for disseminating Doyle's sealed California files is misplaced. Irrespective of the conflicting findings of three different Grant County Judges whose inconsistent responses to Doyle's sealed records at issue here indicate that there exists no consensus between any of the Judges as to what is – or is not – *Brady* material.

A clear reading of the Supreme Court's interpretation of *Brady* and its progeny leaves no question that the information contained in Doyle's sealed California files certainly is not *Brady* material. Doyle's materials at issue are borne out of an administrative investigation which was ultimately contested by Doyle and never fully resolved by a final determination of misconduct. Pursuant to *Brady* and *Agurs* decisions, Lee is not obligated to disseminate this information as he opines.

III. ARGUMENT

A. Respondent's Statement of the Case is argumentative and unsupported by the record.

² *U.S. v Argus*, 427 U.S. 97, 96 S.Ct.2392 49L.Ed.2d 342 (1976)

RAP 10.3(b)(5) requires a statement of the case to be “a fair statement of the facts and procedures relevant to the issues presented for review without argument. Reference to the record must be included for each factual statement.” Respondent’s statement of the case fails to comply with this rule and should be disregarded by the court for the reasons set forth in Motion to Strike Portions of Respondent’s Opening Brief, which is being simultaneously filed with this pleading with this Court.

B. The Case Should be Remanded Back to the Trial Court for Findings and Conclusions

Doyle has previously submitted argument that the matter should be remanded back to the Superior Court to specific findings and conclusions with regard to the Court’s granting Summary Judgment to Lee. See *Opening Brief of Appellant* pp. 21-24.

C. Response to Respondent Derek Lee and Grant County’s Cross-Appeal

1. PROSECUTOR LEE SHOULD HAVE BEEN REMOVED.

Appellant pointed out in his Opening Brief that Lee should have been removed from this case because of his avowed conflict of interest. CP 1-6; 9-31 Prof. John Strait, a leading ethics expert, provided a comprehensive review and analysis of Lee’s conflict of interest. Prof. Strait opined Lee should have been removed from the

case. CP 118-155 Lee proffered no expert testimony to rebut Doyle's position and Prof. Strait's testimony. Instead, Lee relies on cases that are inapposite to the facts of this case to support his position that a prosecutor should not be removed from a case.

2. JUDGE SPARKS DECISION TO DISSOLVE THE PRELIMINARY INJUNCTION WAS MADE ONLY AFTER HE GRANTED LEE'S MOTION FOR SUMMARY JUDGMENT

Doyle objected to the Trial Court's dissolving its Preliminary Injunction at the time Judge Sparks granted Lee's Motion for Summary Judgment. CP 790 This Court has stayed Judge Sparks' Order to Terminate the Preliminary Injunction upon Doyle's timely Notice of Appeal CP 813 and Commissioner McCown's Ruling of July 29, 2010, which remains in effect. Doyle contends the Trial Court Ruling to Dissolve the TRO was improper along with granting Respondent's Motion for Summary Judgment.

3. DOYLE HAD AN EQUITABLE RIGHT TO PROTECT HIS PRIVACY INTERESTS AND OBTAIN INJUNCTIVE RELIEF

Pursuant to the protections set forth in the Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington Constitution, Doyle had a clear legal right in protecting his personal, private property and personal records from disclosure to the courts and public. Unsubstantiated allegations of misconduct, as is the case here, are not subject to disclosure

pursuant to *Brady* and *Agurs*, supra. And private activities are exempt from public disclosure where allegations of misconduct of public employee was unsubstantiated and the release of records would constitute a an invasion of privacy); *Bellevue John Does 1-11 v. Bellevue School Dist. #405*, 164 Wash.2d 199, 189 P.3d 139 (2008) (identities of public school teachers who are subjects of unsubstantiated allegations of sexual misconduct are exempt from disclosure – as unsubstantiated allegations ‘serve[s] no interest other than gossip and sensation). The settlement agreement between Doyle and Sierra County, California fully released Doyle from the allegations of misconduct against him. The charges were withdrawn. Of particular significance in this case, is Lee has not established that any of the allegations of misconduct alleged in the sealed documents in his possession have been sustained. Lee does not have the full administrative file from Sierra County, California that is necessary to make that determination.

Lee has no obligation to disclose Doyle’s sealed California records to Grant County criminal defendants as he claims. The allegations of misconduct contained in Doyle’s sealed California files is nothing more than challenged, preliminary and speculative allegations per *Argus*. Consider Justice Fortis opinion:

This is not to say that convictions ought to be reversed on the ground that information merely repetitious, cumulative, or embellishing of facts

otherwise known to the defense or presented to the court, or without importance to the defense for purposes of the preparation of the case or for trial was not disclosed to defense counsel. It is not to say that the State has an obligation to communicate preliminary, challenged, or speculative information.”

Agurs, 427 U.S. at 110 (FN 16). (*Emphasis ours*).

In this case, the documents at issue are borne out of interdepartmental administrative investigation from a California Sherriff's Department. In the state of California, such documents are protected from disclosure by statute (California Penal Code section 832.7). Initial administrative findings substantiated allegations set forth in an inter-departmental investigation. Doyle appealed that decision and ultimately the issue was resolved by agreement of the parties with a no-fault provision in the signed agreement. It is fundamental Hornbook law that a settlement between parties, in which each side expressly denies any wrongdoing and the parties mutually release one another from any and all claims of liability, operates as a complete release and settlement of disputed claims without any findings of misconduct or wrongdoing by any party and shall be construed in light of the language used in *Stottlemyre v. Reed*, 35 Wash.App. 169, 665 P.2d 1383 (1983).

As such, the issue was never fully resolved and the investigating department ultimately agreed to a resolution which

indicated neither party had any fault in the matter. Whether the complaint was substantiated thus remains a triable issue of fact making summary judgment improper. Doyle has as a legitimate legal right to the privacy of these documents.

The three prong test set forth in *Port of Seattle v. Int'l Longshoremen's & Warehousemen's Union*, has already been met in the present case. The information at issue has been, and continues to be, disseminated by Lee, irrespective of the lower Court's Order of April 08, 2010 and April 23, 2010 (CP 1-6), respectively, prohibiting or limiting their ability to do so. Barring intervention by this Court, the Respondents have made it clear that they have no intention of discontinuing their dissemination of the documents in question and misrepresentation of the information contained therein. CP 24-25 The second prong of the test for injunctive relief has been fulfilled.

The third prong of the *Port of Seattle v. Int'l Longshoremen's & Warehousemen's Union* test requires a showing that "the acts complained of are either resulting in, or will result in, actual and substantial injury" to the Appellant (Plaintiff). In this case, the misrepresented dissemination of the information by the Respondents is directly interfering with the Appellant's ability to perform his duties as a police officer and as it now appears, may cost him his job (Appellant has been suspended). It is also directly

affecting a public image and professional reputation in a tight-knit professional community where image and reputation are critical to job performance. The continued dissemination of these documents and misrepresentation of the information contained therein is causing substantial damage to Doyle.

Courts have routinely held that the publication of private matters does not render the privacy interest itself moot. See *Roman Catholic Diocese of Lexington v. Noble*, 92 S.W.3d 724 (2002); *National Semiconductor Corp. v. Linear Technology Corp.*, 703 F.Supp. 845 (N.D.Cal.,1988); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (Ohio1996);

In *Roman Catholic Diocese of Lexington v. Noble*, 92 S.W.3d 724 (2002) the court reviewed an instance where documents subject to petition for a writ of mandamus seeking relief from the Court of Appeals in ordering the court below to seal certain documents in the court record. The *Noble* court held that the publication of the documents did not render the Motion to Seal moot. In direct citation:

Finally, we address the argument that this case was rendered moot when the stricken allegations were published on the front page of the August 24th edition of The Courier-Journal newspaper. A trial court's order to seal documents and records does not affect the press's right to investigate and publish the information contained in the sealed documents when that information is independently obtained through sources other than the court's records. See *Seattle*

Times Co. v. Rhinehart, 467 U.S. 20, 34, 104 S.Ct. 2199, 2208, 81 L.Ed.2d 17, 27 (1984). This remains true even when the press entity that publishes the information is a party to the lawsuit in which the documents were sealed. *Id.* Conversely, the press's right to publish does not affect a trial court's power to control its own records and documents. It is true that publication of the material in question has diminished the force of the argument in favor of sealing the material, but it has not made that argument moot. Access to court records and documents is not denied solely to prevent publication and dissemination to the public. Access is also denied to keep the parties from using the court as a megaphone to amplify and give credence to scandalous and salacious allegations. Thus, a court may deny access to its records and documents to “insure that its records are not used to gratify private spite[,] promote public scandal” or to “serve as reservoirs of libelous statements for press consumption.” *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598, 98 S.Ct. 1306, 1312, 55 L.Ed.2d 570, 580 (1978). Denying access for these reasons goes to the integrity of the particular court in question and to the judicial system as a whole. These concerns remain independent of any out-of-court publication or dissemination of material that remains sealed in a court's record. Therefore, we hold that the issue raised on appeal is not moot.

Roman Catholic Diocese of Lexington v. Noble, 92 S.W.3d at 734.

The third and final prong of the *Port of Seattle v. Int'l Longshoremen's & Warehousemen's Union* was fulfilled here and injunctive relief was a proper remedy.

Doyle satisfied the elements for injunctive relief. Judge Sparks issued the temporary restraining order finding Doyle was likely to prevail on the merits of his declaratory judgment claim and was likely to suffer irreparable harm. CP 36-38; 47-48; 248

4. LEE'S RELIANCE ON *BRADY V. MARYLAND* IS MISPLACED

Lee spends a great deal of time focused on *Brady*. Doyle does not dispute that the prosecutor has a duty to disclose exculpatory information. But as the case here, the administrative allegations against Doyle in California were dismissed; and it is undisputed that the Sierra County, California Sheriff's proposed discipline against Doyle was overturned. The matter was settled by way of a mutual release between Doyle and Sierra County. CP 5 Lee interprets *Brady* to support his utilitarian position that violating the California Court's sealing orders is somehow outweighed by his constitutional obligations to criminal defendants. Before Doyle brought suit, even Lee had a question as to whether Doyle's sealed California documents were worthy of disclosure under the requirements of *Brady*. Consider Lee's letter to Mr. Dano of April 2, 2010 CP 13-14:

Lee told Doyle in Lee's letter that he had not made a decisions as to whether the material stolen from Doyle was *Brady* material.

The Court in *U.S. v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375 (U.S.Wash.,1985) sets forth a good description of what the Court perceives as the intent of the *Brady* rule:

The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary

system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial:

By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model. The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done. An interpretation of *Brady* to create a broad, constitutionally required right of discovery "would entirely alter the character and balance of our present systems of criminal justice." Furthermore, a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments. For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose. But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial.

Bagley, 473 U.S. at 675 (citations and internal quotes omitted).

Lee wants this court to believe the sealed California documents at issue are exculpatory under *Brady*. But what Lee has continued to misrepresent to the trial court and this court is: (1) the original records were sealed; (2) Respondent Lee only obtained a portion the

California administrative records that were sealed (CP 305), and in essence, are distributing them piecemeal – those documents which only support their purpose in using their position and capacity as the Grant County Prosecuting Attorney’s Office to effect revenge against Appellant for his role in a Bar complaint proceedings against Lee. CP 1-6; 32-35; 446-493

Lee’s reliance in *Denver Policemen’s Protective Assoc. v. Lichenstein*, 660 F.2d 432 (1981), is inapposite. Lee conveniently fails to provide the court with a litany of California cases that support Doyle’s position. For instance, *Fagan v. Superior Court*, 111 Cal.App.4th 607, 4 Cal.Rptr.3d 239 (Cal.App. 1 Dist.,2003); *Berkeley Police Ass’n v. City of Berkeley*, 84 Cal.Rptr.3d 130 (2008); *Davis v. City of San Diego*, 131 Cal.Rptr.2d 266 (2003); *Commission On Peace Officer Standards And Training v. Superior Court*, 64 Cal.Rptr.3d 661 (2007); *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 64 Cal.Rptr.3d 693 (2007); *Garcia v. Superior Court*, 63 Cal.Rptr.3d 948, (2007); *Alford v. Superior Court*, 130 Cal.Rptr.2d 672 (2003).

The term “confidential” in California Penal Code section 832.7 has independent significance and 'imposes confidentiality upon peace officer personnel records and records of investigations of citizens’ complaints, with strict procedures for appropriate

disclosure in civil and criminal cases....” *Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 426, 98 Cal.Rptr.2d 144, quoting *City of Richmond v. Superior Court* (1995) 32 Cal.App.4th 1430, 1440, 38 Cal.Rptr.2d 632. With this in mind, and assuming for argument purposes that the document at issue in this case are *Brady* material, which they are not, if *Brady* was controlling on whether the records protected by California Penal Code Section 832.7 are subject to disclosure, the courts would have long ago abolished the statute as unconstitutional.

Appellant takes no argument with Lee’s position that due process mandates that a criminal defendant be given a fair trial. *Agurs supra*, however, depriving a defendant of evidence violates due process *only* if the evidence is favorable to the defense and is *material* – that is, only if there is a reasonable probability that the evidence would affect the outcome of the trial. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 107 S Ct 989, 94 L.Ed.2d 40 (1987) (“[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome.’ quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S Ct 3375, 87 L.Ed.2d 481 (1985). Lee’s position that this information is material in every criminal case has not merit.

Respondent cannot argue that he and his office have an obligation to disclose all of Doyle's sealed records, and if they did, they cannot argue they have an obligation to disclose the records in each and every case to each and every defendant. Lee seems to ignore the fact Doyle appealed the decision of the Sheriff in Sierra County, and the adverse decision against Doyle was overturned and the dispute was settled mutually between Doyle and Sierra County. *Id.* Lee has not submitted any evidence, and Doyle has not been able to find any, that suggests this is not the case.

The fact Doyle entered into a mutual settlement agreement whereby he and Sierra County released each other from *any and all* claims and specifically agreed that neither Sierra County or Doyle “. . .engaged in. . .any unlawful conduct or employment practice.” *Id.* Again, the Respondents have assumed they have materials which they are obligated to disclose – and they surmise they know the administrative outcome of Doyle's California appeal process – but they have not taken any action to verify their position or the findings in their possession. *Id.* Most importantly, given the nature of the settlement and the fact the discipline was overturned, Lee has no obligation to turn the materials over to criminal defendants as the materials are challenged and speculative, *Augurs, supra.*

5. JUDGE SPARKS FAILURE TO MAKE SPECIFIC FINDINGS UNDER ISHIKAWA IS REVERSIBLE ERROR

The sealing of documents requires the identification of a “compelling interest” and the balancing of that interest against the public’s interest in open courts. *Rufer v. Abbot Laboratories*, 154 Wn.2d 530, 550, 115 P.3d 1182 (2005). Judge Sparks should have considered the five factor test referred to as both *Ishikawa*³ analysis and a *Bone-Club*⁴ analysis. Doyle does not disagree with Respondent’s authority on this issue (*Respondent’s Opening Brief*, pp. 45-47) and agrees that Judge Sparks’ Stay Order contains no analysis of the *Ishikawa* factors, however, Doyle contends the Trial Court acted appropriately in entering its Order sealing the record. *Id.*

6. THE COURTS STAY OF THE ORDER UNSEALING THE TRIAL COURT’S FILES WAS PROPER. DOYLE HAS A COMPELLING PRIVACY INTEREST IN THE DOCUMENTS

Numerous courts and commentators have railed against such a perverse judicial exacerbation of the very intrusion that Doyle sought to remedy by bringing his declaratory judgment action against Lee and requesting that the sealed California records, and any reference to their contents, be sealed in the Kittitas County Superior Court file and the Court of Appeals file. In *United States v. Hubbard* (D.C.Cir.) (1981) 650 F.2d 293, the Court of Appeals

³ *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1992)

⁴ *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995)

reversed a trial court's order unsealing private Church of Scientology documents. The single most important element in the Court of Appeals decision was the fact that the documents had been introduced as exhibits in a hearing brought on for the very purpose of protecting defendants' constitutional and common law right of privacy. The court noted that it would be ironic indeed if "one who contests the lawfulness of a search and seizure were always required to acquiesce in a substantial invasion of those privacy interests simply to vindicate them." *Id.* at 321. Doyle has a constitutional privacy right to information contained in the sealed records. The pleadings and records filed herein, and in the trial court, were properly sealed. The unsealing of the content of the sealed California records would undermine Doyle's resort to the court's to protect his privacy interests.

7. A BOND WAS NOT REQUIRED

Judge Sparks dispensed with the requirement of a bond based on the fact that Doyle brought this action pursuant to RCW 7.24 *et. seq.* and CR 57. CP 5 Judge Sparks granted Doyle's Motion without requiring a bond. CP 36-38 The bond was not necessary because this was a dispute between Doyle as a private citizen and Lee as elected prosecutor. Lee and his office would not and have not suffered any economic loss as a result of the Court issuing a Stay

Order to protect Doyle's private records from being disseminated to the public. Doyle makes further argument in this regard below.

8. ATTORNEY'S FEES ARE NOT PROPER IN THE INSTANT CASE

Lee and his counsel stated they were/are entitled to Attorney's fees in the prosecution of this action because "no bond is available to compensate Respondent for damages for the wrongfully issued injunction" (see Lee's *Motion to Dissolve Stay* filed by Counsel Pam Loginsky, February 25, 2011). This is a misrepresentation of the record by Lee and his Counsel. Doyle posted a \$10,000 cash bond with the Kittitas County Superior Court per Judge Sparks' Order of August 16, 2010. CP 790

If we assume that the trial court could or should award some fees, the standard for review is whether the trial court abused its discretion in not awarding the fees requested by Lee. *Cornell Pump Co. v. City of Bellingham*, 123 Wash.App. 226, 98 P.3d 84 (2004). A trial court abuses its discretion if it bases its decision on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

But there is nothing in the record that suggests Lee ever sought attorney's fees. Until Doyle filed his notice of appeal, Lee's quest to destroy Doyle's career and reputation dominated the proceedings, not any request for attorney's fees. Now Lee wants a

pound of flesh.

Lee contends he is entitled to an award of fees for dissolving a wrongfully issued preliminary injunction. “The applicable equitable rule is that attorney fees *may* be awarded to a party who prevails in dissolving a wrongfully issued injunction or, as here, temporary restraining order.” *Ino Ino, Inc. v. City of Bellevue*, 132 Wash.2d 103, 143, 937 P.2d 154, 943 P.2d 1358 (1997), *cert. denied*, 522 U.S. 1077, 118 S.Ct. 856, 139 L.Ed.2d 755 (1998); *Seattle Fire Fighters Union, Local 27 v. Hollister*, 48 Wash.App. 129, 138, 737 P.2d 1302 (1987).

Here, the injunction was dissolved only after the trial court granted Lee’s Motion for Summary Judgment. Lee’s attempt to dissolve the Trial Court’s Temporary Restraining Order and Preliminary Injunction shortly after it was issued was denied by the Trial Court. CP 156; 248. When the trial court granted Lee’s Motion for Summary Judgment, Doyle sought a Stay of the Dissolution of the Preliminary Injunction in the Court of Appeals. *Id.* After a full hearing, the Court of Appeals granted Doyle’s Request for a Stay. Lee also attempted to dissolve the Court of Appeal’s Stay. On July 29, 2010, that motion was also denied by the Commissioner after a finding that there were debatable issues on appeal and the stay was necessary in order to preserve the fruits of the appeal. *See Boeing Co. v. Sierracin Corp.*, 108 Wash.2d 38, 49, 738

P.2d 665 (1987);

There is nothing in the record to support Lee's position that the injunction in this case was "wrongfully issued" to support an award of fees. To establish the recovery of attorney fees for a wrongfully issued temporary restraining order, or in this case, preliminary injunction, Lee would have had to prevail on the merits at full hearing – and only then was he entitled to attorney's fees if injunctive relief was the sole purpose of Doyle's suit.

If injunctive relief is the sole purpose of the suit, and a temporary injunction has issued upon notice and hearing pending trial on the merits, counsel fees are recoverable as damages resulting from the temporary injunction if the injunction be dissolved at trial. But, where injunctive relief is not the sole purpose of the suit and only incidental or ancillary thereto, counsel fees as damages are recoverable only for services reasonably performed in attempting to quash the temporary injunction and not for professional services rendered in the trial on the merits. Annotation, 164 A.L.R. 1088. See, 28 Am.Jur., Injunctions s 345 (1959).

Cecil v. Dominy, 69 Wash.2d 289, 293, 418 P.2d 233 (1966).⁵

⁵ This case was a dispute between two businessmen to dissolve their partnership. Dominy had brought suit against Cecil claiming Cecil had solicited business within Dominy's territory. Dominy asked for a temporary injunction to restrain Cecil from soliciting business within Dominy's defined territory. The court, after trial, resolved the case in Cecil's favor and dissolved the temporary injunction awarding. The trial court awarded Cecil fees. Here, the only purpose of the trial was to determine whether the injunction would be made permanent. The rule of law is that reasonably incurred attorney's fees are recoverable in procuring the dissolution of an injunction wrongly issued. There is a significant factual distinction here. **The Dominy case deals with having to hire private counsel and pay for fees and costs of private counsel.** Here, the state has not incurred expense of having to hire private counsel. Lee is an attorney employed by the people of Grant County. Lee's attorney, Pam Loginsky, is employed by the Washington State Prosecuting Attorney's Association. Lee has not demonstrated or supplied any evidence that he has incurred fee's association with this case. (emphasis ours)

Doyle sought a declaratory judgment. Doyle's request for injunctive relief prayed for in the complaint was only ancillary thereto. Annotation, 164 A.L.R. 1090: *Donahue v. Johnson*, 9 Wash. 187, 191, 37 P. 322 (1894); *Mann v. Becker*, 90 Wash. 534, 538, 156 P. 396 (1916); *James v. Cannell*, 135 Wash. 80, 83, 237 P. 8 (1925).

No case or statute mandates an award of attorney's fees as Lee suggests. ("The applicable equitable rule is that attorney fees *may* be awarded to a party who prevails in dissolving a wrongfully issued injunction or, as here, temporary restraining order. The award is discretionary[.]” *Cornell, Id.* at 231. Generally, a prevailing party must pay their own attorney's fees and costs. *Rettkowski v. Dept. of Ecology*, 128 Wn.2d 508 at 514 (1996). The cases on which Lee relies provides that the court “*may*” award attorney's fees – at its discretion – and only when the preliminary injunction was wrongfully issued and dissolved. Lee fails to cite precedent which directly contradicts his position. The *Cornell* Court cited extensively the Supreme Court's Ruling in *Confederated Tribes of Chehalis vs. Johnson*, 135 Wn.2d 734, 758 (1998).

Johnson involved an injunction to prevent public disclosure of tribal gambling documents. After the court determined that disclosure was proper, the parties seeking disclosure requested attorney's fees. The Washington Supreme Court denied the request:

The applicable equitable rule is that attorney's fees *may* be

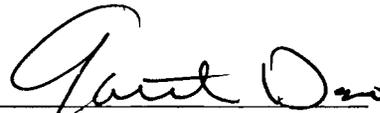
awarded to a party who prevails in dissolving a wrongfully issued injunction or, as here, temporary restraining order. The award is discretionary, and Mr. Johnson does not argue that the trial court abused its discretion in denying him fees. The purpose of the rule permitting recovery for dissolving a restraining order is to deter plaintiffs from seeking relief prior to trial on the merits. The purpose of 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. Here, the trial on the merits would have been fruitless if the records had already been disclosed. If fees were to be awarded based on this equitable rule, they would be limited to those necessary to dissolve the temporary restraining order, not those connected with the appeal. *Johnson*, 135 Wn.2d. at 758-59.

Therefore, in light of the rationale of *Johnson*, Lee's request for attorney's fees is not mandatory or appropriate under the circumstances of this case. Lee's request for attorney's fees should be denied.

Respectfully submitted:

Dated this 5th day of August, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2011, I served a copy of the document to which this certificate is attached upon the following individuals:

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