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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

82128-3

NO. 82128-3

SUPREME COURT OF THE STATE OF WASHINGTON

ALLAN PARMELEE,

Petitioner,

v.

ROBERT O'NEEL, et al.,

Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF

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SUPREME COURT
STATE OF WASHINGTON

2009 APR -6 P 3:41

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I. INTRODUCTION

Prisoner lawsuits alleging violation of civil rights are governed by the Prison Litigation Reform Act (PLRA), codified in part under 42 U.S.C. § 1997e. Although 42 U.S.C. § 1988 authorizes the award of attorney fees in civil rights cases to prevailing parties, the PLRA provides additional direction to courts, directing awards to prisoner-litigants only if a court rules that the prisoner's rights were actually violated and the rights were protected by a statute under which attorney's fees may be awarded under 42 U.S.C. § 1988. 42 U.S.C. § 1997e(d)(1)(A).¹

Mr. Parmelee has not obtained any relief on his civil rights claims. Therefore, his request for attorney fees is premature and was properly denied by the Court of Appeals. Mr. Parmelee's twenty-eight page complaint made allegations against at least 15 different defendants on at least 5 claims of constitutional violations. The Court of Appeals reversed the superior court's dismissal of Mr. Parmelee's complaint under CR 12(c) and remanded it for further proceedings. *See Parmelee v. O'Neel*, 145 Wn. App. 223, 249, 186 P.3d 1094 (2008). The case is still in the pleading stages of litigation. Under 42 U.S.C. § 1988, a litigant is not entitled to fees as a result of a favorable legal ruling contained in an interlocutory remand for further proceedings. Under 42 U.S.C. § 1997e, a

¹ The text of 42 U.S.C. § 1997e(d) is set forth in the Appendix.

prisoner-litigant is not entitled to attorney fees unless he proves and the Court determines an actual violation of his civil rights under federal law.

II. STATEMENT OF THE CASE

Mr. Parmelee brought suit in Clallam County Superior Court alleging Washington State prison officials wrongfully infringed him for calling the Superintendent of Clallam Bay Corrections Center, a “man-hating lesbian” in a letter written to Department Secretary Harold Clarke. Prison officials infringed Mr. Parmelee under WAC 127-28-260 (1) (517), for misconduct not otherwise covered under the prison rules and constituting a misdemeanor under Washington law. CP 713-14. The infraction report referenced RCW 9.58.010, the criminal libel statute, as the relevant misdemeanor. CP 713-14.

Mr. Parmelee alleged under 42 U.S.C. § 1983 that his infraction was made by prison officials in retaliation for his legal activities and exercise of free speech. He also alleged that prison officials violated procedural and substantive due process under federal law. He originally made claims against prison officials under the same criminal libel statute that was the predicate crime for his infraction, and other state law claims. CP 684-711.

After the prison officials answered Mr. Parmelee’s complaint, Mr. Parmelee moved for judgment on the pleadings, contending that he was

entitled to relief as a matter of law on his claims. CP 105. In response, the prison officials argued: (1) RCW 9.58 was not superseded by RCW 9.94A; (2) libel and slander were not protected activities under the First Amendment; and (3) Mr. Parmelee does not have a constitutional right to be placed in any area of a facility as a result of an infraction. CP 122.

The superior court granted the Department of Corrections' motion and dismissed this matter. The superior court ruled that Mr. Parmelee failed to state a claim of libel, slander, retaliation, community liability, and supervisory liability. The prison officials' cross-motion for judgment on the pleadings was granted in its entirety. CP 47, 86.

The Court of Appeals reversed the superior court's dismissal order under CR 12(c) and remanded for further proceedings, while making it clear the court was making no determination that Mr. Parmelee's rights were actually violated. In a published decision, the Court of Appeals held the criminal libel statute was unconstitutional and vacated Mr. Parmelee's infraction and sanction. *Parmelee v. O'Neel*, 145 Wn. App. at 246, 249. It reversed the superior court's order dismissing Mr. Parmelee's § 1983 free speech, retaliation, and substantive due process claims, and remanded the case for further proceedings. *Parmelee v. O'Neel*, 145 Wn. App. at 246-48. However, the Court of Appeals upheld the rights of prison officials to infract offenders for their use of scurrilous language, whether

such language was used in a grievance or not. In so holding, the Division II Court of Appeals approved the reasoning of the Division I Court of Appeals in *In re Parmelee*, 155 Wn. App. 273, 63 P.3d 800 (2003), *review denied* 151 Wn.2d 1017 (2004),² through other prison disciplinary rules, albeit not through the criminal libel statute. *Parmelee v. O'Neel*, 145 Wn. App. at 244-46. The Court of Appeals denied attorney fees under the Federal Civil Rights Act, leaving that issue to be determined in the superior court after further proceedings. *Id* at 249.

Following denial of a petition for rehearing, Mr. Parmelee sought review in this Court contending, because of the Court of Appeals' ruling on the criminal libel statute and the vacation of his infraction, he is now a prevailing party under 42 U.S.C. § 1988, entitled to an award of attorney fees.

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² The Division I Court of Appeals rejected Mr. Parmelee's personal restraint challenge to a disciplinary sanction he received at the King County Jail for abusive language in his grievances. *See In re Parmelee*, 115 Wn. App. at 284. The court rejected Parmelee's argument that he had a First Amendment right to call an officer a "piss-ant" and an "asshole" so long as he used it in a grievance. *Id.* at 276-77. The court also rejected Mr. Parmelee's contention there was a First Amendment right to call another officer a "prick" and that the officer should get fired before he get's "fucked up", so long as he said it in a grievance. *Id.* at 278-79.

III. ARGUMENT

A. MR. PARMELEE HAS NO ENTITLEMENT TO ATTORNEY FEES UNDER FEDERAL LAW BECAUSE HIS CIVIL RIGHTS CLAIMS HAVE NOT BEEN ADJUDICATED

Claims filed by prisoners are controlled by the Prisoner Litigation Reform Act, codified in part in 42 U.S.C. § 1997e(d)(1)(A). Under this statute, a court may award attorney fees only if the fees are “directly and reasonably incurred in *proving an actual violation of the plaintiff’s rights* protected by a statute pursuant to which a fee *may be awarded under section 1988. . . .*” *Id.* (emphasis added).³ 42 U.S.C. § 1988(b) provides that when an action is brought to enforce a provision of 42 U.S.C. § 1983, the Court has discretion to award attorney fees to “the prevailing party.”

Mr. Parmelee’s complaint alleged that prison officials retaliated against him because of his litigation and speech activities, and deprived him of his substantive due process and First Amendment rights. These are civil rights claims for which he may request attorney fees, under 42 U.S.C. § 1988 if he prevails, provided he proves and the court determines an actual violation of his rights as a prisoner under 42 U.S.C. § 1997e(d)(1)(A).

³ The PLRA was intended to curtail frivolous prisoner suits and minimize the taxpayer expense associated with those suits. See *Dannenberg v. Valadez*, 338 F. 3d 1070, 1075 (9th Cir. 2003), citing *Madrid v. Gomez*, 190 F.3d 990, 996 (9th Cir. 1999).

The Court of Appeals properly rejected Mr. Parmelee's premature request for attorney fees for two reasons. First, Mr. Parmelee won a remand of his civil rights case to the superior court; he did not prevail on his civil rights claims under § 1988 and under federal case law interpreting that provision. The reversal of the superior court dismissal under CR12(c) is a procedural decision that does not entitle the prisoner to attorney fees. On remand, the superior court must still determine the merits of his civil rights claims for substantive due process and retaliation against the individual defendants before determining that he prevailed and ordering the payment of attorney fees.

Thus, the Court of Appeals correctly recognized that Mr. Parmelee raised a number of constitutional claims in his complaint that had not been determined, concluding:

[E]ven if we wanted to address whether the statutes are unconstitutional as applied to Parmelee, the record is insufficient to properly decide this issue. Thus, we cannot address whether Washington's criminal libel statutory scheme is unconstitutional as applied to Parmelee in this case. Likewise, we cannot address whether Parmelee's freedom of speech or substantive due process rights were violated because the record is insufficient to make those determinations. Nor do we address whether procedural due process was violated because Parmelee abandoned that claim at oral argument.

Parmelee v. O'Neel, 145 Wn. App. at 246-47 (emphasis added).

Second, Mr. Parmelee's attorney fee claim fails under 42 U.S.C. § 1997e(d)(1)(A) because such an award must be predicated on a determination that Mr. Parmelee's federally protected rights were actually violated. Thus, the Court of Appeals decision is consistent with the federal case law and statutes on both points.

1. Mr. Parmelee Did Not Prevail In A Civil Rights Claim By Obtaining A Remand

Even before the 1995 enactment of the PLRA, the United States Supreme Court recognized that there is no presumptive entitlement to attorney fees in a prisoner civil rights case. Instead, a prisoner must prevail by obtaining substantive relief under § 1983 of the Civil Rights Act. See *Hewitt v. Helms*, 482 U.S. 755, 107 S. Ct. 2672, 96 L. Ed. 2d 654 (1987). In *Hewitt*, years before the passage of the PLRA, a Pennsylvania prisoner brought suit under 42 U.S.C. § 1983, alleging denial of due process when he was placed in disciplinary confinement based on the testimony of an undisclosed informant. *Id.* at 757. The federal court of appeals held that he was denied due process, reversing the district court's conclusion to the contrary, and remanded the case for consideration of the damages. On remand, the district court granted summary judgment for the defendants, on the basis of qualified immunity. *Id.* at 758.

The Court in *Hewitt* held that although the prisoner successfully argued that he was denied due process, he was not entitled to attorney fees under § 1988 because of the favorable legal holding he won on appeal. His successful appeal did not him grant the relief he sought. The Court cautioned against treating a favorable statement of law as if it were declaratory relief on which a party prevailed in a civil rights suit:

[T]here is a very practical objection to equating statements of law (even legal holdings en route to a final judgment for the defendant) with declaratory judgments: the equation deprives the defendant of valid defenses to a declaratory judgment to which he is entitled.

Id. at 763. The Court held that “a favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff does not suffice to render him a ‘prevailing party.’ Any other result strains both the statutory language and common sense.” *Id.*

Like the prisoner claim addressed in *Hewitt*, Mr. Parmelee’s civil rights claims have not been adjudicated. There is no statutory authority to award attorney fees for successfully contending that a state statute is unconstitutional. Under both § 1997e and § 1988, Mr. Parmelee must prevail on one or more of his civil rights claims. The Court of Appeals decision to remand the case for further proceedings does not render Mr. Parmelee a prevailing party in a civil rights case.

Federal courts have followed *Hewitt* by refraining from granting attorney fees based on interlocutory appellate decisions containing legal holdings favorable to the appellant. See *Sole v. Wyner*, 551 U.S. 74, ___, 127 S. Ct. 2188, 2197, 167 L. Ed. 2d 1069 (2007)(no attorney fees despite the grant of temporary injunctive relief, holding that “[a] plaintiff who achieves a transient victory at the threshold of an action can gain no award under that fee-shifting provision if, at the end of the litigation, her initial success is undone and she leaves the courthouse emptyhanded.”); *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 605, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001)(precedent “counsel[s] against holding that the term ‘prevailing party’ authorizes an award of attorney’s fees *without* a corresponding alteration in the legal relationship of the parties”); *Radvansky v. Olmstead Falls*, 496 F.3d 609, 619-20 (6th Cir. 2007)(a litigant does not become a prevailing party by winning on appeal a reversal of a summary judgment of dismissal).

The United States Supreme Court’s holding in the *Hewitt* case was reinforced in *Farrar v. Hobby*, 506 U.S. 103, 111, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992). In *Farrar*, a prisoner brought a civil rights claim seeking damages of \$17 million, but he was awarded only \$1 in nominal damages. The Supreme Court reversed the circuit court’s determination

that the prisoner was a prevailing party, concluding:

As we have held, a nominal damages award does render a plaintiff a prevailing party by allowing him to vindicate his “absolute” right to procedural due process through enforcement of a judgment against the defendant. In a civil rights suit for damages, however, the awarding of nominal damages also highlights the plaintiff’s failure to prove actual, compensable injury. Whatever the constitutional basis for substantive liability, damages awarded in a § 1983 action “must always be designed ‘to compensate injuries caused by the [constitutional] deprivation’”. When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all.

Id. at 115 (alteration in original) (citations and italics omitted).

As in the *Hewitt* and *Farrar* cases, Mr. Parmelee has not obtained any relief on his *civil rights retaliation or substantive due process claims* that would entitle him to attorney fees. The Court of Appeals properly remanded the matter for further proceedings in the superior court to allow Mr. Parmelee to “raise his claims for damages against DOC for violating his First Amendment rights, violating substantive due process, and retaliating against him.” *Parmelee v. O’Neel*, 145 Wn. App. at 249. The Court of Appeals also clearly upheld *In re Parmelee* and the ability of prison officials to infract Mr. Parmelee for his behavior that triggered this matter. *Id.* at 244-46. On remand, the Defendants will have the opportunity to respond to Mr. Parmelee’s allegations, assert affirmative

defenses, and to move for summary judgment, including an assertion of qualified immunity. Until the civil rights claims are adjudicated, there is no basis for requesting attorney fees under 42 U.S.C. § 1997e(d). “A judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party.” *Farrar*, 506 U.S. at 113.

Here, the Court of Appeals clearly indicated that it was making no determination regarding the merits of Mr. Parmelee’s civil rights claims. *Parmelee v. O’Neel*, 145 Wn. App. at 246-47. The Court of Appeals’ holding does not make Mr. Parmelee a prevailing party under § 1988. On the contrary, at the conclusion of this litigation, Mr Parmelee should “leave the courthouse emptyhanded.” *Sole*, 127 S. Ct. at 2197.

2. The Court Of Appeals Holding Regarding RCW 9.58.010 Does Not Support A Claim Of Attorney Fees Under The PLRA, 42 U.S.C. § 1997e

This Court may decide this case on the separate and independent ground that the Court of Appeals’ decision regarding the criminal libel statute and the infraction falls far short of the requirements for attorney fees under 42 U.S.C. § 1997e(d), which controls Mr. Parmelee’s right to seek attorney fees under § 1988. The requirements of § 1997e(d)(1)(A) confirm that there is no authority for concluding that a party has prevailed

for attorney fees where the Court of Appeals has remanded the party's claims for further proceedings. § 1997e(d)(1) requires:

[i]n *any action brought by a prisoner* who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, *such fees shall not be awarded*, except to the extent that—

(A) the fee was directly and reasonably incurred in *proving an actual violation of the plaintiff's rights* protected by a statute pursuant to which a fee *may be awarded under section 1988* of this title; and . . .

(B)(i) the amount of the fee is proportionately related to the court orderd relief for the violation; or (ii) the fee was directly and reasonably incurred in enforcing the ordered for the violation.

Id (emphasis added). Mr. Parmelee is a prisoner. Therefore, “[h]is recovery of fees is therefore restricted by the PLRA.” *Siripongs v. Davis*, 282 F.3d 755, 757-58 (9th Cir. 2002)(holding that a grant of a temporary restraining order temporarily preventing a condemned prisoner's execution did not entitle him to attorney fees under the PLRA). In *Siripongs*, the Ninth Circuit Court of Appeals noted:

[t]he plain meaning of an ‘actual violation’ of plaintiff's rights excludes a violation that has not been proven in fact, but merely has been asserted.

Siripongs, 282 F.3d at 758.

The PLRA restriction on fees claimed under § 1988 applies to all suits by prison inmates, not just those related to prison conditions.

Jackson v. State Board of Pardons and Paroles, 331 F.3d 790, 796 (11th Cir. 2003). In addition, the award of such fees must be predicated on a determination that an actual violation of the prisoner's civil rights was determined by the court based on proof made by the prisoner civil rights plaintiff. *See Siripongs*, 282 F.3d at 758.

Here, the Court of Appeals expressly and clearly refrained from making any determination that Mr. Parmelee's rights as a prisoner were actually violated. *Parmelee v. O'Neel*, 145 Wn. App. at 246-47 ("Thus, we cannot address whether Washington's criminal libel statutory scheme is unconstitutional as applied to Parmelee in this case. Likewise, we cannot address whether Parmelee's freedom of speech or substantive due process rights were violated because the record is insufficient to make those determinations."). Therefore, Mr. Parmelee's claim for attorney fees fails under § 1997e(d).

Assuming Mr. Parmelee prevails on his civil rights claims on remand, in making a decision regarding attorney fees, the superior court will be required to determine whether the requested fees were "directly and reasonably incurred in *proving an actual violation* of the plaintiff's rights." 42 U.S.C. § 1997e(d)(1)(A)(emphasis added). In other words, a determination of whether fees were directly and reasonably incurred in

proving Mr. Parmelee's civil rights claims cannot be made before further proceedings take place on remand.

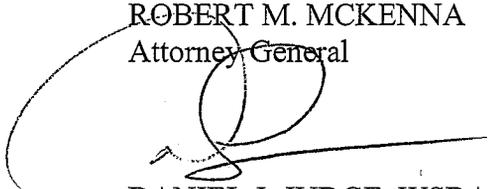
The superior court and the Court of Appeals did not make any determination regarding the merits of Mr. Parmelee's civil rights claims. *Parmelee v. O'Neel*, 145 Wn. App. at 246-47. Until the merits of his claims are actually determined, it is premature to address the attorney fees that may be available at the conclusion of the case.

IV. CONCLUSION

The Respondents respectfully request that the Court of Appeals' denial of Mr. Parmelee's request for attorney fees be affirmed.

RESPECTFULLY SUBMITTED this 6th day of April, 2009.

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V. CERTIFICATE OF SERVICE

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