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DIVISION II

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

RICHARD KING and RICHARD JACKSON, individually and representing a class of similarly situated individuals,

Plaintiffs,

DEREK GRONQUIST,

Appellant-Intervenor-Plaintiff,

V.

CHASE RIVELAND and JANNET BARBOUR in their official capacities; the DEPARTMENT OF CORRECTIONS OF THE STATE OF WASHINGTON; the INDETERMINATE SENTENCING REVIEW BOARD; and KEN EIKENBERRY in his official capacity as Attorney General of the State of Washington,

Respondents-Defendants,

KING COUNTY PROSECUTOR DANIEL T. SATTERBERG,

Respondent-Intervenor-Defendant.

APPELLANT'S OPENING BRIEF

Derek E. Gronquist
#943857 C-511-2
Monroe Correctional Complex
Twin Rivers Unit
P.O. Box 888
Monroe, WA 98272

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A. ASSIGNMENT OF ERROR.

The trial court erred in granting the Defendants motion to dismiss the contempt action.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

1. Does judicial estoppel bar the Defendants from obtaining prospective modification of an injunction based upon assurances that such modification would not effect a contempt action and then asking the court to dismiss the contempt action because it prospectively modified the injunction?

2. Whether a trial court's order to "prospectively" vacate an injunction can be applied retroactively to moot a contempt action?

3. Is a contempt action moot when the trial court possesses statutory authority to order the Defendants to compensate Plaintiff for damages, costs and attorney fees incurred because of their contemptuous conduct?

4. Whether a contempt action is moot when a trial court possesses the statutory authority to request a prosecutor to initiate a criminal contempt proceeding or appoint a special counsel to prosecute a criminal contempt proceeding?

5. Is a contempt action moot when the trial court possesses inherent authority to impose any remedy or punishment necessary to address the Defendants violation of a court order?

C. **STATEMENT OF THE CASE.**

1. **Substantive facts.** This case involves repeat breaches of a permanent injunction spanning more than two-decades.

a. **Subject matter of underlying action.** Between May 1989 and March of 1991 Appellant Derek Gronquist participated in the Sex Offender Treatment Program (SOTP) while incarcerated in the Department of Corrections (DOC). CP 587-592. When Mr. Gronquist began the SOTP program, he entered into a written confidentiality agreement with DOC that any information he provided to SOTP staff would be confidential, subject to six exceptions. See King v. Riveland, 125 Wn.2d 500, 503 (1994). On October 17, 1990 DOC issued a "revised" confidentiality agreement "provid[ing] that the rules of confidentiality were not applicable if a prosecuting attorney or the Attorney General were considering whether to have an inmate committed as a sexually violent predator." King, 125 Wn.2d at 503-04. The DOC "interpreted this policy as

retroactive and applied it to all participants in the SOTP back to the inception of the program." Id., at 504.

Plaintiffs Richard King and Richard Jackson filed a class action lawsuit challenging DOC's "revised" policy. King, 125 Wn.2d at 504. In June of 1992, the Thurston County Superior Court certified a class consisting of "[a]ll current and former inmates of the Twin Rivers Corrections Center who participated in the Sex Offender Treatment Program prior to October 17, 1990." King, 125 Wn.2d at 518-520. In 1993 the Court found that DOC's revised policy constituted a breach of contract and issued a permanent injunction "prohibiting the DOC from releasing information from Plaintiffs' SOTP files except in accordance with the terms of the Confidentiality Statement." King, 125 Wn.2d at 504. The injunction states, in relevant part:

> 1. Defendants, their officers, agents, servants, employees, attorneys, and any person who in concert or participation with them who receives actual notice of the order are hereby enjoined from releasing any documents or other information from the Sex Offender Treatment Program ("SOTP") file of any member of the Plaintiff class (any person who participated in the SOTP prior to October 17, 1990) to any person other than SOTP treatment staff, as provided in the original Confidentiality Statement.

. . .

> 5. Copies of this Judgment and Permanent Injunction shall be delivered by the Attorney General to the Department of Corrections, the Superintendent of the Twin Rivers Corrections Center, the Director of the Sex Offender Treatment Program at Twin Rivers, the End of Sentence Review Committee, the Indeterminate Sentence Review Board, and the Prosecuting Attorney for each county in the State of Washington.

CP 150-151 (emphasis added).

The Supreme Court rejected the trial court's finding of a breach of contract, but unanimously upheld certification of the class and the terms of the injunction under promissory estoppel. King, 125 Wn.2d at 518-20.

b. The Defendants prior breaches of the injunction and concessions that it applied to Mr. Gronquist. In 1994 Mr. Gronquist was convicted of subsequent offenses committed in December of 1993. CP 135-140. During that prosecution, SOTP Team Leader Anmarie Aylward disclosed Mr. Gronquist's entire SOTP file to King County Prosecutors, who in turn disseminated the file to Roger Wolfe, an expert hired to form an opinion in support of an exceptional sentence. CP 8-10. Wolfe's report incorporated enjoined information from Gronquist's SOTP file. Id. Also in 1994, SOTP treatment staff

Bruce Garner and Debra Baker orally disclosed information about Gronquist's SOTP participation to Kathleen Docherty, a DOC Community Corrections Officer. Id. Officer Docherty prepared a Presentence Investigation Report that incorporated opinions and quoted sections from the Wolfe Report, and referenced disclosures made by Mr. Garner and Ms. Baker. CP 10.

Mr. Gronquist successfully moved to have the Wolfe Report suppressed and the Presentence Report redacted, as violative of the King injunction. CP 587-592. During the suppression hearing, King County Deputy Prosecuting Attorney Robert Reischling "conceded that [the enjoined information] was confidential," and assured the court that he had "handed up to the Court the only copy the State had" of the protected information, and had instructed Wolfe to destroy his copies. Id.

Mr. Gronquist brought an action for money damages and injunctive relief against the DOC, former SOTP Director Arthur Gordon, and King County Prosecutors because of the 1994 disclosures. Id., and CP 10-11. When deposed during that litigation, Director Gordon claimed to have

> engaged in a series of activities designed to make sure that such an error would not happen again. We got a list of all individuals who

> could have been affected by [the injunction], namely, individuals who had been in treatment between '88 and I believe it was '92. We determined through a file review whether or not they had signed the original injunction, the original consent form, whether they had signed a revised consent form that came in I believe 1990, we particularly focused on those individuals who had signed the original consent form but had not signed a new one. We tracked their files down throughout DOC. We arranged for a letter to be inserted in each file on the front page specifying or describing the injunction. I believe it was a letter written by Thomas Young of the AG's department. In addition, we arranged for a fluorescent orange sticker to be put on the face of the file specifying essentially that no material from the file should be distributed in any way.

CP 10.

Director Gordon also testified that "[s]anctions were not brought against individual staff members," but they were told "it should not have happened and how we were going to respond differently in the future." Id.

The King County Prosecutors convinced the court that the matter was moot because they no longer possessed Gronquist's SOTP file or other records containing confidential information, and would not seek their disclosure again. CP 587-592. To settle claims against DOC, the parties entered an agreement, whereby DOC paid Gronquist $15,000 and promised to retrieve and destroy all copies of

his SOTP file and other records containing improperly disclosed information. Id.

c. **Recent breaches that prompted the contempt action**. In 2013, Mr. Gronquist discovered that DOC had not only failed to retrieve and destroy all of his SOTP records and records relating to them, but had again disseminated his confidential SOTP records to: (1) the End of Sentence Review Committee (ESRC), who used the information to designate Gronquist as a "Level III" sex offender, and inform its decision to refer him for civil commitment under Chapter 71.09 RCW; (2) the King County Prosecutor's Office for use in civil commitment proceedings; (3) psychologist Harry Hoberman, who relied almost exclusively upon the information to conclude that Gronquist met the criteria for commitment as a sexually violent predator; (4) DOC officials in the Community Corrections Division, who used the information, ESRC decision, and Hoberman Report as a basis to deny Gronquist's proposed residences and thereby his release from confinement; and (5) Mason County law enforcement. CP 11-20 & 587-592.

As is apparent from communications generated at the time, the SOTP, ESRC, and King County

Prosecutor's Office were upon fresh notice of the terms of the King injunction, and made informed decisions to disseminate and use Gronquist's SOTP records in violation of the injunction. CP 12-14.

2. **Procedural facts**. This case has a protracted procedural history.

a. **Trial court proceedings**. On August 28, 2014 Mr. Gronquist initiated a proceeding in the Thurston County Superior Court to hold the DOC, ESRC Chair Anmarie Aylward, and King County Prosecutor's Office in contempt of the King injunction. CP 5-33. The Defendants raised various procedural defenses in response to the proceeding, such as lack of standing. CP 34-54. After a motion to show cause was set for hearing, the Honorable Eric J. Price found that the Defendants arguments were improperly raised and sue sponte cancelled the hearing to allow the Defendants to move to dismiss the action. CP 56-57. On January 30, 2015 Judge Price granted the Prosecutor's motion to dismiss, without prejudice, on the ground that an unnamed class member must first intervene to enforce a class-wide injunction. CP 729. On July 17, 2015 the court granted intervention to Mr. Gronquist. CP 60-62.

On September 17, 2015 Mr. Gronquist re-filed his contempt action. CP 63-73. DOC responded by seeking a special setting "[b]ecause of the number and the complexity of the issues raised by intervenor Gronquist in his motion for contempt, and because there are likely to be three separate and distinct entities represented at the hearing." CP 74-75.

King County Prosecutor Daniel T. Satterberg filed his own motion to intervene, which the trial court granted on October 2, 2015. CP 77-78. Based upon the DOC's request and the Prosecutor's actions, Judge Price bifurcated the proceeding into two phases: procedural defenses to the contempt proceeding in the first phase, and determination of whether the King injunction was violated and its remedy in the second phase. CP 695.

Within the briefing schedule for phase one of the contempt proceeding, the Defendants filed motions presenting defenses of res judicata, collateral estoppel, laches, unclean hands, and that the "injunction should be clarified and/or modified as to Gronquist." CP 79-107. Mr. Gronquist opposed the motions on several grounds including the collateral bar rule, which prohibits defendants

in a contempt action from contending that the injunction is invalid. CP 743-762.

On January 14, 2016 Judge Price issued a letter opinion rejecting the defenses of res judicata, collateral estoppel, laches and unclean hands, but "granted relief in part" by invalidating the King injunction prospectively only and as to Mr. Gronquist alone based upon a 1995 amendment to RCW 71.09.025. CP 593-598. Judge Price found that the collateral bar rule did not preclude prospective invalidation of the injunction based upon the Defendants stipulation that it would not affect the Court's contempt powers:

> With respect to the collateral bar rule, the Court is persuaded that the rule does not prevent the prospective vacation of the injunction as to Gronquist, given Respondents' concession that this aspect of their motion does not directly affect the current action.

CP 596 (emphasis added).

Consistent with the two-phase proceeding, Judge Price emphasized:

> The Court resolves these concerns, with an interest in judicial economy, by granting this aspect of the relief requested by Respondents, but making it clear that this decision affects only Gronquist. . . . However, this Court specifically orders that its decision to vacate is not intended to affect any other class member. Further, the Court's order is prospective only, and does not resolve allegations of contempt in the past.

Id. (emphasis added).

Concerning the second phase of the proceeding, the court instructed: "Remaining hearings in this case should be scheduled consistent with standard practice." CP 598. The case was transferred to the Honorable Anne Hirsch. Id., at n.3. Amid attempts to schedule the second phase of the proceeding, on March 29, 2016, DOC informed Mr. Gronquist that it had interpreted Judge Price's January 14, 2016 order as no longer protecting existing SOTP records, and would disclose Mr. Gronquist's records to the Prosecutor unless he obtained a stay. CP 766.

On April 1, 2016 Mr. Gronquist filed a motion to stay Judge Price's January 14, 2016 ruling and asked the court to "set a hearing date to resolve the second step of the contempt action as contemplated by Judge Price's ruling" so that "any and all issues can be appealed at once if need be." CP 763-773. The Prosecutor opposed the motion. CP 777-788. Judge Hirsch granted a temporary stay, and directed Mr. Gronquist to request a longer stay from the Court of Appeals. CP 789-791.

On June 30, 2016 DOC filed a motion to dismiss the contempt action as "moot and no longer viable

as a matter of law as a result of th[e] court's January 14, 2016 ruing." CP 599-605. The Prosecutor joined DOC's motion, asserting "there are no conceivable remedies available to Gronquist through the Court's contempt powers" because "Gronquist is not the Thurston County Prosecutor [and] lacks the authority to initiate a criminal contempt action." CP 708-714. Gronquist opposed the motions. CP 695-707. On August 5, 2016 Judge Hirsch dismissed the contempt action as moot. CP 723-724.

b. **Appellate proceedings**. On May 13, 2016 Mr. Gronquist filed a Motion for Discrectionary Review in the Court of Appeals seeking a stay of Judge Price's ruling.[1] COA No. 49057-9-II. The Court of Appeals denied a stay, reasoning that "[b]ecause Gronquist did not seek discretionary review of the January 14, 2016 order, the propriety of that order is not before the court." Ruling by Commissioner Schmidt, entered May 25, 2016. With no stay in place, DOC provided the Prosecutor with Mr. Gronquist's entire SOTP file, and Gronquist voluntarily withdrew his motion. Motion to

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[1]Most of the records cited in this section are contained in the Court of Appeals case file. They will be cited by date or title, rather than the "CP" designation used for superior court records.

Voluntarily Withdraw Petition for Discretionary Review at 2; Ruling Granting Motion to Withdraw Motion for Discretionary Review, entered June 14, 2016.

On August 31, 2016 Mr. Gronquist filed a Notice of Appeal from the trial court's orders requiring him to intervene, allowing the Prosecutor to intervene, the January 14, 2016 ruling on the Defendants procedural defenses, and the August 5, 2016 order dismissing the action as moot. CP 725-742. On September 22, 2016 a Court of Appeals Case Manager instructed the parties via letter to address the appealability of those orders. Because the Prosecutor asserted that he was "currently preparing a motion to either re-designate or dismiss Gronquist's appeal" on that basis, the court withdrew its request in anticipation of the Prosecutor's motion. Letter from David Hackett to Clerk dated October 7, 2016.

On October 19, 2016 the Prosecutor filed a motion to dismiss, raising arguments of mootness; whether the appeal should be re-designated as a request for discretionary review; and whether Gronquist's appeal of the January 14, 2016 order should be dismissed as a final order that was not

timely appealed. See Motion to Dismiss, or in the Alternative, Redesignate Appeal. Mr. Gronquist opposed the motion, emphasizing that the trial court structured the contempt action as a bifurcated proceeding which allows appeal of all orders entered in the case following the August 5, 2016 order dismissing the action; or the rules should be relaxed due to his reliance on the procedure urged by the Defendants and implemented by the superior court. Response to Motion to Dismiss at 9-20.

On December 6, 2016 a commissioner granted the motion in part and denied it in part, characterizing the Prosecutor's motion underlying the January 14, 2016 order as a "post judgment motion" to "vacate a judgment" and holding the January 14, 2016 order was "appealable when it was entered," and as such, Gronquist's August 31, 2016 appeal of that order was untimely. Ruling on Motion to Dismiss Appeal at 4-6. The commissioner also held that Mr. Gronquist <u>may</u> appeal the order dismissing the action as moot, and the appealability of orders regarding intervention were not before her. Id., at 6-7. Mr. Gronquist filed a Motion to Modify the Commissioner's Ruling, which

was denied on March 6, 2017. Order Denying Motion to Modify.

On April 2, 2017 Mr. Gronquist filed a Motion for Discretionary Review from the March 6, 2017 order declining to modify the commissioner's ruling in the Washington State Supreme Court. S.Ct. No. 94338-9. The Supreme Court denied review on August 22, 2017. Ruling Denying Review. On October 12, 2017 the clerk of the Court of Appeals issued a Mandate terminating all further review in the case. Mr. Gronquist filed a Motion to Recall Mandate on October 31, 2017, which was unopposed. Cf. Response of the Department of Corrections to Appellant Gronquist's Motion to Recall Mandate; and leter from David Hackett to Clerk dated November 14, 2017. On January 24, 2018 the Chief Judge of the Court of Appeals issued an order partially recalling the mandate "but only as to the August 5, 2016 post-judgment order dismissing Gronquist's contempt motion as moot." Order Partially Recalling Mandate at 2.

D. ARGUMENT,

A trial court's grant of a motion to dismiss is reviewed de novo. Washington Trucking Association v. Employment Security Department, 188

Wn.2d 198, 207 (2017). Such dismissals are "appropriate only when it appears beyond doubt that the plaintiff cannot prove any set of facts that would justify recovery." Id.

I. JUDICAL ESTOPPEL BARS THE DEFENDANTS FROM SEEKING DISMISSAL OF THE CONTEMPT ACTION ON THE BASIS OF THE TRIAL COURT'S PROSPECTIVE MODIFICATION OF THE INJUNCTION

"Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538 (2007). Application of judicial estoppel is guided by three core factors:

> (1) whether a party's later position is clearly inconsistent with its prior position; (2) whether allowing the inconsistent position would create the perception that either the first or second court was mislead; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Arkison, 160 Wn.2d at 538-539.[2]

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[2] The standard of review for judicial estoppel upon a motion to dismiss "is not self-evident." Taylor v. Bell, 185 Wn.App. 270, 284 n.13 (2014). It is generally reviewed for abuse of discretion, but that standard conflicts with the requirement to review motions to dismiss de novo. Cf. Id.; and Hayes v. USAA Casualty Insurance Co., 2015 Wash.App. LEXIS 314, ¶ 40 n.9 (recognizing that the standard of review is unsettled).

a. The Defendants positions are clearly inconsistent. Judge Price prospectively modified the King injunction based upon "Respondents' concession that this aspect of their motion does not directly affect the current action." CP 596. When the case was transferred to Judge Hirsch, the Defendants moved to dismiss the contempt action as "moot and lo longer viable as a matter of law as a result of th[e] court's January 14, 2016 ruling" prospectively vacating the injunction. CP 599-605 & 708-714.

Those positions are diametrically opposed, and therefore clearly inconsistent. New Hampshire v. Maine, 532 U.S. 742, 749 (2001)("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position. . .").

b. Allowing the Defendants to maintain their inconsistent positions creates the perception that the Court was mislead. "The collateral bar rule prohibits a party from challenging the validity of a court order in a proceeding for violation of that order." City of Seattle v. May, 171 Wn.2d 847, 857 (2010).

As a defense to the contempt proceeding, the Defendants argued that the King injunction was invalid pursuant to a 1995 amendment to RCW 71.09.025, and should be vacated. CP 593-598. Judge Price ruled that the collateral bar rule did not prohibit prospective modification of the injunction based upon the Defendants stipulation that it would not affect the contempt proceeding:

> With respect to the collateral bar rule, the Court is persuaded that the rule does not prevent the prospective vacation of the injunction as to Gronquist, given Respondents' concession that this aspect of their motion does not directly affect the current action.

CP 596 (emphasis added).

As soon as the case was transferred to Judge Hirsch, the Defendants moved to dismiss the contempt action as "moot and not longer viable as a matter of law as a result of th[e] court's January 14, 2016 ruling" prospectively vacating the injunction. CP 599-605 & 708-714. The Defendants informed Judge Hirsch - falsely - that Judge Price's statement that modification of the injunction "is prospective only, and does not resolve allegations of contempt in the past" was "incorrect," and "plainly wrong as a matter of law." Id. Based upon those contrary and misleading positions, Judge Hirsch ruled that Judge Price's

January 14, 2016 order rendered the contempt action moot. CP 723-724.

Hindsight exposes the Defendants actions for what they truly are: an intentional deception to circumvent the collateral bar rule. That conduct is precisely what judicial estoppel is designed to prohibit. Ashmore v. Estate of Duff, 165 Wn.2d 948, 950 (2009)("The graveman of judicial estoppel is the intentional assertion of an inconsistent position that erodes respect for the judicial process and the courts.").

c. Allowing the Defendants to maintain their inconsistent positions would be unfair. The Defendants repeatedly violated a permanent injunction intended to protect some of the most private communications known to humankind. See King, 125 Wn.2d at 514-515. Each time Mr. Gronquist discovered those violations and tried to enforce the injunction, the Defendants lied to evade being held accountable for their conduct. See pages 4-12 above.

The Supreme Court has made clear that "[p]ersons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if

they have proper grounds to object to the order." Celotex Corp. v. Edwards, 514 U.S. 300, 306 (1995); State v. Turner, 98 Wn.2d 731, 738-739 (1983) ("court order which is merely erroneous must be obeyed despite the error and may not be collaterally attacked in a contempt proceeding.").

Allowing the Defendants to maintain their inconsistent positions grants immunity from the law: they can violate a court order at will, and when caught, be relieved from both future compliance with the law and past violations of it. Such conduct grants the Defendants an unfair advantage, which is incompatable with the rule of law:

> The interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction over persons and subject matter. One who defies the public authority and willfully refuses his obedience, does so at his peril.

United States v. United Mine Workers of America, 330 U.S. 258, 303 (1947).

Mr. Gronquist has also suffered an unfair detriment. He entered into a lawfully binding agreement with agents of the state of Washington to maintain the confidentiality of communications made in the course of psychiatric treatment. CP 587-

592; King, 125 Wn.2d at 503. The King injunction was entered to ensure that such highly private and sensitive information would not be shared outside of the therapeutic environment, and especially not with officials like the ESRC and King County Prosecutor who may misinterpret or misapply such information to inform their decision on whether a person should be civilly committed as a sexually violent predator. See King, 125 Wn.2d at 517 (emphasizing "that such a proceeding might not be instituted absent release of this information.").

When the 2013 breach of the King injunction was discovered, Mr. Gronquist retained counsel and prosecuted a contempt action to protect not only his interests but the integrity of the Court as well; only to be left with no protection for his confidential communications, the loss of over $150,000, and no remedy for the Defendants repeat and flagrant violations of the King injunction. No litigant should be subject to such an unfair detriment. Cf. McDevitt v. Harborview Medical Center, 179 Wn.2d 59, 76 (2012)(nullifying cause of action pursuant to a new judicial decision would produce an "inequitable outcome" when party reasonably relied on a prior judicial ruling).

d. Judge Hirsch's failure to apply judicial estoppel must be reversed. The Defendants contrary and false assertions are precisely the type of conduct that judicial estoppel is designed to protect. All three factors strongly support its application to bar the Defendants motion to dismiss. The trial court's failure to apply judicial estoppel under these circumstances essentially assists the Defendants circumvention of the collateral bar rule:

> It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience.

Maggio v. Zeitz, 333 U.S. 56, 69 (1948).

The failure to apply judicial estoppel also condones the Defendants violation of Judge Price's express ruling that his decision to vacate "is prospective only, and does not resolve allegations of contempt in the past." CP 596. That ruling - unchallenged on appeal - is binding, and may not be overruled at the whim or caprice of the Defendants.

Judge Price's prospective-only ruling ensured that his decision did not violate the separation of

powers doctrine. See Section II(a) below. More importantly, Judge Price's prospective application of his decision means that it cannot be applied to this case under any circumstance. See Id. Judge Hirsch's failure to apply judicial estoppel under these circumstances was erroneous under any standard of review.

II. THE TRIAL COURT ERRED IN DISMISSING THE CONTEMPT ACTION AS MOOT BECAUSE IT POSSESSED THE AUTHORITY TO PROVIDE EFFECTIVE RELIEF

Mootness is a question of law that is reviewed de novo. Bavand v. OneWest Bank, 176 Wn.2d 475, 510 (2013). A case is "not moot if a court can provide any effective relief." City of Sequim v. Malkasian, 157 Wn.2d 251, 259 (2005). The relief available need not be fully satisfactory to avoid mootnesss. Church of Scientology of California v. United States, 506 U.S. 9, 13 (1992).

a. The superior court possessed the authority to coerce compliance with the King injunction. Contempt is "intentional . . . [d]isobedience of any lawful judgment, decree, order, or process of the court." RCW 7.21.010(1)(b).

The King injunction prohibits the release of "any documents or other information from the [SOTP]

file of any member of the Plaintiff class. . ." CP 150. The facts alleged in Mr. Gronquist's motion to show cause clearly establish that the Defendants knowingly, intentionally, and repeatedly violated the King injunction. CP 5-33 & 63-73. The Defendants themselves brazenly admit that all of Mr. Gronquist's SOTP records are in the "possession of Prosecutor Satterberg." CP 710. That conduct constitutes contempt of court. RCW 7.40.150; Blakiston v. Osgood Panel & Veneer Co., 173 Wash. 435, 438 (1933)(injunction must be obeyed implicitly, according to its spirit, in good faith, and cannot be evaded by connivance, trick, or evasion).

The trial court clearly possessed statutory authority to coerce the Defendants into compliance with the King injunction. See RCW 7.21.030(2). The Defendants contend that the court lacked authority to coerce compliance with the injunction because Judge Price vacated it on January 14, 2016. CP 599-605 & 708-714. That position ignores the legal effect of Judge Price's ruling that his order "is prospective only." CP 596.

"A court may give its decisions prospective-only application to avoid substantially inequitable

results." McDevitt, 179 Wn.2d at 75. "Prospective application affects only those cases arising after the announcement of the new rule." Lunsford v. Saberhagen Holdings, 166 Wn.2d 264, 270-71 (2009). It prohibits application of the new rule to the case sub judice. McDevitt, 179 Wn.2d at 76; Cascade Security Bank v. Butler, 88 Wn.2d 777, 784 (1977) (prospecitve decision does not apply "to the parties in the overruling case.").

Judge Price gave his ruling prospective-only application based upon the Defendants "concession" that it would not affect this contempt action. CP 596. His ruling to vacate was based upon a post King amendment to RCW 71.09.025. CP 593-598. Retroactive application of that statute would overrule the Supreme Court's unanimous decision in King (which interpreted the former version of RCW 71.09.025), violating the separation of powers doctrine and vitiating Mr. Gronquist's vested right to the confidentiality of his SOTP records. Cornelius v. Department of Ecology, 182 Wn.2d 574, 589 (2013)("the legislature may not retroactively reverse decisions of this Court"; separation of powers violated when new legislation "affects the rights of parties to the court's judgment.");

Linkletter v. Walker, 381 U.S. 618, 636 ("prior determinations deemed to have finality and acted upon accordingly have 'become vested'"). It would also punish Mr. Gronquist for relying upon the Supreme Court's decision in King v. Riveland, 125 Wn.2d 500 (1994), which would be substantially inequitable. McDevitt, 179 Wn.2d at 75-76.

Prospective application of Judge Price's ruling means that the King injunction remains in full force and effect for this case, and protects all SOTP records created prior to January 14, 2016. State ex rel. Washington Finance Commission v. Martin, 62 Wn.2d 645, 673-674 (1963)(prospective application of new judicial decision ensured that "bonds issued and to be issued and sold pursuant to [the prior decision] are lawful and valid"); Cascade Security Bank, 88 Wn.2d at 785-786 (prospective application of new judicial decision protects "rights and liabilities" established under prior real estate contract). Because the injunction remains in full force and effect for this action, the superior court could have imposed any of the remedies articulated by RCW 7.21.030(2) to coerce the Defednants into compliance with the court's order. Because the court can provide effective

relief under RCW 7.21.030(2), this case is not moot.

b. **The superior court possessed the authority to require the Defendants to compensate Mr. Gronquist for his injuries, costs, and attorney fees.** One of the civil contempt remedies enumerated by Chapter 7.21 RCW states:

> The court may, in addition to the remedial sanctions set forth in subsection (2) of this section, order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney fees.

RCW 7.21.030(3).

"RCW 7.21.030(3) allows the court to order a contemnor to pay losses suffered as a result of the contempt and costs incurred in the contempt proceeding for any 'person found in contempt of court' without regard to whether it is possible to craft a coercive sanction." In re Structured Settlement Payment Rights of Rapid Settlements, 189 Wn.App. 584, 601 (2015)(emphasis added).

RCW 7.21.030(3) has long been used to compensate parties who's interests have been violated through the breach of a court order. See Structured Settlement Payment Rights, 189 Wn.App. at 609-610 (and cases cited therein). The statute

codifies the common law rule that "judicial sanctions in civil contempt proceedings may be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained":

> The Supreme Court has long recognized that one appropriate kind of sanction for civil contempt is remedial rather than coercive. That is, the sanction provides the plaintiff with a substitute for the defendant's obedience without compelling that obedience itself. Thie most straightforward version of the remedial sanction is the compensatory fine, paid to the plaintiff as compensation.

Id. (quoting United Mine Workers, 330 U.S. at 303-304 and 1 Dan B. Dobbs, Dobbs Law of Remedies 194 (2nd ed. 1993)(emphasis added)).

The purpose of recovery for losses incurred because of contemptuous conduct is "to provide complete relief in the original action and to eliminate the necessity of a second suit to recover the expense caused by such contempt." Id. (quoting State ex rel. Lemon v. Coffin, 52 Wn.2d 894, 896 (1959)).

The Defendants argued that this case was moot because the Court could not fashion a civil remedy to coerce compliance with an injunction that had been prospecitvely modified. CP 599-605 & 708-714.

That position squarely conflicts with RCW 7.21.030(3), which allows the Court to compensate Mr. Gronquist for injuries, costs, and attorney fees incurred because of the Defendants contemptuous conduct "without regard to whether it is possible to craft a coercive sanction." Structured Settlement Payments, 189 Wn.App. at 609-10. This case is, therefore, not moot. Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 99 (2005)(case not moot when question of "attorney fees, costs, and sanctions" remained).

c. **The trial court possessed authority to request a prosecutor to initiate a criminal contempt proceeding or appoint a special counsel to prosecute a criminal contempt proceeding.** RCW 7.21.040 provides:

> (1) Except as otherwise provided in RCW 7.21.050, a punitive sanction for contempt of court may be imposed only pursuant to this section.
>
> (2)(a) An action to impose a punitive sanction for contempt of court shall be commenced by a complaint or information filed by the prosecuting attorney or city attorney charging a person with contempt of court and reciting the punitive sanction sought to be imposed.
>
> (b) If there is probable cause to believe that a contempt has been committed, the prosecuting attorney or city attorney may file the information or complaint on his or her own initiative or at the request of a person aggrieved by the contempt.
>
> (c) A request that the prosecuting attorney

> or the city attorney commence an action under this section may be made by a judge presiding in an action or proceeding to which a contempt relates. If required for the administration of justice, the judge making the request may appoint a special counsel to prosecute an action to impose a punitive sanction for contempt of court. A judge making a request pursuant to this subsection shall be disqualified from presiding at the trial.

(Emphasis added).

The Prosecutor contended that this contempt action was moot because "Gronquist is not the Thurston County Prosecutor [and] lacks the authority to initiate a criminal contempt action." CP 708-714. While it is true that Mr. Gronquist is not the Thurston County Prosecutor, it was misleading to suggest that this case was moot because of that fact. The trial court clearly possessed statutory authority to either request a prosecutor to initiate, or appoint a special counsel to prosecute, a criminal contempt proceeding from this action in "which a contempt relates." RCW 7.21.040. Because the exercise of such authority could have provided Mr. Gronquist with effective relief, this case is not moot. United Mine Workers, 330 U.S. at 294 (fact that a court order is later ruled invalid does not place the defendants conduct beyond the reach of criminal

contempt); Mead School District No. 354 v. Mead Education Association, 85 Wn.2d 278 (1975)(same).

d. The trial court possessed inherent authority to fashion a remedy for the Defendants contemptuous conduct. The superior court is vested with broad inherent contempt power:

> The power of a court, created by the constitution, to punish for contempt for disobedience of its mandates, is inherent. The power comes into being upon the very creation of such a court and remains with it as long as the court exists. Without such power, the court could ill exercise any other power, for it would then be nothing more than a mere advisory body.

Mead School District, 85 Wn.2d at 282.

Inherent contempt power is separate from statutory contempt power. Interest of Silva, 166 Wn.2d 133, 140-141 (2008). It may be utilized when "the legislatively prescribed procedures and remedies are specifically found inadequate." Mead School District, 85 Wn.2d at 288. Inherent contempt power may be civil or criminal. Detention of Young, 163 Wn.2d 684, 691 (2008). It can be used to coerce compliance with a court order, to compensate the party injured by a breach of a court order, or to impose punishment to "vindicate the authority of the court." Structured Settlement Payment Rights, 189 Wn.App. at 608 (quoting Gompers v. Buck's Stove

& Range Co., 221 U.S. 418, 441-442 (1911)).

Judge Hirsch clearly believed that the statutory contempt procedures and remedies were inadequate or unavailable when she dismissed this case as moot. CP 723-724. Despite that belief, Judge Hirsch failed to recognize that she could have utilize inherent contempt power to address the Defendants violation of the King injunction. That was error.

Inherent contempt power could have been used to impose remedial sanctions ranging from a fine to imprisonment. Mead School District, 85 Wn.2d at 286. While such remedial sanctions must contain a "purge" condition, that condition does not need to relate to the order alleged to have been violated:

> a trial court has inherent authority to impose purge conditions beyond the four corners of the violated order, as long as the condition is reasonably related to the cause or nature of the contempt.

Structured Settlement Payment Rights, 189 Wn.App. at 614 (citing Interest of M.B., 101 Wn.App. 425, 450 (2000)).

The Defendants could have been fined or remitted to jail until they purged themselves of all of the records and information they obtained in violation of the King injunction - even if the

injunction was ruled invalid. Mead School District, 85 Wn.2d at 280.

The trial court could have also used its "inherent power to impose punitive sanctions for indirect contempt without violating the due process clause of the United States Constitution." Dependency of A.K., 162 Wn.2d 632, 646 (2007). "Violations of an order are punishable as criminal contempt even though the order is set aside on appeal, or through the basic action has become moot." United Mine Workers, 330 U.S. at 294. Contrary to the Defendants claims, Judge Hirsch could have utilized inherent criminal contempt powers in the absence of a disinterested prosecutor or a separate criminal action. Interest of Mowery, 141 Wn.App. 263, 278-279 (2007).

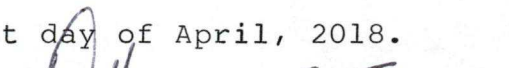
Finally, as a court of equity, the superior court could have utilized its inherent authority to enjoin the DOC from confining Mr. Gronquist, the ESRC from characterizing him as a "Level III" sex offender, and the King County Prosecutor from filing a civil commitment proceeding. Mowery, 141 Wn.App. at 281 (judiciary has the power to do all that is reasonably necessary for the efficient administration of justice).

The trial court's failure to recognize its inherent contempt power under these circumstances is erroneous. Utilization of such power could provide Mr. Gronquist with effective relief. As such, this case is not moot.

E. CONCLUSION.

Mr. Gronquist requests this Court to reverse the dismissal of this contempt action as moot, and remand for determination of whether the Defendants violated the King injunction and imposition of appropriate sanctions, including the award of costs, attorney fees, and damages. Mr. Gronquist also requests the award of costs incurred on appeal.

Submitted this 21st day of April, 2018.



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DECLARATION OF SERVICE

Derek Gronquist declares under penalty of perjury under the laws of the state of Washington that on this day I deposited a properly addressed envelope(s) in the internal legal mail system of the Monroe Correctional Complex, and made arrangements for postage, containing: Appellant's Opening Brief. Said envelope(s) was addressed to:

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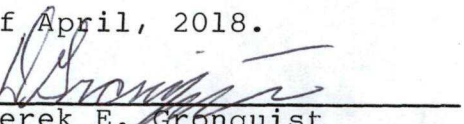
Dated this 21st day of April, 2018.



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