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No. 68975-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

HECTOR L. RESSY,

Appellant,

v.

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

Respondents.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

Assignments of error

No. 1: The trial court erred in ruling that “Plaintiff has not suffered a cognizable injury because the Defendants’ actions were justified by former RCW 9.95.220.”

No. 2: The trial court erred in making the specific finding of fact in its May 25, 2012 order that “[t]he statements Mr. Burris [sic] made in the Notice of Violation and in his court testimony were not false.”

No. 3: The trial court erred in entering the order of May 25, 2012, granting defendants’ motion for summary judgment dismissal, when it viewed the evidence in the light most favorable to the moving party and made inferences from the evidence only in favor of the moving party, by concluding that no retaliation occurred and by concluding that none of Plaintiff’s claims were viable.

Issues Pertaining to Assignments of Error

Issue No. 1: Whether a Community Corrections Officer (“CCO”) can escape liability for retaliation against an Offender under DOC supervision for exercise of First Amendment freedoms, when such officer knows his statements and allegations submitted to the court under penalty

of perjury are false, and when such officer fails to correct the false allegations when he is before the court? (Assignment of Error 1.)

Issue No. 2: Defendant Burriss prepared a declaration under penalty of perjury on April 3, 2008, stating that he had left messages and notes for Mr. Ressay, and that Mr. Ressay had failed to respond to any of the messages. Mr. Burriss further stated that Mr. Ressay had failed to report to the DOC since March 25, 2008. Mr. Ressay called Burriss on April 3, 2008, responding to his messages. Mr. Ressay reported to the DOC on April 8, 2008. Did the trial court err in making a specific finding that Mr. Burriss' statements in the declaration and in court on April 17th and May 8, 2008 were not false? (Assignment of Error 2.)

Issue No. 3: During a regularly scheduled April 17, 2008 community custody review hearing Plaintiff was arrested and placed in jail based on a false "failure to report" allegation presented by defendant Mr. Burriss (a CCO). Mr. Burriss was present at the hearing, knew that his declaration and complaints against Mr. Ressay made under penalty of perjury were no longer true at the time of the hearing, yet stayed quiet when he had the opportunity to correct the record. Did Mr. Burriss' presentation of false statements made against Mr. Ressay and his failure to correct the record when he had a chance constitute violations of Mr. Ressay's rights under the

first and fourth amendments to the United States Constitution?
(Assignment of Error 3.)

II. STATEMENT OF THE CASE

A. Procedure below.

Mr. Ressay's claims were dismissed on May 25, 2012 following a hearing on defendants' motion for summary judgment. CP 105-127 (motion for summary judgment); and CP 387-390 (trial court's order granting summary judgment).

B. Plaintiff's claims.

This is a civil rights action brought under 42 U.S.C. Sec. 1983 (Mr. Ressay also asserted State law claims), based on abuse of process by defendants in retaliation against Mr. Ressay for his exercise of free speech in complaining about a State agent. CP 85-95 (Amended Complaint). The action also sought recovery based on claims of: (a) intentional infliction of emotional distress, (b) negligent infliction of emotional distress; and (c) *respondeat superior*. *Id.*

Mr. Ressay bases his claims, in part, on defendants' presentation of a false declaration executed on April 3, 2008 claiming a "failure to report" shortly after Mr. Ressay presented written and verbal grievances against his assigned Community Corrections Officer ("CCO") Jack Kuczynski. CP 85-95. The action further alleged that defendants omitted

information and failed to correct the false declaration at two hearings in 2008, and as a result, Mr. Ressay spent 60 days in jail. *Id.*

C. Background and timeline of events.

In the spring of 2008 Mr. Ressay was on probation for a misdemeanor violation of a no-contact order, reporting to the Department of Corrections (“DOC”), at 405 W. Stewart Avenue, Suite B, Puyallup, Washington 98371. CP 319-327 (Ressay decl., ¶3). The persons listed in the no-contact order, and described as victims in the “Offender Accountability Plan,” were Antonia Thomas and Mr. Ressay’s daughter Destini Thomas. *Id.* Although found guilty of a misdemeanor, Mr. Ressay maintains his actual innocence. *Id.*

1. DOC reporting requirements.

Mr. Ressay was assigned to CCO Jack Kuczynski at the Puyallup office. CP 320 (Ressay decl., ¶4). As part of the conditions of probation, Mr. Ressay was required to report to his assigned CCO Mr. Kuczynski two times per month, on every second and fourth Tuesday of the month. *Id.*

2. Conditions of probation prohibited contact between Mr. Ressay and his daughter.

As a further condition of probation, Mr. Ressay was prohibited from having direct or indirect contact with his daughter. CP 320 (Ressay decl., ¶5). On Friday evening, March 21, 2008, Mr. Ressay received a

message on his answering machine from his daughter, informing him that she had run away from her abusive mother, that she had no shoes, and that she wanted him to pick her up. CP 320-321 (Ressy decl., ¶5). Mr. Ressay's daughter called all weekend seeking help. *Id.* Mr. Ressay was unable to respond or help his daughter due to the no-contact order. *Id.*

3. Dispute with assigned CCO Mr. Kuczynski.

Mr. Ressay left messages for his CCO, Mr. Kuczynski, over the weekend of March 22, 2008 to keep him informed so there would be no misunderstandings as to Mr. Ressay's compliance with the conditions of his probation. CP 321 (Ressay Decl., ¶6). Mr. Kuczynski called Mr. Ressay back on Monday, March 24, 2008. *Id.* Mr. Kuczynski was hostile towards Mr. Ressay for attempting to report to him to comply with conditions. *Id.* Mr. Kuczynski made fun of and humiliated Mr. Ressay when Mr. Ressay tried to explain the situation involving the calls from his daughter. *Id.*

4. Written grievances against CCO.

Mr. Ressay prepared a written grievance complaining about his CCO, Mr. Kuczynski, to DOC Office of Correctional Operations Supervisor Carol Rigney. CP 321 (Ressay decl., ¶7). Mr. Ressay reported to the DOC on March 25, 2008 as scheduled. *Id.* He met with his assigned CCO Mr. Kuczynski, who again was hostile towards Mr. Ressay

in response to Mr. Ressay's attempts to explain the situation of his daughter's phone calls and imminent danger. *Id.* Mr. Ressay prepared a second written grievance on March 25, 2008 after his meeting with Mr. Kuczynski, again directed to Supervisor Carol Rigney. *Id.*

5. Verbal grievances against CCO.

Mr. Ressay presented two grievances against his assigned CCO, Jack Kuczynski. CP 321, lines 9-15 (Ressay Decl., ¶7). Mr. Ressay asked to speak with the CCO supervisor about his grievance, but was instead sent to speak with another CCO, Steven Burriss. CP 322, lines 10-16. Mr. Burriss responded by looking angrily at Mr. Ressay with a flushed red face stating "you are going to get a lot of people's attention now." *Id.* Mr. Ressay felt threatened by Mr. Burriss' statement and expression. *Id.*

Mr. Ressay's next written required report date was Tuesday, April 8, 2008. CP 322 (Ressay decl., ¶12); *see also* CP 358, lines 1-3 (Burriss testimony excerpt).

6. Mr. Burriss assumes supervision after hearing grievances.

Mr. Burriss in his deposition testimony states that a change in CCO assignment was made two days after the March 25th report date, and that nothing was sent to Mr. Ressay on March 27th, 28th, 29th, 30th, 31st, or

the 1st of April to let Mr. Ressay know of the change. CP 353-355 (Joerres decl., Ex. 1 – excerpts from Burriss testimony - pages 107-109).

The DOC never notified Mr. Ressay following the presentation of his grievances against his assigned CCO Mr. Kuczynski that the monitoring of his supervision was being assigned to Mr. Burriss' caseload. CP 321 and CP 322, lines 6-19 (Ressay decl.)

7. Mr. Burriss leaves messages and notes for Mr. Ressay during the first week of April 2008.

On Thursday, April 3, 2008, Mr. Ressay discovered notes outside the door to his house. CP 322, lines 20-23 (Ressay decl.) The notes appeared to be from "the desk of Steve Burriss," but were not signed. *Id.* One of the notes suggested that Mr. Ressay's supervision may be transferred to Mr. Burriss' caseload. CP 322-323. April 3rd was the first time Mr. Ressay received any messages from Mr. Burriss. CP 323, line 3.

8. April 3, 2008 - Mr. Ressay responds to Mr. Burriss' notes and messages.

Mr. Ressay received the Burriss notes and message on April 3, 2008. CP 322-323. Mr. Ressay did not know what the notes meant either before or after speaking with Mr. Burriss on April 3, 2008. CP 323, lines 1-3. Mr. Ressay returned Mr. Burriss' phone calls and messages on April 3, 2008. CP 323, line 7-8.

Mr. Burriss never told Mr. Ressay that he was his new assigned CCO, or that Mr. Ressay was in violation of the terms and conditions of community custody. CP 323, lines 8-10. Instead, when the two spoke on April 3rd, Mr. Burriss asked to see Mr. Ressay the following day. CP 323, lines 7-11; *see also* CP 357 (Burriss Transcript excerpt, page 118).

The following testimony from Mr. Burriss describes the April 3, 2008 conversation:

Q. What did you tell him when he asked you if he was in violation of terms and conditions of his supervision?

A. I told him I was not willing to discuss that with him over the phone, that he had to come in the office.

Q. So you didn't tell him you're in violation?

A. No, I did not.

Q. Did you tell him on that date, Mr. Ressay, I am your assigned CCO?

A. (No audible response.)

Q. Do you have a specific recollection of doing that?

A. No.

CP 357.

9. Mr. Ressay was unable to attend the April 4th meeting due to an anxiety attack.

On the afternoon of April 4th, Mr. Ressay experienced a severe anxiety attack with chest pains. CP 323, lines 11-15. Mr. Ressay checked himself in to Good Samaritan Hospital for care. *Id.* Mr. Ressay understood that Staff at the Hospital contacted Mr. Burriss to inform him of Mr. Ressay's medical emergency. *Id.* At the advice of his doctor, Mr. Ressay went home to rest after getting discharged from the Hospital. *Id.*

10. Mr. Ressay reports to the DOC on April 8, 2008 and receives no further contact from the DOC.

After reporting as instructed to the DOC on March 25, 2008 (CP 321, lines 10-12), Mr. Ressay's next written required report date was Tuesday, April 8, 2008. CP 322, line 16; *see also* CP 358, lines 1-3 (Burriss testimony excerpt).

Mr. Ressay reported to the DOC on April 8, 2008 (the second Tuesday of April), prior to the scheduled April 17th review hearing. CP 323 (Ressay decl., ¶ 17). Mr. Kuczynski never directed or advised Mr. Ressay to report on an additional date between his required reporting dates. CP 322, lines 6-10 (Ressay decl.) The DOC never issued any new written terms and conditions or a new Offender Accountability Plan to let Mr. Ressay know of any change in the reporting rules. *Id.*

Mr. Ressay received no further contact from either Mr. Burriss or from his assigned CCO Mr. Kuczynski between April 4th and his next assigned report date of April 8, 2008. CP 323, lines 16-22.

Mr. Ressay was accompanied to the DOC office on April 8, 2008 by his attorney. CP 323-324 (Ressay decl., ¶ 17), and CP 339-341 (declaration of attorney Patricia Todd). Mr. Ressay received no messages following his two-part check-in, and subsequently left the office and returned home. *Id.* Mr. Ressay received no further contact from the DOC or any of its employees for the next 9 days. *Id.*

11. The April 3, 2008 declaration.

The declaration at issue was signed by Mr. Burriss and Ms. Rigney on April 3, 2008, and appears to have been presented for filing with a “Notice of Violation” on April 4, 2008. CP 280-282. Defendants did not provide Mr. Ressay notice of the allegations, and Mr. Ressay was not aware of or notified of the “Notice of Violation” filing prior to the April 17, 2008 hearing. CP 324 (Ressay Decl.); *see also* CP 352 (Joerres decl, Ex. 1, Burriss deposition transcript page 91).

The “failure to report” allegation, made by defendant Burriss under penalty of perjury, was summarized as “Failing to report to the Department of Corrections in Pierce County, Washington as directed since 3/25/08.” CP 280 (Burriss decl., Ex. 7). The Burriss declaration in

support of the Notice of Violation (“NOV”) elaborated on the alleged Violation #1 as follows:

A copy of the Judgment and Sentence was provided to Mr. Ressay on 11/5/07. Mr. Ressay signed the Conditions, Requirements and Instructions form on that date agreeing to report as directed. The undersigned Community Corrections Officer called and left messages for Mr. Ressay on 3/27/08, 3/28/08 (twice), and on 4/1/08 requesting the contact this Officer and report to the Department of Corrections. The residence was also visited on 4/2/08 and a note was left for him to make contact with this Department immediately and explain why he was not responding to the message. **He has failed to respond to any of the messages.** [emphasis added].

CP 281.

12. April 17, 2008 hearing.

CCO Mr. Burriss appeared for the April 17, 2008 hearing, and stood next to the State prosecutor while it was represented to the court that Mr. Ressay had been refusing to report. CP 191, lines 6-7 and 15-18.

Mr. Burriss did not speak up to correct the declaration and notice of violation during the April 17, 2008 hearing. CP 190-199 (Morrone Decl., Exhibit 7 – transcript of April 17, 2008 court hearing).

At the conclusion of the review hearing Mr. Ressay asked what he did wrong:

THE DEFENDANT: Can I know what I did, Your Honor, to violate the order, just to know, what did I do?

MR. GROSS: Is the Court setting bail or is it remanding until - -

THE COURT: It's remanding until we have the hearing.

THE DEFENDANT: Your Honor, can I know what I did wrong, please?

THE COURT: You are in violation of probation.

THE DEFENDANT: What did I do in violation, Your Honor, just to understand?

THE COURT: You didn't report.

THE DEFENDANT: I did report, Your Honor. I did report, Your Honor. Your Honor, I didn't do anything wrong, Your Honor. Please, my mom is alone at the house.

THE COURT: That will conclude this matter. Thank you.

CP 198 (emphasis added).

Mr. Burriss was aware that Mr. Ressay was being sent to jail based on Mr. Burriss' "failure to report" allegation. CP 349, lines 12-15 (Joerres Decl., Exhibit 1, excerpts from the Steven Burriss deposition transcript, 70:12-15).

Following the hearing, Judge Spector of the King County Superior Court entered an order remanding Mr. Ressay immediately to the King County jail. CP 201.

13. May 6, 2008 hearing.

On May 6, 2008 a probation hearing was held. CP 324 (Ressy decl., ¶20). Mr. Burriss again appeared on behalf of the DOC, and stated that Mr. Ressy failed to show up at his scheduled probation check-in on April 4, 2008. *Id.* Mr. Burriss also stated that Mr. Ressy was in violation of conditions of probation for failing to check-in since March 25, 2008. *Id.*

14. Burriss' "failure to report" allegations were based on Mr. Ressy not responding quickly enough to Mr. Burriss.

Mr. Burriss prepared his Notice of Violation declaration on April 3, 2008, based on Mr. Ressy not returning Mr. Burriss' calls and messages – this was the “failure to report” as alleged by Mr. Burriss in his declaration at issue in this action. CP 350-352 (Joerres Decl., Ex. 1 – Burriss deposition transcript excerpts, at 89:23-25; 90:1-8 and 18-25; and 91:1-3). Defendants did not reveal this fact to the court at either hearing. CP 149-186, and 190-199 (Morrone decl., exhibits 5 & 7 – transcripts from the May 6 and April 17 2008 hearings).

Mr. Burriss' deposition testimony taken December 22, 2011 explains his 2008 “failure to report” allegation:

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

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

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

A. There was no specific date.

Q. So if there's no specific date, how is he supposed to know when he's supposed to report?

A. Because I left him voice messages and I left him this piece of paper on his door to contact me because he had not been doing that.

Q. What if Mr. Ressay was staying at his girlfriend's house for a few days and missed your calls and missed your notes?

A. Then Mr. Ressay was not being accountable to the Department of Corrections.

Q. Unless perhaps Mr. Kuczynski never told him or gave him instruction that he needed permission to stay at a girlfriend's house; would you agree?

A. It's possible.

Q. Do you think it's fair to have somebody thrown in jail if they don't know that they're supposed to be reporting?

A. No.

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

A. Correct.

Q. Is it's not that he missed his date that was specified in his offender accountability plan?

A. No.

CP 350 (lines 23-25) - 352 (Burriss testimony excerpts).

III. SUMMARY OF ARGUMENT

The trial court improperly viewed the evidence and inferences in a light most favorable to the moving party on summary judgment by concluding that the Burriss “failure to report” allegation was based on something other than what is contained in the record.

The main factual issues Appellant contends the trial court overlooked are: (1) Mr. Ressay did not know that defendant Burriss was his new CCO, and he did not know that he was required to be available to take Mr. Burriss’ calls; (2) Mr. Ressay did not know he was required to meet with Mr. Burriss; (3) even if the facts on re-assignment of CCO are viewed in defendants’ favor, Mr. Burriss on April 4, 2008 sent a declaration and NOV for filing with the court that misrepresented the facts on reporting status; and (4) Mr. Burriss failed to correct the record when he had the chance.

Mr. Burriss, as a purported officer of the court, had a duty to be forthcoming and honest in his representations. Mr. Burriss had opportunities to correct or withdraw his declaration testimony. Mr. Burriss chose to stay quiet. As a result, Mr. Ressay went to jail based on the false failure to report allegation, where he stayed for 60 days.

There are at least two distinct points in time that Mr. Burriss retaliated against Mr. Ressay for complaining; first, when he presented the false declaration for filing, and second, when he stayed quiet on April 17th.

A reasonable jury could draw legitimate inferences that retaliation occurred, and render judgment in Mr. Ressay's favor as to the abuse of process in retaliation for presenting grievances.

IV. ARGUMENT

A. Standard of review.

The standard of review on appeal from an order on summary judgment is *de novo*. *Sane Transit v. Sound Transit*, 151 Wn. 2d 60, 68, 85 P. 3d 346 (2004). The appellate court engages in the same inquiry as the trial court. *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 630-31, 71 P.3d 644 (2003); *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 169, 736 P.2d 249 (1987).

In assessing a motion for summary judgment, the evidence, together with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir.2001); *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn. 2d 265, 275 (1999).

“Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] ... ruling on a motion for summary judgment.” *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986). “Reasonable” inferences need not be more probable or likely than other inferences that might tilt in the moving party’s favor. Instead, so long as more than one reasonable inference can be drawn, and one inference creates a genuine dispute of material fact, the trier of fact is entitled to decide which inference to believe and summary judgment is not appropriate. *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999).

B. Applicable law on the retaliation claims.

Official reprisal for protected speech “offends the Constitution [because] it threatens to inhibit exercise of the protected right,” and the law is settled that as a general proposition the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for speaking out. *Hartman v. Moore*, 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006), citing *Crawford-El v. Britton*, 523 U.S. 574, 588, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998).

Offenders, like prisoners, have a First Amendment right to present grievances. *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir.2009); *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir.2009). “Retaliation

against prisoners [and similarly, against an offender such as Mr. Ressay] for their exercise of this right is itself a constitutional violation, and prohibited as a matter of ‘clearly established law.’” *Brodheim*, 584 F.3d 802, 806 & n.4 (9th Cir.1995). There are five basic elements for a viable claim of First Amendment retaliation:

- (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.

Brodheim, 584 F.3d at 1269 (quoting *Rhodes*, 408 F.3d at 567-68).

Plaintiff’s claims, as set forth in the pleadings, and as supported by the facts presented herein satisfy the five basic elements for a viable First Amendment claim of retaliation.

Defendants presented a false declaration to the court in response to Mr. Ressay’s grievances. The court relied on the “failure to report” allegation in ordering Mr. Ressay to jail on April 17th. CP 198. Mr. Ressay responded to Mr. Burriss’ calls and message on April 3rd. Mr. Ressay reported to the DOC on April 8th and checked in as required. Mr. Ressay did not miss a required report date. Mr. Ressay was confined in jail for 60 days, and upon release was subjected to further distress and humiliation by having to report to Mr. Burriss, the person Mr. Ressay viewed as being

primarily responsible for his 60 day confinement. Scared of further retaliation and jail time, Mr. Ressay decided to keep quiet while under DOC supervision. CP 325 (Ressay decl., ¶25).

The test for whether official conduct had a chilling effect is objective. “[T]he proper First Amendment inquiry asks ‘whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities.’ ” *Rhodes*, 408 F.3d at 568 (*quoting Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir.2000)). Consequently, a prisoner alleging a First Amendment retaliation claim “does not have to demonstrate that his speech was ‘actually inhibited or suppressed.’” *Rhodes*, 408 F.3d at 569 (*quoting Mendocino Environmental Center*, 192 F.3d at 1300).

Plaintiff has alleged sufficient facts to demonstrate that a person of ordinary firmness could be silenced in a situation such as that alleged here. This analysis flows from Ninth Circuit decisions in non-prison contexts where the retaliatory conduct took the form of investigative scrutiny or minor disciplinary action. *See Pinard v. Clatskanie School Dist.* 63, 467 F.3d 755, 771 (9th Cir.2006) (finding that the suspension of varsity basketball players who spoke out against their coach “would lead ordinary student athletes in the plaintiffs' position to refrain from complaining about an abusive coach in order to remain on the team”);

White v. Lee, 227 F.3d 1214, 1226-28 (9th Cir.2000) (finding eight month invasive investigation by the Department of Housing and Urban Development into the activities and beliefs of three individuals who opposed the conversion of a motel into a multi-family housing unit more than meets the “person of ordinary firmness” standard even though HUD did not ban or seize their materials and did not seek criminal or civil sanctions against them).

While the Ninth Circuit appears not to have specifically addressed whether the type of action alleged here would chill speech, other circuits have found such alleged action to state a retaliation claim. *See, e.g., Thomas v. Eby*, 481 F.3d 434, 435 (6th Cir.2007) (prisoner stated a claim for retaliation where corrections officer told him that she would “teach [him] a lesson” for submitting a grievance against another corrections officer and then submitted an allegedly false sexual-misconduct report against the prisoner).

In the instant case, Mr. Burriss responded to Mr. Ressay’s grievances by looking angrily at Mr. Ressay with a flushed red face stating “you are going to get a lot of people’s attention now.” CP 322, lines 10-16. Mr. Burriss then submitted a false “failure to report” allegation, and failed to correct it when he had the chance. Similarly to the

prisoner/plaintiff in *Thomas v. Eby, supra*, Mr. Ressay has presented a viable case.

C. Applying RCW 9.95.220 as a bar to Plaintiff's claims improperly assumes the motivations behind the "failure to report" allegation were pure.

The trial court ruled that RCW 9.95.220 barred Plaintiff Mr. Ressay's claims, deciding that defendants' actions were justified. CP 387-390 (*see* 389, lines 13-14). RCW 9.95.220 provides in pertinent part as follows:

Whenever the state parole officer or other officer under whose supervision the probationer has been placed **shall have reason to believe** such probationer is violating the terms of his probation [...] he shall cause the probationer to be brought before the court[.] [emphasis added]

The trial court's application of the statute as a bar to retaliation claims assumes defendants' motives were pure. The ruling also runs contrary to the facts, as Mr. Burriss talked with Mr. Ressay on April 3, 2008, rendering his declaration and "failure to report" statement false as presented.

The undisputed facts show that the "failure to report" allegation was based on Mr. Burriss' claim that Mr. Ressay failed to respond to any of his notes or messages. CP 350-352. Mr. Burriss admitted in his deposition that Mr. Ressay did in fact respond on April 3, 2008, the same

day his declaration was signed. CP 323, 357, 280-282. Mr. Burriss presented his declaration for filing on April 4, 2008, and thereafter made no attempt to set the record straight. CP 280-282, CP 149-186, and CP 190-199. Mr. Burriss was in court on April 17, 2008, and had the opportunity to set the record straight when he heard that the court was sending Mr. Ressay to jail based on a failure to report. CP 190. Instead of speaking up, Mr. Burriss chose to stay quiet.

Going back to the plain language of the statute, Mr. Burriss did not have legitimate *reason to believe* that Mr. Ressay was in violation for failure to report for not responding to his notes and messages. Mr. Ressay was sent to jail based on the court's acceptance of Mr. Burriss' representation in his April 3rd declaration. The representation of facts contained in the declaration was false. The trial court committed reversible error by ruling that RCW 9.95.220 barred Mr. Ressay's claims, and committed further error by finding the Burriss statements were not false.

D. The trial court erred by viewing facts and drawing inferences in the light most favorable to the moving party.

The drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] ... ruling on a motion for summary judgment." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986).

The trial court in the instant matter improperly made the inference that because defendant Burriss was acting in his role as a CCO, that his actions and motives must have been justified.

1. The trial court improperly ignored direct and circumstantial evidence of retaliatory animus.

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

Mr. Burriss’ statement to Mr. Ressay in response to the grievances,¹ his credibility issues, and the timeline all demonstrate that issues of fact exist for trial. Such issues include Mr. Burriss’ and Ms. Rigney’s credibility, and whether their motives were retaliatory in nature. The trial court erred by overlooking facts supportive of Plaintiff’s case,

¹ Mr. Burriss responded to Mr. Ressay’s grievances by looking angrily at Mr. Ressay with a flushed red face stating “you are going to get a lot of people’s attention now.” CP 322. This direct evidence of retaliatory animus is admissible under ER 803(a)(1)-(3), and ER 801(d)(2).

and by drawing inferences only in favor of the moving party (by assuming pure motive). The trial court further ignored other inferences that could have been drawn in Plaintiff Mr. Ressay's favor.

2. An inference of retaliation is reasonable based on Mr. Burriss' presentation of a false declaration, and his failure to set the record straight.

The timeline and admissions from defendant Burriss show that his April 3, 2008 declaration and "failure to report" allegation were based on the premises that: (1) Mr. Ressay knew he was required to report to Burriss (false), and (2) that Mr. Ressay did not respond to Burriss' notes and messages (also false).

Mr. Ressay responded to Mr. Burriss' notes and messages on April 3rd, and subsequently reported to the DOC on April 8th. Mr. Burriss made no effort to correct his declaration, and stayed quiet at the hearing on April 17th, allowing the Court to think that Mr. Ressay was essentially AWOL. This chronology of events supports an inference of retaliation in Mr. Ressay's favor. *McDonald v. Hall*, 610 F.2d 16, 18 (1st Cir.1979) (prisoner adequately alleged causation in retaliation suit by "aver[ing] a chronology of events which may be read as providing some support for an inference of retaliation").

A reasonable inference can be drawn from the facts presented that Mr. Burriss abused process and acted in retaliation when he presented his “failure to report” allegation, and then when he stayed quiet in court on April 17th when he had another chance to correct the record.

In concluding that Mr. Burriss did nothing wrong, the trial court improperly viewed the facts and drew inferences in the light most favorable to defendants, the moving party on summary judgment. “Reasonable” inferences need not be more probable or likely than other inferences that might tilt in the moving party’s favor. Instead, so long as more than one reasonable inference can be drawn, and one inference creates a genuine dispute of material fact, the trier of fact is entitled to decide which inference to believe and summary judgment is not appropriate. *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999).

The trial court drew inferences only in favor of the moving party when more than one reasonable inference could have been drawn. This error supports Appellant Mr. Ressay’s request for reversal of the trial court decision.

E. The Retaliation claim based on abuse of process distinguishes this case from the subcategory of malicious prosecution claims to which the central *Hartman v. Moore* holding applies.

In *Hartman v. Moore*, 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006), the U.S. Supreme Court held that a plaintiff in a **retaliatory-prosecution** action must plead and show the absence of probable cause for pressing the underlying criminal charges, and based its holding on the unique need to “bridge” a causation gap between the non-prosecuting government agent’s retaliatory animus and the prosecutor’s independent decision, which is accorded presumptive regularity. *Id.* at 252, 263-266.

Hartman does not apply to this case because the Court made clear a distinction between retaliatory-prosecution actions, to which the additional pleading and proof requirements apply, and “ordinary” retaliation actions to which the requirements do not apply. *Id.* at 259-262, 126 S.Ct. 1695; accord *Skoog v. County of Claskamas*, 469 F.3d 1221, 1233-34 (recognizing that *Hartman*’s absence of probable cause element applies to “a particular subcategory of retaliation claims: retaliatory prosecution claims”). Mr. Ressay’s case involves an ordinary retaliation action (based in part on abuse of process) and, therefore, *Hartman* is inapplicable.

When the facts and reasonable inferences are viewed in a light most favorable to Mr. Ressay (the non-moving party at summary judgment), no non-retaliatory ground existed for not speaking up to correct or to otherwise withdraw the “failure to report” allegation. A

reasonable inference from the facts presented by plaintiff Mr. Ressay is that Mr. Burriss acted in retaliation.

The tort of abuse of process goes to use of the process once it has been issued for an end for which it was not designed. *Batten v. Abrams*, 28 Wn. App. 737, 748, 626 P.2d 984, 990 (1981). The presence or absence of probable cause is irrelevant in assessing the merits of a given case, as the regularity or irregularity of the initial process is irrelevant. *Id.*; see also, *Peterson v. Littlejohn*, 56 Wn. App. 1, 13-14, 781 P.2d 1329 (1989), citing *1 C. Antieau, Federal Civil Rights Acts* § 143 (2d ed. 1980) (a § 1983 action is available against persons acting under color of law for abuse of process, and the presence or absence of probable cause is irrelevant).

F. Application of collateral estoppel would work an injustice.

While not ruled upon by the trial court, defendants based their motion for summary judgment in part on a collateral estoppel argument. CP 105-106. In the event the Appellate Court chooses to consider the additional grounds not ruled upon by the trial court, Appellant addresses those arguments herein.

“The doctrine of collateral estoppel prevents relitigation of an issue after the party estopped has had a full and fair opportunity to presents its case.” *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561,

852 P.2d 295 (1993). Mr. Ressay was not afforded a full and fair opportunity to present his case, as he was essentially ambushed on April 17th when faced with the false allegation that he had not been reporting to the DOC. The law is clear on the requirement for application of the doctrine that its application must not work an injustice. *Id.* at 562. The evidence of retaliation suggests collateral estoppel should not apply.

1. The issues are not identical.

Plaintiff Mr. Ressay's claims are based in part on the purported re-assignment of his caseload, the timing of the re-assignment, and the retaliation against Mr. Ressay as manifested from the timeline of events, Mr. Burriss' statement to Mr. Ressay when they discussed his grievances, the presentation of a false declaration, the factual omissions from the declaration at issue, and the failure to correct the record when it mattered most (during the two hearings). Given that Mr. Ressay did not have a full and fair opportunity to litigate his claims or these issues, summary judgment based on collateral estoppel is inappropriate (issue identity is lacking).

2. Mr. Ressay did not have a full & fair opportunity to present his case.

At the April 17th hearing Mr. Ressay was deprived of notice of the "failure to report" allegation (CP 324, 352), he did not have the ability or

the right to conduct discovery, he was unable to present evidence and witnesses, he did not have opportunities to cross-examine witnesses, and he was deprived of the provision of a final decision rendering findings of fact and conclusions of law, and the right to judicial review. It appears, therefore, that Mr. Ressay was afforded insufficient process for the resulting decision to have any preclusive effect. *See, e.g., Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 483–85 (1982) (finding process constitutionally sufficient where plaintiff had opportunity to present evidence, witnesses, and his own testimony, had the opportunity to rebut evidence, could ask for subpoenas, and could seek judicial review); *Reninger v. State DOC*, 134 Wn.2d 437, 451(1998) (procedures deemed adequate included representation by counsel who gave opening and closing arguments, examining and cross examining witnesses, discovery, and depositions under oath); *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 509–11 (1987) (procedures deemed sufficient included adequate notice).

3. The *Hanson v. City of Snohomish* case is distinct on legal and factual grounds.

The *Hanson* case (relied on by defendants in their summary judgment briefing), while generally instructive on collateral estoppel and

exceptions thereto, is far from on-point for purposes of a dismissal in favor of defendants.²

Plaintiff Mr. Ressay is not suing the police or prosecutors for malicious prosecution. Probable cause is also not at issue in this lawsuit, and it was not argued during the 2008 hearings. While Mr. Ressay was put in jail, he was not convicted of any new crimes. Even if determinations made at the two hearings are viewed as convictions, the evidence now presented by Mr. Ressay of fraud, perjury or other corrupt means eliminates the defendants' argument for applying collateral estoppel. *Hanson*, 121 Wn.2d at pages 556, and 561-562 (application of the doctrine must not work an injustice).

4. Application of collateral estoppel would work an injustice.

Plaintiff Mr. Ressay should not be collaterally estopped from seeking justice in this matter as he did not have an unencumbered, full and fair opportunity to litigate his claims at either hearing. *Allen v. McCurry*, 449 U.S. 90, 100-01 (1980).

² The court in the *Hanson* decision made clear that they were affirming on a different theory than the trial court. *Id.* at 297-298. Specifically, the Supreme Court made clear that their analysis started and ended with (1) the recognition that malicious prosecution actions are not favored, and (2) that malice and want of probable cause constitute the gist of a malicious prosecution action. *Id.* at 558. Mr. Ressay has not asserted malicious prosecution claims.

Once he was put in jail on April 17th, based on the “failure to report” allegation, Mr. Ressay was essentially ham-strung in preparation, and had nothing to do but wait for the next round on May 6th. CP 325-326 (Ressay decl., ¶¶25-26). But for the false “failure to report” allegation, Mr. Ressay would not have been placed in jail. If Mr. Ressay had remained free back in 2008, he would likely have been able to promptly demonstrate to the court that all the charges against him were false.

G. Absolute immunity is not warranted.

CCO Steven Burriss, and defendants collectively, argued to the trial court in their summary judgment motion that they were entitled to absolute immunity as officers of the court (claiming quasi-judicial immunity). CP 124-125. Mr. Burriss (and the other defendants) should be held to a similar standard as other officers of the court if that is the capacity in which he claims to have acted.

As a purported officer of the court, Mr. Burriss had an obligation and a duty to exercise candor and honesty towards the tribunal to avoid conduct that undermines the integrity of the adjudicative process. In other words, Mr. Burriss offered material evidence as a complaining witness when he presented a declaration against Mr. Ressay alleging a failure to report.

Mr. Burriss knew as of the April 17, 2008 hearing that his declaration was false. Mr. Burriss had a duty to promptly disclose the false declaration to the court, yet he failed to do so either before or during the hearing. As a result, Mr. Ressay was sent to jail on the mistaken premise that he had failed to report as alleged in the Burriss declaration.

Absolute immunity necessarily leaves wronged claimants without a remedy. This runs contrary to the most fundamental precepts of our legal system. Therefore, in determining whether a particular act entitles the actor to absolute immunity, courts must start from the proposition that there is no such immunity. *Lutheran Day Care v. Snohomish County*, 119 Wn. 2d 91, 105-106 (1992), *citing Butz v. Economou*, 438 U.S. 478, 506 (1978) (“No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.” (*quoting United States v. Lee*, 106 U.S. 196, 220 (1882))).

Quasi-judicial immunity will only extend to those functions that parole officers perform that are an integral part of a judicial or quasi-judicial proceeding. *Hertog, ex re. S.A.H. v. City of Seattle*, 138 Wn.2d 265 (1999) (quasi-judicial immunity may apply in *negligence* actions). Retaliating against a person in violation of their First Amendment

Freedoms is not a function integral to a judicial proceeding (nor is it an act of negligence). Retaliation against an offender is also plainly not within the legitimate powers of the DOC. In short, quasi-judicial immunity is inapplicable because (1) the DOC declaration was false; and (2) defendants failed to provide all material information to the court and failed to set the record straight when the opportunity arose. *Estate of Jones v. State*, 107 Wn. App. 510, 520 (2000).

Retaliation is distinct from a negligence claim. While the issue is rare, courts have recognized the basic concept that quasi-judicial immunity is “not a license to commit intentional torts.” *Pension Advisory Group, Ltd. v. Country Life Ins. Co.*, 771 F. Supp. 2d 680, 700 (S.D. Tex. 2011), citing *Ball v. Xidex*, 967 F.2d 1440, 1445 (10th Cir.1992).

Because Mr. Ressay's claims are primarily based on the intentional tort of retaliation, defendants should not be afforded the cloak of absolute immunity. Precedent supports this position. *Kalina v. Fletcher*, 118 S.Ct. 502 (1997) (prosecutor may be liable under §1983 when the prosecutor has stepped into the functional role of a “complaining” witness). Mr. Burriss was a complaining witness when he presented his “failure to report” allegation; immunity does not apply.

Quasi-judicial immunity attaches to persons or entities who perform functions that are so comparable to those performed by judges

that it is felt they should share the judge's absolute immunity while carrying out those functions. *Lutheran Day Care*, 119 Wn. 2d 91, 99-100 (1992), citing *Butz v. Economou*, 438 U.S. 478, 512-14 (1978). It should be made clear, however, that such immunity is not to be confused with absolute *judicial* immunity. *Lutheran Day Care*, 119 Wn. 2d at 99-100. The phrase "quasi-judicial" employs the word "judicial" only in comparing the *function* of a nonjudicial person or entity to the functions of a judge. *Id.* True judicial immunity of judges and of those to whom courts have extended judicial immunity are not involved here, as we are dealing with an intentional tort.³ It is also important to note that the main Burriss/Rigney allegation at issue was not prepared at the direction of the court.

Only when the person claiming absolute immunity can prove that such immunity is justified will it be imposed. *Lutheran*, 119 Wn.2d at 105-106; see also, *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432

³ In stressing a careful analysis of the facts of each case, the Court in the *Lutheran* case, *supra*, states, "[t]hus, strict reliance on case law to determine the extent of immunity carries the risk of finding immunity based on the fact that the function being performed has been characterized as "quasi-judicial" in a prior case which may have concerned entirely different issues and in which the court did not have reason to consider the policy implications of absolute immunity. Such reliance also carries with it the risk of finding immunity based on analogy to a case where the title held by the relevant official is the same as the one at issue, but the functions, procedures, and inherent protections available are quite different." *Id.* at 100-101.

(1993); *Lallas v. Skagit County*, 167 Wn.2d 861 (2009) (act of restraining defendant was not an integral part of judicial proceeding); *Tyner v. State, Dept. of Social and Health Services, Child Protective Services*, 92 Wn. App. 504 (1998), *affirmed in part and reversed in part*, 141 Wn. 2d 68 (2000) (absolute immunity does not apply where government employee controls the flow of information to the court or where incomplete information is provided); *see also, Estate of Jones v. State, supra*, (quasi-judicial immunity does not apply where defendant fails to provide all material information to the court).

Statutory immunity under RCW 9.94A.704(10) does not apply because returning Mr. Burriss' phone calls and messages prior to April 3, 2008 was neither possible under the circumstances, nor was it a term or condition of community supervision (Mr. Ressay was not notified by the DOC of any change in assigned CCO prior to the time that Mr. Burriss executed his declaration, and while Mr. Ressay actually did return the calls and messages on April 3rd, it was apparently not important to Mr. Burriss' for purposes of clarifying things with the court – a fact supporting the inference of retaliation).

Plaintiff's claims involve an intentional tort. There is no justification for retaliation. The facts presented in opposition to summary

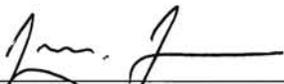
judgment established genuine issues for trial; it was error to dismiss the case.

**IV. CONCLUSION AND REQUEST
FOR ATTORNEY'S FEES UNDER RAP 18.1**

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

Appellant further requests that Respondents/Defendants be ordered to pay costs including reasonable attorney's fees, expert fees, and other costs and expenses to the Appellant pursuant to RAP 18.1 and 42 U.S.C.A. § 1988. RAP 18.1(a) provides in pertinent part that, "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses[.]" 42 U.S.C.A. § 1988(b) provides in pertinent part that "[i]n any action or proceeding to enforce a provision of sections [...] 1983 [...] of this title, [...] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs[.]"

Respectfully submitted this 7th day of September, 2012.



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AFFIDAVIT OF SERVICE

On this 7th day of September 2012, I filed the foregoing Brief of Appellant with the Court of Appeals, Division I. The foregoing Brief was served on all parties as follows: HAND DELIVERED to counsel for defendants, by leaving a copy with the receptionist at his office:

Jon R. Morrone, Assistant Attorney General
Office of the Attorney General – Tort Division
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Seattle, WA 98104-3188

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

By: 
Joshua M. Joerres

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I