Hon. Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

TERRY ELLIS, *et al* Plaintiffs, v. **CLARK COUNTY DEPARTMENT OF CORRECTIONS, CLARK COUNTY, *et al*** Defendants	**NO. 3:15-cv-05449** Plaintiffs' Reply to Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment

DEFENDANTS' ARGUMENTS REGARDING PLAINTIFFS LENTZ, GAVIN, FULLER AND KRAVITZ LACK FACTUAL SUPPORT

Defendants argue there are questions of fact whether individual plaintiffs Lentz, Fuller, Gavin and Kravitz had their possessions taken by Defendants. Plaintiffs addressed this issue in their Response to Defendants' Motion for Summary Judgment, Dkt# 45, starting at p. 3 "Argument against specific plaintiffs". Plaintiffs incorporate that discussion here. It can be summarized by saying there is sufficient direct and circumstantial evidence from which a reasonable jury could conclude the Clark County Corrections Work Crews took the property of each plaintiff and there is no evidence to the contrary.

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Defendants must show there are some contrary facts to raise a dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256,106 S.Ct.2005, 2514 (1986). Defendants have not presented any facts showing some other person or agency removed Plaintiffs' property. Merely questioning the Plaintiffs' credibility is not sufficient to create a material question of fact. *Id.* There remain no questions of fact whether Defendants were the ones who removed the property of Plaintiffs Fuller, Gavin, Lentz and Kravitz. They are entitled to summary judgment on their claims.

DEFENDANTS FAIL TO PRESENT ANY FACTS INDICATING PLAINTIFFS ABANDONED THEIR PROPERTY

Defendants claim Plaintiffs "have failed to show that there is not a dispute of material fact regarding whether the allegedly lost property was abandoned, nor what standard this Court should apply to determine if property was 'un-abandoned' as a matter of law." Dkt. 47, p.3:15-18.

"Property is abandoned when the owner intentionally relinquishes possession and rights in the property." *State v. Kealey*, 80 Wn. App. 162, 171, 907 P.2d 319, 325 (Div. 2, 1995), *as amended on denial of reconsideration* (Feb. 26, 1996)(citing 1 AmJur 2d, Abandoned, Lost and Unclaimed Property, §§11-13).

Abandonment is determined by the intent of the owner and the "inquiry should focus on whether, through words, acts or other objective indications, a person has relinquished a reasonable expectation of privacy in the property at the time of the search or seizure." *Lavan v. City of Los Angeles*, 797 F.Supp.2d 1005, 1013 (C.D. Ca. 2011)(internal citations omitted), affirmed 693 F.3d 1022.

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Plaintiffs all stated that at the time their property was taken, they had not abandoned it. *See*, Plaintiffs' declarations, Dkt. 38 #s 2 – 9, at ¶ 3. Each also showed that they returned to the location where they had left the property to find it gone or being removed by the work crew, thus indicating an intent to retain ownership of the property.

Plaintiffs Ellis, Bradish, Lentz, Sparks, and Kravitz[1] all tried to intervene with the work crew to stop having their property taken or to request its return. By these actions they showed they had not abandoned the property. Mr. Fuller's and Mr. Ellis' property was contained in their backpacks when taken. Some of Mr. Kravitz' property was contained in a backpack which he left at his camping site during the December 2012 incident. Mr. Mee's property included a rolling suitcase. Courts have ruled that items such as luggage, briefcases and purses, "constitute traditional repositories of personal belongings protected under the Fourth Amendment". *State v. Kealey*, *supra*, 80 Wn. App. at 170, 907 P.2d at 324. A backpack is a form of luggage, or at the very least is an easily recognized "repository of personal belongings".

Joe Hillstead, a former work crew member, stated that on several occasions when the work crew picked up property from what appeared to be a camp site, the property did not appear to be abandoned. When clearing Esther Short Park and other locations in Vancouver, the crew was instructed to look for and remove property which people had hidden in bushes. Dkt. # 38-10.

[1] In Mr. Kravitz' case, during the first incident when his property was taken in August 2012, he and his camping mates attempted to prevent having their property taken but were threatened with arrest. He was not present the second time his property was taken. Dkt 38-6.

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The circumstances of each Plaintiff's individual case indicate they did not intend to permanently give up control or ownership of their property. At most, they had temporarily left the property unattended.

Defendants seem to argue that "unattended" should be considered "abandoned". However, the words have obviously different meanings. "Unattended" means "not watched, lacking accompaniment or a guard or escort". *Webster's online dictionary,* (www.webster-dictionary.org). Leaving something unattended does not necessarily indicate an intent to permanently give up ownership or control. Defendants have not provided any facts from which a jury could reasonably conclude the plaintiffs intended to give up control or ownership of their property. Because there are no material issues of fact on this issue, Plaintiffs are entitled to summary judgment in their favor. *Anderson v. Liberty Lobby, supra.*

DEFENDANTS' ARGUMENTS ABOUT DUE PROCESS LACK LEGAL AND FACTUAL SUPPORT

Defendants argue the existence of the Washington State Tort Claim Act provides sufficient post-deprivation process to satisfy their due process obligations to the Plaintiffs. Plaintiffs addressed this issue in their Response to Defendants' Motion for Summary Judgment, Dkt# 45, starting at p. 15 "Argument against Due Process claim". Plaintiffs incorporate that discussion here.

Defendants assert that the original Work Crew policy in place before June of 2013 "allowed only for the disposition of 'abandoned' property". Dkt 47, p. 4:11. This is inaccurate. The procedures to implement this policy expressly stated "if a camp has been

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abandoned **or there is no one currently at the site** immediately clean the camp and restore the area." Dkt. 38-18 (emphasis added). Based on this policy the work crews' explicit instructions were to clean a homeless/transient camp regardless of whether the camp was abandoned or merely temporarily unattended. Furthermore, the procedure required that if the camp was occupied the work crews were to tell the people present that they had one hour to leave the area, and any property left behind would be disposed of. *Id*. Property left behind was to be disposed of, even if not abandoned.

Testimony of Defendants Harper and Miller as well as the declarations of Plaintiffs Ellis and Fuller further established that the practice of Work Crews, based on interpretation of official policy, was to remove and dispose of *all* personal property the crews came across, regardless of whether it was located in a "camp" or determined to be abandoned. (Dkt. # 37, pp. 9-10.)

Contrary to Defendants' argument, on its face the original (2012) policy and practice treated all unattended property as subject to disposal. Municipalities violate the Fourth Amendment when they treat unattended property in this manner. *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1027-1029 (9th Cir. 2012). As such, Clark County's policy violated the constitutional rights of Plaintiffs Ellis, Gavin, Kravitz, Lentz and Mee. Furthermore, the County employees who took (or directed work crews to take) these Plaintiffs' property were acting in accordance with the County's established policy, not, as Defendants assert, acting outside of it.

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Defendants are correct that the policy was changed in 2013 to one that admonished work crews **not** to take property from homeless/transient camps. Dkt. 38-19. However, the uncontested facts show the work crews continued to take and dispose of property in and out of homeless/transient camps even after that date. Dkt. 38-2 (Samuel Bradish declaration), 38-4 (Ronald Fuller declaration); 38-9 (Todd Sparks declaration), 38-8 (Christopher Mee declaration), 38-10 (Hillstead dec.), 38-11 (Chumley dec.).

Defendants argue that because the written policy was changed in 2013, any confiscation of personal property by work crews after that date must be the "unauthorized act" of a Crew Chief. Dkt. 47, p. 4. But it was not until Defendant Biffle conducted a training on the new policy for the work crew chiefs and leads that the practice actually changed. Dkt. 38-13, Biffle dep. 59-60, 69. Ms. Biffle recognized in October 2015 that crew chiefs were continuing to follow old practices and had not been adequately trained in the new policy. *Id.*

Defendants argue that Plaintiffs' claims can be characterized as alleging only a due process violation. Dkt 42, p. 10:26-28, Dkt 47, p. 3:22-23. To the contrary, Plaintiffs have alleged violations of the Fourth and Fifth Amendments as applied to the states by the Fourteenth Amendment and of the Fourteenth Amendment. *Amended Complaint*, Dkt. 22, p. 17. In their motion for summary judgment Plaintiffs made it clear they are asking the court to find Defendants liable for violation of their Fourth Amendment right to protection from unreasonable seizure. Dkt. 37 p. 12:14-13:10. Defendants have presented no facts and do not make an argument that their actions withstand the Fourth

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Amendment's reasonableness requirement. For that reason, Plaintiffs are entitled to summary judgment finding Defendants liable for unreasonably seizing and destroying their property in violation of the Fourth Amendment. *Lavan, supra* at 1030.

Defendants cite to *Parrat v. Taylor* for support of their position that post-deprivation process is sufficient due process. However, the holding in *Parrat* is limited to instances where the government officials acted in "random, unpredictable, and unauthorized ways." *Zimmerman v. City of Oakland*, 255 F.3d 734, 738 (9th Cir. 2001). Specifically the existence of post-deprivation remedies will not "save an otherwise unconstitutional act from unconstitutionality in cases in which the state officer acted pursuant to some established procedure." *Id*. [citing *Hudson v. Palmer*, 468 U.S. 517, 534 (1984)]. The 9th Circuit has held that an action cannot be either random, unpredictable or unauthorized when it is done pursuant to an established "law, regulation or institutionalized practice." *Haygood v. Younger*, 769 F.2d 1350, 1357 (9th Cir. 1985).

Parrat is not applicable to this case. Plaintiffs Ellis, Gavin, Kravitz, Lentz and Mee had their property taken pursuant to an established policy of the County. Plaintiffs Fuller, Sparks and Bradish had their property taken pursuant to an institutionalized practice of the County's Work Crew Program. Neither an established policy nor an institutionalized practice can be deemed to be "random, unpredictable, and unauthorized." *Id*. Therefore, Defendants cannot shield themselves from liability under *Parrat*.

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Parrat dealt with the case of negligent actions of jail employees in improperly failing to deliver a mailed hobby kit to an inmate, contrary to written procedures. The present case alleges intentional disposal of multiple plaintiffs' personal property, some of which was highly personal and irreplaceable, by County employees following an explicit County policy. *Lavan* makes it clear that homeless individuals have a substantive right to due process which requires at a minimum some form of notice and opportunity to be heard before a municipality takes and destroys their property. *Lavan, supra* at. 1031-1032. *Parrat* does not apply to substantive due process rights. *Smith v. City of Fontana*, 818 F2d, 1411, 1415 (9th Cir 1987) rev'd on other grounds, *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999).

It is undisputed that Defendants provided no process allowing Plaintiffs notice or opportunity to prevent their property from being confiscated and destroyed by the County work crews. Even those plaintiffs who were present and requested return of their property or tried to prevent its confiscation were rebuffed.

The *Parrat* exception does not apply. The only evidence in the record shows Defendants, under color of law, unreasonably seized Plaintiffs' property in violation of Plaintiffs' Fourth Amendment rights. The undisputed facts also show Defendants, acting under color of law, violated Plaintiffs' substantive due process right to notice before being deprived of their property by a government agent. The Court should grant Plaintiffs' motion for summary judgment and find Defendants liable under Section 1983 for taking Plaintiffs' property in violation of Plaintiffs' Fourth, Fifth and Fourteenth amendment rights.

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DEFENDANTS HAVE NOT RESPONDED TO PLAINTIFFS' CLAIMS FOR CONVERSION

Defendants have not responded to Plaintiffs' claims for conversion. There are no facts in dispute that Defendant County through its employees and specifically through Defendant Miller wrongfully interfered with Plaintiffs' possession of their property. Plaintiffs are each entitled to summary judgment on this claim.

DATED this 19th day of August, 2016.

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