SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

JEFFREY BEST, DANIEL CAMPOS and GARY DALE HUTT, on behalf of themselves and all others similarly situated and GREGG HANSEN,	)	
Plaintiffs,	)	No. 04 2 00189 0
vs.	)	**MEMORANDUM DECISION**
GRANT COUNTY, a Washington County,	)	
Defendant.	)	

INTRODUCTION

On September 30, 2005 the parties argued cross-motions for summary judgment, more fully described herebelow. The court thereafter took the matter under advisement to consider the arguments of the parties and review the supporting materials.

DISCUSSION

1. Background. On August 26, 2004 by memorandum decision this court granted the plaintiffs' motion to certify this litigation as a class action against Grant County in the quest to seek injunctive and declaratory relief to protect the constitutional right of effective assistance of counsel of all present and future indigent criminal defendants in Grant County. On September 13, 2004 the court signed the order granting for class certification. Since that time the parties

have been engaged in very extensive and contentious discovery requiring several court hearings and producing probably the largest, most voluminous[1] court file in the history of the Kittitas County Superior Court.

The plaintiffs seek partial summary judgments regarding the Grant County public defender system status, both before the filing date of this lawsuit of April 4, 2004 and with regard to the system since the date of filing. They contend there is no issue of material fact and that they are entitled as a matter of law to a declaration by this court that the Grant County public defender system, both before and after the filing of this lawsuit resulted in the rendering of ineffective assistance of counsel for indigent defendants. The defendants counter the plaintiffs' motions with their own motion for summary judgment of dismissal essentially contending the pre-filing facts surrounding the Grant County public defender system are irrelevant and that there is no evidence under the present new 2005 contract to show there has been a denial of effective assistance of counsel or that there is evidence to suggest a well-grounded fear of immediate harm under the 2005 contracts, thereby providing no basis to establish that Grant County's current public defender system is resulting or will result in actual or substantial injury to the plaintiffs' right to effective assistance of counsel.

2. Law of Summary Judgment. The purpose of a summary judgment is to avoid a useless trial. However, a trial is required and summary judgment must be denied whenever there are genuine issues of material fact. CR 56(c); Jacobsen v. State, 89 Wn.2d 104 (1977). Material facts are those facts upon which the outcome of litigation depends, either in whole or in part. Harris v. Ski Park Farms, 120 Wn.2d 727, 729 (1993). In a summary judgment the burden is always on the moving party regardless of where the burden would lie in the trial of the matter. Peninsula Truck Lines, Inc. v. Tooker, 63 Wn.2d 724 (1961). In ruling on a motion for summary judgment the court must consider all of the evidence and all reasonable inferences from the evidence in favor of the non-moving party. CR 56(c); Ohler v. Tacoma General Hospital, 92 Wn.2d 507 (1979). Summary judgment should be granted only if there is no genuine issue of material fact or if reasonable minds can reach but one conclusion on that issue based on the evidence construed in a light most favorable to the non-moving party. White v. State, 131 Wn.2d 1, 9 (1997); Weatherbee v. Gustafson, 64 Wn.App. 128 (1992).

[1] Boxes.

3. Law Regarding Declaratory Judgments and Injunctive Relief. This action is for injunctive and declaratory relief. A party seeking an injunction must show a clear, legal or equitable right, a well-grounded fear of invasion of their right, and actual substantial injury if the acts complained of are permitted to continue. In exercising its equitable power, the court should balance the relative interests of the parties and of the public, if appropriate. Tyler Pipe Industries v. Department of Revenue, 96 Wn.2d 785, 792 (1982); Port of Seattle v. International Longshoremen's and Warehousemen's Union, 52 Wn.2d 317, 319 (1958); Isthmian S.S. Company v. National Marine Engineer's Beneficial Association, 41 Wn.2d 106 (1952). Declaratory relief is appropriate if there is either an issue of major public importance or a judiciable controversy. Nollette v. Christianson, 115 Wn.2d 594, 598 (1990); Superior Asphalt v. Labor and Industries, 121 Wn.App. 601, 606 (2004).

4. Decision. Here, the plaintiffs allege the class members face a well-grounded fear their rights to effective assistance of counsel will be violated, to their profound injury. First, there is no dispute that the class members have a clear, legal and equitable right to effective assistance of counsel. Article 1, Section 22 of the Washington State Constitution; Sixth Amended to the United States Constitution; State v. Long, 104 Wn.2d 285, 288 (1985). A right to effective assistance of counsel is inherent in the guarantee of counsel and is essential to a fair trial. Strickland v. Washington, 466 U.S. 668, 685 (1984). The real issue presented is whether the class plaintiffs had and have a well-grounded fear of immediate invasion of their right to effective assistance of counsel.

It is undisputed that prior to this litigation being filed in April 2004, the caseloads of the Grant County Public Defenders were excessively high and exceeded any advisory guideline for caseload limits. It is also undisputed that Grant County did not provide meaningful supervision over the public defender system and that the Grant County Prosecutor's Office interfered with the ability of the public defenders to seek funds for retaining investigators and/or expert witnesses independent of the remuneration provided by contract for the public defenders. In fact, essentially all of the statement of facts outlined in plaintiffs' motion for partial summary judgment in paragraph II are uncontested. Moreover, regardless of whether one is of the opinion that the facts point to ineffective assistance of counsel and a well-grounded fear of continued invasion of that right or whether they simply point to a "terrible" public defense system is not the point on the request for injunctive relief. Evidence of past practices is certainly relevant and

admissible where there exists a possibility that the practices will continue and /or occur again. Braam ex. rel. v. State, 150 Wn.2d 689, 708, 709 (2003). The systemic deficiencies of the pre-filing public defense system in Grant County certainly created an atmosphere in which the class plaintiffs developed a well-grounded fear of immediate invasion of their respective rights to effective assistance of counsel and is evidence of an ongoing concern. The court should grant the class plaintiffs' motion for partial summary judgment on the pre-filing period but only as outlined above.

With respect to post-filing motion for partial summary judgment, the court makes similar observations. What the county did subsequent to the filing in hiring attorneys after April 4, 2004 and under the present 2005 contract is uncontested. Determining from that evidence as a matter of law, however, that the class plaintiffs are receiving ineffective assistance of counsel and will continue to do so and that the court should just focus on the remedies is beyond what this court is willing to do at this time. The court will grant the plaintiffs' motion for partial summary judgment regarding the Grant County public defense system after April 4, 2004 to the extent that the facts allow the court to conclude the atmosphere in which the class plaintiffs are being represented still creates a well-grounded fear of immediate invasion of the right to effective assistance of counsel.

The court by granting "partially" the class plaintiffs' motions for partial summary judgment is not ruling in favor of the class plaintiffs on their request for declaratory judgment that as a matter of law the Grant County Public Defender system deprives class plaintiffs of effective assistance of counsel. Creating an atmosphere in which there exists a well-grounded fear of immediate invasion of the right to effective assistance of counsel is not, at least in the court's mind, the same as owning a public defense system which in fact denies class plaintiffs of the effective assistance of counsel.

Having determined the plaintiffs' motions for partial summary judgment should be "partially" granted at this time, before the court addresses the defendant's motion, allow the court to advance the premise that it views the facts as to the actions of the county both before and after April 4, 2004 as being virtually uncontested; that the Grant County public defender system prior to April 4, 2004 suffered from systemic deficiencies and continues to suffer from problems after this action was filed; and that efforts with the 2005 contract have improved somewhat the conditions that existed prior to the institution of the lawsuit. The interrelationship of Grant

County Resolution No. 97-29-CC, the *Washington Defender Association Standards for Public Defense Services* and the *ABA Ten Principles of a Public Defense Delivery System* should form the basis for the court to determine how to eliminate that fear and prevent substantial harm from manifesting in actual ineffective assistance of counsel to the class defendants. Since the guidelines above referenced are advisory there is room to devise a Chevrolet system as opposed to a Cadillac system to meet the constitutional obligation to provide effective assistance of counsel. The focus of the trial should be on devising that system.

Turning now to the defendant's motion for summary judgment, this court denies the same. The court does not believe the Strickland test of Strickland v. Washington, supra is the appropriate test to apply to determine whether the Grant County public defender system creates an atmosphere in which there exists a well-grounded fear of immediate invasion of the right of effective assistance of counsel as an institution. Certainly on a case by case basis post-conviction relief complaining of ineffective assistance of counsel must apply the Strickland test. Here, however, complaint of the class is the ultimate systemic failure of the system and only prospect of relief is being sought to fix the system. As such, class plaintiffs do not have to demonstrate individual prejudice.[2]

CONCLUSION

Based on the foregoing, please present appropriate orders to reflect the court's decision[3].

DATED: October 14, 2005

JUDGE

[2] See Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988), *cert. denied*, 495 U.S. 957, L.Ed. 2d 744, 110 S.Ct. 2562 (1990). See also Kenney A. ex. rel. Winn v. Perdue, 357 F.2d 1353, 1362 (N.D.Ga. 2005); see Nicholson v. Williams, 203 F.Supp. 2d 153, 240 (E.D. N.Y. 2002). (With respect to the declaratory judgment aspect of this case, however, see the court's discussion above).

[3] Please heed the court's observation that many of the facts are uncontested. In effort to streamline the presentation during trial would certainly be appreciated, even to the point of developing a stipulation that would obviate the need for witnesses to be required to testify to give the uncontested facts.