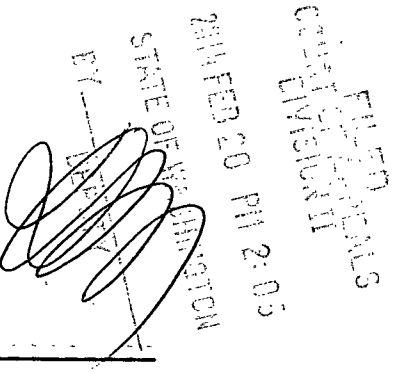
NO. 45542-1-II

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

STEVEN P. KOZOL,
Appellant,

vs.

KING COUNTY,
Respondent.



ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY
HONORABLE STEPHANIE A. AREND

APPELLANT STEVEN P. KOZOL'S OPENING BRIEF

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ORIGINAL

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INTRODUCTION

A party electing to employ the alternate means of service by mail of its reply on summary judgment must comply with the time requirements of both CR 56(c) and CR 6(e).

A requestor bringing a civil action against a state or local agency for violation of Washington's Public Records Act, chapter 42.56 RCW, has a period of one year to file suit, under RCW 42.56.550(6), from the time the agency last responds to the requestor's most recent follow-up request or from the date such request was submitted.

A court should not, as a matter of law, make a factual determination of a clearly identified follow-up records request, seeking a new class of records, by interpreting the request to impose consequences which are implicated by wording not mentioned in the document.

Where a plaintiff moves to amend the complaint, to conform to evidence tried by implied or express consent of the parties, such amendment shall be freely granted, and is virtually automatic, in the absence of a showing of specific prejudice to the nonmoving party that cannot be cured by a continuance.

ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred in denying Mr. Kozol's motion to strike King County's untimely Reply on Summary Judgment and the supporting Second Declaration of Kristie Johnson.

Assignment of Error No. 2: The trial court erred in granting summary judgment dismissal of Mr. Kozol's claims that King County violated the Public Records Act, chapter 42.56 RCW.

Assignment of Error No. 3: The trial court erred in denying Mr. Kozol's motion to amend the complaint.

ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

Issues Pertaining to Assignment of Error No. 1:

Issue 1.1: Did Mr. Kozol have the right to do some act or take some further proceeding within the 5-calendar days prescribed by CR 56(c)?

Issue 1.2: Does the filing of a motion to amend complaint and a motion to shorten time constitute a "further proceeding" under CR 6(e)?

Issue 1.3: Is a party being served by mail with a moving party's reply on summary judgment entitled to have an additional 3 days, to act or take further proceedings under CR 6(e), to be added to the 5-day period prescribed by CR 56(c)?

Issue 1.4: Is a bi-directional or a backwards-only counting method applied when computing the time periods in CR 56(c) and CR 6(e)?

Issue 1.5: Is the interplay between the requirements of CR 56(c) and CR 6(e) vague and confusing so as to require judicial clarification?

Issue 1.6: Did the trial court err in denying Mr. Kozol's motion to strike King County's Reply on summary judgment and the supporting Second Declaration of Kristie Johnson?

Issues Pertaining to Assignment of Error No. 2:

Issue 2.1: Was the issue of the mailing and receipt of Mr. Kozol's May 22, 2011 follow-up request material to the decision on summary judgment?

Issue 2.2: Did Mr. Kozol present sufficient evidence of mailing to invoke presumption of receipt?

Issue 2.3: Was King County's evidence insufficient to rebut presumption of receipt of the May 22, 2011 follow-up request?

Issue 2.4: Did a genuine issue of material fact preclude summary judgment?

Issue 2.5: Did the trial court improperly determine, as a matter of law, that the May 27, 2011 follow-up request was not requesting any additional search or production of any additional documents?

Issue 2.6: Did the trial court err in finding Mr. Kozol's May 22, 2011 follow-up records request to be analogous to the administrative appeal in Greenhalgh v. Department of Corrections, 170 Wn.App. 137 (2012), and therefore failed to toll the statute of limitations to file suit?

Issue 2.7: Is a follow-up request materially different than an administrative appeal for purposes of calculating the statutory time limit for a requestor to commence an action under the Public Records Act?

Issue 2.8: Under the Public Records Act, is an agency empowered to classify and/or treat a clearly identified follow-up request as an administrative appeal when it benefits the agency's litigation interests?

Issues Pertaining to Assignment of Error No. 3:

Issue 3.1: Was King County's failure to formally state an objection to the May 22, 2011 follow-up letter a waiver of its right to object?

Issue 3.2: If King County did properly object to the May 22, 2011 follow-up letter, was amendment under CR 15(b) nevertheless to be allowed "freely" to present the merits of the action?

Issue 3.3: Was the issue of the May 22, 2011 follow-up letter tried by express or implied consent of the parties, resulting in virtually automatic amendment under CR 15(b)?

Issue 3.4: Did King County establish prejudice sufficient to preclude amendment of the complaint that could not be cured by granting a continuance?

Issue 3.5: Should the requested amendment be permitted to relate back pursuant to CR 15(c)?

Issue 3.6: Did the trial court err in denying Mr. Kozol's motion to amend the complaint to conform to the evidence pursuant to CR 15(b)?

STATEMENT OF THE CASE

In March 2009, a person confessed to committing the crimes Mr. Kozol has been wrongfully convicted of and incarcerated for since November 2000. In this confession, it was revealed that the assailant had lost a wristwatch at the crime scene while struggling with the victim. Clerk's Papers (CP) at 115.

Neither Mr. Kozol nor his trial attorney had been informed prior to trial that the police had seized this watch at the crime scene. CP 115. Through new counsel, Mr. Kozol inquired to the King County Prosecuting Attorney's Office (KCPAO) if such a watch existed. Upon acknowledgment by the KCPAO that the watch did exist, Mr. Kozol requested complete forensic testing of the watch, and of the original

confession letter and envelope. The KCPAO agreed to conduct full forensic testing of this new evidence. CP 116.

After waiting approximately one year Mr. Kozol was finally informed by the KCPAO that testing revealed zero fingerprint or DNA evidence on the watch, confession letter and envelope. Upon Mr. Kozol's submission of several letters challenging the truthfulness of the KCPAO's assertions, the County responded by refusing to conduct any further investigation into this matter. CP 116.

Mr. Kozol then submitted Public Records Act requests to the KCPAO for all documents related to the watch, including forensic testing allegedly conducted. The KCPAO only produced 5 pages of records and claimed no other responsive records existed. The KCPAO did not provide any records on an installment basis or claim any exemptions from production. CP 116-117.

Mr. Kozol submitted a follow-up records request to the KCPAO dated May 22, 2011, requesting a further comprehensive search be conducted and that all records in the KCPAO's case file No. 00-1-09050-8KNT be provided. CP 136. Having received no reply, Mr. Kozol filed a civil complaint in Pierce County Superior Court on March 7, 2012, CP 78-79, and a First Amended Complaint on June 6, 2012. CP 90-91.

Over the next year, in responding to Mr. Kozol's interrogatories and requests for production, the KCPAO identified and produced additional documents responsive to Mr. Kozol's first two PRA requests. CP 107-108. The court granted Mr. Kozol's motion to set a trial date, which was opposed by the County.

On August 7, 2013, the County moved for summary judgment and dismissal, claiming Mr. Kozol's action was time-barred pursuant to the new ruling in Bartz v. Department of Corrections, 173 Wn.App. 522, 297 P.3d 737 (2013). CP 92-96. In response, Mr. Kozol argued the mailing of his May 22, 2011 follow-up request extended the time under RCW 42.56.550(6) for him to bring suit, thus rendering Bartz inapplicable. CP 101. Supporting this response was the sworn declaration of Isabelle Sanabria, an independent third-party who had photocopied the May 22, 2011 follow-up request prior to mailing it to the KCPAO for Mr. Kozol on May 25, 2011. CP 111-114.

In its reply, the County argued it had not received the May 22, 2011 follow-up request. CP 224. In support of its reply, the County filed the Second Declaration of Kristie Johnson, the former public records officer who attested to not recalling having received the May 22, 2011 request, and that there was no indication, in unidentified locations, of the request being received. CP 231-232.

At oral argument, Mr. Kozol moved to strike the County's reply on summary judgment and the second Johnson declaration as untimely served. Report of Proceedings (RP) 1, at 5-6. The motion was denied. RP1, at 7. The County argued that the May 22nd letter was not presented in the pleadings, RP1, at 10, and that under Greenhalgh v. WDOC, 170 Wn.App. 137 (2012), Mr. Kozol's May 22nd letter was more akin to an administrative appeal, thus rendering Mr. Kozol's suit as time-barred. RP1, at 11-12. Mr. Kozol argued the County's evidence of non-receipt of the letter was insufficient to support summary judgment, RP1, at 12-16, and argued his clearly labeled follow-up request was materially distinguishable from the administrative appeal at issue in Greenhalgh, and was instead identical to the follow-up request in Johnson v. WDOC, 164 Wn.App. 769 (2011). RP1, at 17-18.

The court granted summary judgment dismissal, finding the May 22nd letter analogous to Greenhalgh, and Mr. Kozol's suit thus to be time-barred. RP1, at 20-21. Mr. Kozol moved for reconsideration and filed a motion to amend. CP 249-261, 264-270. The court further determined, as a matter of law, that the May 22nd letter was analogous to the appeal in Greenhalgh. RP2, at 8. Without comment or explanation the court denied the motion to amend. CP 297-298. This timely appeal ensues.

The Verbatim Report of Proceedings dated September 6, 2013 and October 11, 2013 are designated as RP1 and RP2, respectively.

ARGUMENT

A. The Trial Court Erred in Denying Mr. Kozol's Motion to Strike King County's Untimely Served Reply on Summary Judgment and its Second Declaration of Kristie Johnson

1. Standard of Review of Motion to Strike

A trial court's ruling on a motion to strike is reviewed for an abuse of discretion. King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King County, 123 Wn.2d 819, 826, 872 P.2d 516 (1994); Analytical Methods, Inc. v. Dep't of Revenue, 84 Wn.App. 236, 244, 928 P.2d 1123 (1996).

2. Improper Calculation of Time for Service by Mail Under CR 6(e) Deprived Appellant of Period to Act or Take Proceeding

Under the civil rules, the County's reply on summary judgment was to be filed and served "not later than 5 calendar days prior to the hearing." CR 56(c). Mr. Kozol moved to strike the County's reply and second declaration of Kristie Johnson as untimely served. RP1, at 5-6. The County argued that its service by mail was not untimely, because its reply was due on Tuesday, September 3, 2013, and under CR 5(b)(2) service was effected on September 3, 2013. CP 277.

Nevertheless, this did not afford Mr. Kozol either the minimum 5 days under CR 56(c) to prepare to meet the County's arguments at the hearing, nor did it afford Mr. Kozol the additional 3 days to act or take some proceeding afforded by CR 6(e).

The trial court denied both Mr. Kozol's initial motion to strike and reconsideration thereof. RP1, at 7; RP2, at 7. Accordingly, Appellant asserts that either the trial court erred in its interpretation of the court rules and in denying the motion to strike, or, in the alternative, that the interplay between CR 56(c) and CR 6(e) as applied to the facts of this case is vague and confusing, requiring judicial clarification.

The Civil Rules apply properly to procedural matters only. Vasquez v. Dept. of L & I, 44 Wn.App. 379, 383, 722 P.2d 854 (1986). The Superior Court Civil Rules shall be construed so as to eliminate procedural traps and provide uniformity in judicial procedure. Gott v. Woody, 11 Wn.App. 504, 524 P.2d 452 (1974).

CR 6(e) makes it clear that "whenever a party has the right or is required to do some act or take some further proceedings within a prescribed period after service of a notice or [some] other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period." CR 6(e).

In this case, the prescribed period is "5 calendar days prior to the hearing" defined by CR 56(c). Mr. Kozol, the non-moving party on summary judgment, not only had the right to this period of 5 days to research and prepare oral argument against the County's motion and reply, but he further had the right to these 5 days to "do some act or

take some proceeding" as recognized in CR 6(e), which in this case was filing a motion to amend the complaint to include the fact of the mailing of the May 22, 2011 letter.

A "proceeding" is "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment." Christensen v. Ellsworth, 162 Wn.2d 365, 374 (2007)(quoting Black's Law Dictionary, 1241 (8th ed. 2004)).

Per CR 56(c), the "5 calendar days" prior to the hearing were already shortened to 3 days because of the intervening Sunday, September 1st and Monday, September 2nd (Labor Day). Thus it was even more crucial that Mr. Kozol was afforded an extra 3 calendar days under CR 6(e) in which to act or take a proceeding, e.g., file a motion to amend complaint with an accompanying motion to shorten time, prior to the September 6th summary judgment hearing.

Unlike in other situations, Mr. Kozol could not invoke a CR 6(e) 3-day extension to act before the summary judgment was heard by the court. It was not his motion to re-note. Therefore, the appropriate, and only procedure in this case, was for the County to allow for the CR 6(e) 3-day extension before serving its reply by mail, effectively counting backwards from the day of the hearing to comply with both CR 56(c) and CR 6(e).

Since the County elected to serve by mail, there are two possible ways to calculate the days in this case under

CR 56(c) and CR 6(e). The first calculation is to count backwards 5 days from the September 6th hearing date, which would be Sunday, September 1st, and then, because of Monday, September 2nd being a holiday, move forward to the next day nearer the hearing that is neither a weekend or holiday, which would be Tuesday, September 3rd. Then, 3 calendar days are added under CR 6(e), again counting backwards, which would be Saturday, August 31st. Thus, service by mail would have had to be effected by August 31st to allow Mr. Kozol the 3 additional days to act or take proceeding guaranteed by CR 6(e). Meaning, under CR 5(b)(2)(A), the County's reply papers had to be placed in the mail on August 28, 2013, if they elected to use the service-by-mail option.

The second method, a backwards-only calculation, would be to count back under CR 56(c) 5 days from the September 6th hearing date, which would be Sunday, September 1st, and then continue to count backwards another 3 days, under CR 6(e), which would make Tuesday, August 29th the day by which service was to be effected. If electing to use the optional service-by-mail mechanism, the County had to mail its reply papers by August 26th. CP 296. By either method, the County did not timely serve its reply papers to comply with the requirements of CR 6(e).

Significantly -- and dispositive by either of the above calculation methods -- the County's late service did not account for CR 6(e). Consequently, Appellant's inability

to file a motion to amend was expressly recognized by the trial court. RP1, at 20. Had the County used personal service, timeliness would not have become an issue.

Procedural rules are unique, in that, "practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." Emwright v. King County, 96 Wn.2d 538, 543, 637 P.2d 656 (1981) The overall purpose of time computation rules is to ensure that the party with the duty, or right, to act within the allotted time period is accorded the full number of days specified in the court rule, court order, or applicable statute. Christensen, 162 Wn.2d at 376 (citation omitted).

"Litigants and potential litigants are entitled to know that a matter as basic as time computation will be carried out in an easy, clear and consistent manner, thereby eliminating traps for the unwary who seek to assert or defend their rights." Stikes Woods Neighborhood Ass'n v. City of Lacy, 124 Wn.2d 459, 463, 880 P.2d 25 (1994); Capello v. State, 114 Wn.App. 739, 748-49 (2002).

Consistency and equity requires that Mr. Kozol was to be served by mail 3 additional days before the time period prescribed by CR 56(c) began, since he was not able to enjoy the same fair benefit by moving the summary judgment hearing 3 days forward.

The Supreme Court's opinion in Seto v. American Elevator, Inc., 159 Wn.2d 767 (2007) is instructive, as there the Court recognized the potential for injustice resulting from a party's electing to serve papers by mail.

> "Requiring completion of service before the [] period begins also serves to prevent the injustice that Seto pointed out: to rule otherwise would give people personally served longer to [act] than people served by mail. Allowing service by mail affords a convenience to the server; it should not penalize the party receiving service by mail by shortening the period [to act]. This concern is reflected in Superior Court Civil Rule CR 6(e), which provides three additional days [to act] to papers served by mail. Although 20 days allowed under MAR 7.1 cannot be extended, the start of the period can be tolled in cases of service by mail, just as it would be in cases not submitted top arbitration."

Seto, 159 Wn.2d at 775.

Because the CR 56(c) "5 calendar days" cannot be tolled because they count backwards from the hearing date rather than forward from a precipitating event, Seto supports the argument that the CR 6(e) 3 additional days must be applied to the CR 56(c) 5-day period (adjusted for weekends and holidays) before effecting service by mail upon a party.

The goal of equity is to do substantial justice. Equity exists to protect the interests of deserving parties from the "harshness of strict legal rules." Washington courts embrace a long and robust tradition of applying the doctrine of equity. Columbia Community Bank v. Newman Park, LLC, 177 Wn.2d 566, 569, 304 P.3d 472 (2013).

Accordingly, Appellant requests that this Court act upon equity intra legem, and find the County's optional service by mail was untimely, and should have been stricken.

B. The Trial Court Erred in Granting Summary Judgment Dismissal of Mr. Kozol's Claims as Statutorily Time-Barred Under RCW 42.56.550(6)

1. Summary Judgment Standard of Review

An appellate court reviews a trial court's order granting summary judgment de novo. Mohr v. Grantham, 172 Wn.2d 844, 859, 262 P.3d 490 (2011). On review of a summary judgment order the court views all evidence in the light most favorable to the nonmoving party. Id. Summary judgment is appropriate "if...there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law." CR 56(c). A fact is material if it affects the outcome of the litigation. Owen v. Burlington N. Santa Fe R.R. Co., 153 Wn.2d 780, 789, 108 P.3d 1220 (2005).

Questions of fact may be determined on summary judgment as a matter of law only where reasonable minds could reach but one conclusion. Viewpoint-North Stafford LLC v. CB Richard Ellis, Inc., 175 Wn.App. 189, 197, 303 P.3d 1096 (2013) (citing Alexander v. County of Walla Walla, 84 Wn.App. 687, 692, 929 P.2d 1182 (1997)).

Summary judgment is not proper if "reasonable minds could draw different conclusions from undisputed facts, or if all of the facts necessary to determine the issues are not present." Tran v. State Farm Fire and Cas. Co., 136 Wn.2d 214, 223, 961 P.3d 358 (1998) (citation omitted).

"A motion for summary judgment based on a statute of limitations should be granted only if the record demonstrates that there is no genuine issue of material fact as to when the statutory period commenced." Crownover v. State ex rel. Dep't of Transp., 165 Wn.App. 131, 141, 265 P.3d 971 (2011); Young Soo Kim v. Choong-Hyun Lee, 174 Wn.App. 319, 323, 300 P.3d 431 (2013); CR 56(c).

The statute of limitations is an affirmative defense on which the defendant bears the burden of proof. Young Soo Kim, supra, at 323 (citing Haslund v. City of Seattle, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976)). Whether the statute of limitations bars a plaintiff's action is a legal question reviewed de novo. Niesle v. Concrete Sch. Dist., 129 Wn.App. 632, 638, 127 P.3d 713 (2005), review denied, 156 Wn.2d 1036, 134 P.3d 1170 (2006).

2. Public Records Act Statute of Limitations

RCW 42.56.550(6) sets forth a one-year statute of limitations for a requestor to initiate an action in superior court for judicial review of an agency's action in responding to a Public Records Act request.

In Tobin v. Worden, 156 Wn.App. 507, 233 P.3d 906 (2010), the Division One Court of Appeals held that the one-year statute of limitations to bring an action under RCW 42.56.550(6) did not begin to run until the agency either claims an exemption, or last produces a record on a partial or installment basis.

In Johnson v. Department of Corrections, 164 Wn.App. 769, 265 P.3d 216 (2011), the Division Two Court of Appeals held that the one-year limitation under RCW 42.56.550(6) would begin to run when a requestor receives an agency's last response to his follow-up request.

In contrast, Division Two held in Greenhalgh v. State Dep't of Corrections, 170 Wn.App. 137, 282 P.3d 1175 (2012), that the one-year period under RCW 42.56.550(6) did not begin when a requestor merely submitted an "administrative appeal" to the agency.

Division Two then declined to adopt the reasoning in Tobin, and issued its decision in Bartz v. Dept. of Corrections, 173 Wn.App. 522, 297 P.3d 737 (2013), holding that the one-year period to bring an action under RCW 42.56.550(6) began to run when an agency last provides even a single production of records.

In the case at bar, Appellant's May 22, 2011 follow-up request was mailed to Respondent on May 25, 2011. On summary judgment, Respondent claimed to have not received this follow-up request. Because a requestor's follow-up initiates or re-triggers the one-year time period under RCW 42.56.550(6), as held in Johnson, supra, the evidence of the May 22, 2011 follow-up request is material to the determination on summary judgment.

3. Sufficient Evidence of Mailing Follow-Up Request

Appellant presented evidence by way of sworn declaration that the May 22, 2011 follow-up request had been mailed. CP 111-114. Respondent presented evidence by way of sworn declaration claiming to have not received the May 22, 2011 letter. CP 231-232. Respondent argued to the trial court that Appellant's failure to establish proof of compliance with office mailing customs precluded a presumption of receipt of the letter. CP 224-225. However, reliance on the "proof of mailing custom" standard was erroneous, as the sworn declaration from a third-party that the letter was mailed was alone sufficient proof of mailing in this case.

Upon direct proof of mailing, it is presumed the mail proceeds in due course and the letter is received by the person or entity to whom it is addressed. Kaiser Aluminum & Chemical Corp. v. Department of Labor & Industries, 57 Wn.App. 886, 889, 790 P.2d 1254 (1990)(citing Augerinion v. First Guar. Bank, 142 Wash. 73, 78, 252 P. 535 (1927)).

Accordingly, upon sworn testimony or declaration that an item was properly addressed and mailed, and that the letter was not returned, "[t]he legal presumption is that it reached the addressee." Malloy v. Drumheller, 68 Wash. 106, 117, 122 P. 1005 (1912). In the absence of direct testimony as to mailing, a second way to establish proof

of mailing is to prove compliance with office custom. Kaiser Aluminum, 57 Wn.App. at 889 ("case which first acknowledged the alternate means of establishing proof of mailing by office custom....")(citing Farrow v. Dept. of Labor & Indus., 179 Wash. 453, 455, 38 P.2d 240 (1934)).

The court in Farrow reasoned in its opinion:

> "Obviously, in an office handling...[a large amount of] correspondence...no one can remember the fact of mailing any particular notice or letter. So the law has become well established in such instances that proof of mailing may be made by showing (a) an office custom with respect to mailing; [and] (b) compliance with the custom in the specific instance."

Farrow, 179 Wash. at 455.

On summary judgment, Respondent's argument solely relied upon cases where the alternate "proof of office mailing custom" was applied. CP at 224-225. In every such case, the circumstances stem from a business or governmental agency's ability to prove -- in the absence of an individual's direct testimony as to mailing -- that the office's customary practice and procedures with respect to mailing were complied with to a sufficient degree to establish mailing factually occurred.

Because of Appellant's direct evidence of mailing, reliance upon Olsen v. The Bon, 144 Wn.App. 627, 183 P.3d 359 (2008), and Neuson v. Macy's, 160 Wn.App. 786, 249 P.3d 1054 (2011) is misplaced. In Olson, the appellant invoked reliance on the mailbox rule, Olson, 144 Wn.App. at 634, and presented evidence of its office practice and contracting

of mail services with a third-party, who in turn submitted an "affidavit explaining its customary practice and procedures with respect to mailing" the materials for The Bon. Id., at 635.

In Neuson, the respondent, Macy's Department Store, was "entitled to a presumption of mailing it if show[ed] the company's customs on mailing...and its compliance with these customs in [the] specific instance." Neuman, 160 Wn.App. at 793.

However, neither Olson nor Neuson are controlling in the instant case, as Appellant's May 22, 2011 letter was photocopied and mailed for him by a family member from home, not from or through a high-volume office mailing system. The two sworn declarations Appellant presented clearly establish that the May 22, 2011 letter: (a) was addressed to Kristie Johnson, from Steven P. Kozol; (b) was photocopied at the time of mailing and the copy retained; (c) was mailed as addressed on May 25, 2011 via First Class U.S. Mail, postage prepaid, CP 111-114; and (d) the letter was never returned as addressed via U.S. Mail. CP 118.

Under Washington case law, this direct evidence of mailing is sufficient to establish the follow-up request letter was mailed. See Malloy v. Drumheller, 68 Wash. 106, 117, 122 P. 1005 (1912)("The respondent testified that it was properly addressed and mailed...and that the letter was not returned"); Lieb v. Webster, 30 Wn.2d 43, 47, 190

P.2d 701 (1948)("There can be no question that, if the department had produced a witness who had testified to the deposit in the United States Mail...sealed, stamped, and properly addressed, the presumption would be effective...."); Scheeler v. Dept. of Employment Security, 122 Wn.App. 484, 489, 93 P.3d 965 (2004)(Department "offered no testimony or affidavit from the person [who] purportedly mailed the [materials]...nor did it offer any evidence of its custom in mailing these notices or whether a custom, if it exists, was followed in this case").

In striking similarity to the facts of the instant case, Kubey v. Travelers Prot. Ass'n of America, 109 Wash. 453, 187 P. 3d (1920) dealt with the son of a respondent testifying that he wrote a letter on behalf of his father and then placed it in the mail. Not only had the son "testified positively and unequivocally that he had addressed and mailed the letter," but another family member testified that the mailing of the letter "was referenced to in conversation in the home from time to time." Kubey, 109 Wash. at 457.

Likewise, in Malloy v. Drumheller, a respondent testified that he properly addressed and mailed a letter, and that it was not returned; the presumption of receipt attached. Malloy, 68 Wash. at 117.

In the case at bar, not only did Appellant's evidence contain a sworn declaration from Isabelle Sanabria that

the letter was mailed, as in Kubey and Malloy, but the mailing is further corroborated by the additional facts of (1) a photocopy of the letter being made just prior to the time of mailing, (2) the mailing of the letter is discussed in a separate letter from the third-party family member, and (3) the letter was not returned as addressed. See Cortez-Kloehn v. Morrison, 162 Wn.App. 166, 252 P.3d 909 (2011)(the appellate court reasoned that production of a copy of a draft letter, but without producing a copy of the completed final copy that was purportedly mailed, would not support that the letter was completed and mailed), id., at 176; Kubey v. Travelers, 109 Wash. at 457 (the mailing was discussed between family members, "referenced to in conversation in the home from time to time"); Malloy v. Drumheller, 68 Wash. at 117 (a letter that was not returned also supports a legal presumption of receipt.)

Other jurisdictions have given similar weight to such corroborative evidence. In several cases it has been held or stated that the inference of mailing may be proven by evidence that a copy of the document allegedly mailed was properly filed by the mailer where such copying and filings would not have occurred without the original having been mailed. See Consolidated Motors, Inc. v. Skousen, 56 Ariz. 481 (1941); National Motors, Inc. v. Newman, 29 Colo.App. 380 (1971); Good v. Detroit Auto. Inter. Insurance Exchange, 67 Mich.App. 270 (1976); Campbell v. Royan Indem. Co., 256

Pa.Super. 312 (1978); Christnacht v. Department of Industry, Labor & Human Relations, 68 Wis.2d 445 (1975).

Other jurisdictions have similarly used evidence that the mail item was return-addressed but not returned as corroborative evidence of mailing. See Tabor & Co. v. Gorenz, 43 Ill.App.3d 124 (1976); Goodin v. General Acci. Fire & Life Insur. Corp., 450 S.W.2d 252 (1970); Good v. Detroit Auto Inter. Insurance Exchange, 67 Mich.App. 270 (1976); Mohr v. Universal C.I.T. Credit Corp, 216 Md. 197 (1958).

Accordingly, the evidence presented by Appellant on summary judgment directly establishes proper mailing, attaching the presumption of receipt. Kaiser, 57 Wn.App. at 889; Augerinion, 142 Wash. at 76. This is a far cry from situations "when an office handles such a large volume of business that no one could be expected to remember any particular notice or letter." Olson v. The Bon, 144 Wn.App. at 635 (citing Farrow, supra, at 455).

4. Respondent's Evidence Was Insufficient to Rebut Presumption of Receipt

In an attempt to rebut Appellant's two supporting declarations establishing the direct mailing of the May 22, 2011 follow-up request, Respondent relied solely upon the Second Declaration of Kristie Johnson. CP 231-232.

With this declaration, Respondent attempted to prove that the agency had not received the May 22, 2011 follow-up request letter in the U.S. Mail. However, there are several deficiencies in the declaration which prove fatal to Respondent's arguments.

First, Kristie Johnson declared that she was the "former public records officer" for the agency. CP 231. However, this declaration does not establish the date or period in which Johnson was not employed in this position. Thus, there is a lack of foundation for her to testify regarding receipt of the May 22, 2011 letter.

Under ER 602 and CR 56(e), Johnson could only attest to what she personally knew, and in the absence of evidence establishing she was employed in this position by the agency around the time the May 22, 2011 letter was mailed, this lack of foundation is fatal, as a matter of law.

Second, Johnson's reference to "the database" and "electronic locations" that she allegedly reviewed is insufficient to establish a material fact to rebut presumption of receipt. CP 231. Not only are these locations and database not identified with sufficient specificity to identify what they are, but no copies of these records were attached to Johnson's declaration. CP 231-246. On summary judgment, if documents are relied upon, they shall be attached in full. Affidavits as to their

substance or effect are not sufficient. Melville v. State, 115 Wn.2d 34, 36, 793 P.2d 952 (1990).

Because any such database or electronic location is not only discoverable under CR 34, but also meets the definition of a public record under RCW 40.14.010 and RCW 42.56.010(3) and is therefore disclosable, printouts of these records are easily available, and should have been attached to Johnson's declaration before such evidence could be properly considered on summary judgment.

Third, Johnson's declaration is similarly deficient in that it only relies on recollection and lack of indication. CP 231. This, too, is a fatal deficiency. Ultimate facts or conclusions of fact are insufficient for summary judgment purposes; likewise, conclusory statements of fact will not suffice. Grimwood v. Univ. of Puget Sound, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). Lack of recall is not sufficient to controvert clear opposing evidence on a summary judgment motion. Overton v. Consolidated Inc. Co., 145 Wn.2d 417, 431, 38 P.3d 322 (2002)(citing Marshall v. AC&S, Inc., 56 Wn.App. 181, 185, 782 P.2d 1107 (1989)).

In Overton, a party's initial statement that he did not recall an event occurring rendered him incompetent for lack of sufficient personal knowledge to testify as to whether opposing party notified him of a fact during the specific event; thus, the only admissible evidence before

the court on the issue of when notice was given was an authenticated report. Id. at 430. Moreover, Overton's conclusory statement that the visits did not take place because he did not recall them was not to be properly considered on summary judgment in any event. Id. at 430 (citing CR 56(e)).

Here, Kristie Johnson's purported lack of recollection does not rise to the requisite showing of fact necessary to grant summary judgment. "A fact is an event, an occurrence, or something that exists in reality. It is what took place, an act, an incident, a reality as distinguished from supposition or opinion." Woodward v. Lopez, 174 Wn.App. 460, 468, 300 P.3d 417 (2013)(citing Grimwood, 110 Wn.2d at 359).

Fourth, Johnson's declaration is devoid of any evidence establishing that the agency did not receive the May 22, 2011 letter in the U.S. Mail. There is a lack of testimony from any of the agency's mailroom staff, and Respondent failed to present any evidence establishing the agency's procedures for processing incoming mail. There is no proof as to the agency's mailroom or mail distribution customs, nor of compliance therewith. Plus, it certainly would be probative had Respondent provided any sort of mailroom tracking or receipt log sheets, showing an absence of the May 22, 2011 letter, but such evidence was never submitted. RP1, 13-14.

Respondent's failure to establish its compliance with customary practices and procedures with respect to mail processing and distribution is highly material, given that the agency "handles such a large volume of mail that no one could be expected to remember any particular letter." Automat v. Yakima, 6 Wn.App. 991, 995 (1972); Lieb v. Webster, 30 Wn.2d at 46-47.

Further, lack of such evidence is all the more material in the analysis in light of the fact that the King County Prosecuting Attorney's Office admittedly had problems with losing, missing, and unlawfully destroying multiple documents pertaining to Mr. Kozol's and other citizens' PRA requests. RP1, at 16; CP 116, 198, 200, 214-215. Not only had the agency recently allowed unlawful destruction of original, exculpatory public records in Mr. Kozol's criminal case file, but the agency had repeatedly signed and filed false motion papers and a declaration stating all records had been provided to Mr. Kozol, in another of his civil actions against the County. RP1, at 16; CP 120, 196-202.

Commensurately material is the fact that, despite Respondent's stating to have produced all responsive records to Appellant's requests at issue, the record shows that each time this assertion was made, additional records were then identified after Appellant insisted the agency conduct more thorough searches for records; this cycle repeated itself several times. CP 120.

In sum, Kristie Johnson's second declaration failed to establish the proper foundation for her personal knowledge as to the period of time in question, her claim to not "recall" ever receiving such a request letter from Appellant is insufficient as a matter of law to establish a fact on summary judgment, no documents from the referenced database(s) were produced, and no evidence was presented to show that either the agency's mailroom or other employee had not received the May 22, 2011 request.

A court cannot consider inadmissible evidence when ruling on a summary judgment motion, nor does a court consider conclusory affidavits. Kenco Enterprises N.W. LLC v. Wiese, 172 Wn.App. 607, 615, 291 P.3d 261 (2013). See Discover Bank v. Bridges, 154 Wn.App. 722, 727, 226 P.3d 191 (2010)(Summary judgment in favor of bank reversed because supporting declarations filed by bank contained records of purported actions or fact, "[n]ot detailed, itemized proof" of the facts declared to); Gingrich v. Unigard Sec. Ins. Co., 57 Wn.App. 424, 428, 788 P.2d 1096 (1990)(Summary judgment may not be appropriate when material facts are particularly within knowledge of moving party).

5. Genuine Issus of Material Fact Precluded Summary Judgment

Even if the Second Declaration of Kristie Johnson was admissible and sufficient to rebut a presumption of receipt of the May 22, 2011 follow-up request, this created

a determination of credibility that was only to be found by a trier of fact, thus precluding summary judgment.

Here, declaration filed by Mr. Kozol establish the May 22, 2011 follow-up request was mailed to the agency on May 25, 2011. CP 111-114, 117-118. The County attempted to rebut this evidence with a declaration purporting it did not receive the May 22nd letter. CP 231-232. This rises to a genuine issue of fact.

The court does not weigh credibility in deciding a motion for summary judgment. If the facts as presented by the parties would require the court to weigh the credibility on any material issue, a genuine issue of fact exists and summary judgment will normally be denied.

Conflicting affidavits present the classic example. If the affidavits and counter-affidavits submitted by the parties conflict on material facts, the court is essentially presented with an issue of credibility, and summary judgment will be denied. See, e.g., Riley v. Andress, 107 Wn.App. 391, 27 P.3d 618 (2001); Meadows v. Grant's Auto Brokers, Inc., 71 Wn.2d 874, 431 P.2d 216 (1967).

Just as courts are not entitled to weigh evidence on summary judgment, Fleming v. Smith, 64 Wn.2d 181, 185, 390 P.2d 990 (1964), similarly the court should not grant summary judgment when there is some question as to the credibility of a witness whose statements are critical to an important issue in the case. Powell v. Viking Ins. Co., 44 Wn.App. 495, 722 P.2d 1343 (1986).

Therefore, it is axiomatic that credibility issues are raised where a party's material facts averred in an affidavit are particularly within the knowledge of the party moving for summary judgment, or where all declarations are made only by employees. CP 257.

Here, the proof of mailing and/or receipt of the May 22, 2011 follow-up letter was in dispute. The trial court acknowledged the letter was material, stating that the summary judgment motion "rises and falls" upon it. RP1, at 10. Further, because mailing and/or receipt was dispositive insofar as the follow-up request established the statutory filing deadline pursuant to Johnson v. Dept. of Corrections, 164 Wn.App. 769 (2011), any question concerning proof of mailing and/or receipt therefore precluded summary judgment.

See Santos v. Dean, 96 Wn.App. 849, 856, 982 P.2d 632 (1999)(summary judgment precluded because of disputed facts of whether or not party received letter mailed by opposing party; disputed fact related to receipt of letter was material to the outcome); Neuson v. Macy's Dept. Stores, Inc., 160 Wn.App. 786, 796, 249 P.3d 1054 (2011)("Macy's evidence of mailing and receipt and Ms. Neuson's evidence of non-receipt becomes a question of fact for the trier of fact."); Kubey v. Travelers, 109 Wash. at 457 (It is for the jury to determine from all the evidence whether

letter was received by appellant); Malloy v. Drumheller, 68 Wash. at 117 (same); Automat v. Yakima County, 6 Wn.App. 991, 996 (1972)(trial judge in a position to assess the credibility of witnesses regarding mailing and receipt of mail); Augerinion v. First Guaranty Bank, 142 Wash. 73, 78 (1927)("The weight given to factual assertion [of whether mail was received by party] is not for us to decide, it is for the trial court.")

Moreover, Respondent conceded on summary judgment that whether the letter was received by the County was a question of fact. CP 225. In construing the facts and reasonable inferences from the facts in the light most favorable to Appellant, the existence of a genuine issue of material fact precluded summary judgment.

6. The Trial Court Made an Improper Finding of Fact, as a Matter of Law

Appellant's May 22, 2011 follow-up request plainly stated on its face that it was a "Public Records Request" and a "follow-up". The letter also requested that the agency "please conduct a comprehensive search throughout your agency," and that the agency "provide [Mr. Kozol] with all responsive records." CP 114. Further, the May 22nd letter was presented under sworn declaration to be a "request letter," CP 118, and was asserted in motion papers to be a "follow-up request" and a "letter amending his records request." CP 98, 100, 101.

However, after Respondent argued that the May 22nd letter should instead be called an "administrative appeal" such as the one at issue in Greenhalgh v. State Dept. of Corrections, 170 Wn.App. 137 (2012), where an administrative appeal was held to not trigger or begin anew a one-year statutory limit to bring suit, the trial court then found that Mr. Kozol's request "is basically an objection to the last response by King County." RP1, at 21. On reconsideration, the court further "determined, as a matter of law, that [the letter] was not requesting any additional search or production of any additional documents," and was therefore analogous to the administrative appeal at issue in Greenhalgh. RP2, at 8. The trial court erred in making such a finding of fact.

Material factual issues may be decided as a matter of law on summary judgment only if reasonable minds could reach but one conclusion. In re Wash. Builders Ben. Trust, 173 Wn.App. 34, 57, 293 P.3d 1036 (2013); Sherman v. State, 128 Wn.2d 164, 184, 905 P.2d 355 (1995).

Appellant argued to the trial court that it could not reclassify his May 22, 2011 letter as an administrative appeal, because it "specifically says that it's a records request, it is a follow-up and it asked that a search be conducted for all records -- an additional search; therefore, on that strict language on the face of that document, it cannot be construed to be purely an administrative appeal."

RP2, at 6. As is plainly apparent from the express wording of the letter, amending the request to seek all records in the Prosecutor's Office file in Case No. 00-1-09050-8KNT is clearly not an administrative appeal. It is asking for the entire file, which were more records than had been requested to date.

Further, Appellant pointed out that the May 22, 2011 letter never used the term "Appeal," it was not addressed to anyone presiding in a supervisory capacity above the public records officer, it asked for an additional search for all records, and it was not challenging a denial or claimed exemption. RP2, at 6-7.

As argued to the court, even if the May 22nd letter could somehow be equally construed as either a follow-up request or an appeal, i.e., on its face it was so ambiguous so as to support either interpretation, summary judgment standards construing all facts in the light most favorable to the nonmoving party nevertheless required the letter to be found as a "follow-up request." CP 292-293. Washington case law supports Appellant's position.

A court will not interpret a document to impose consequences which are implicated by wording not mentioned in the document. See Marquardt v. Federal Old Line Ins. Co., 30 Wn.App. 685, 690, 658 P.2d 20 (1983)("We will not interpret these documents to hold that a 'consequence' of that suit was to decide an issue of statutory interpretation

neither framed in the pleadings nor mentioned in the documents.")

The court will not strain to interpret a [document] in favor of secret or undisclosed intentions that are at odds with the fair meaning of the document. Hadley v. Cowan, 60 Wn.App. 433, 439, 804 P.2d 1271 (1991). "It is the duty of the court to declare the meaning of what is written, and not what was intended to be written." Condon v. Condon, 177 Wn.2d 150, 162, 298 P.3d 86 (2013)(citation omitted). "The subjective intent of the part[y] is generally irrelevant if the intention can be determined from the actual words used." Id.

On its face, the May 22nd letter is clearly a follow-up records request, asking that a further search be conducted and that all additional responsive records related to State v. Kozol, No. 00-1-09050-8KNT now be provided.

However, even if this Court were to somehow find the May 22nd letter facially ambiguous to such a degree as to not rise to a follow-up records request, the apparent intentions of Appellant establish it as a follow-up.

Where parties dispute the meaning of the words actually used, the intent of the parties is relevant to that question. Stephens v. Gillispie, 126 Wn.App. 375, 381, 108 P.3d 1230 (2005). As referenced above, not only was the May 22nd letter presented under sworn declaration as a "follow-up" request, but it was also addressed and mailed to the agency's

Public Records Officer, not to an administrative supervisor/reviewer. CP 114,

As presented to the trial court, the King County Prosecutor's Office has its own established appeal process, codified in King County Code 2.12.290. This mirrors the Act at RCW 42.56.520, RP1, at 17, which requires an agency to "establish mechanisms for the most prompt possible review of decisions denying" records requests. RCW 42.56.520. "An agency's internal review of a denial need not be elaborate. It could be reviewed by the public records officer's supervisor, or other person designated by the agency." WAC 44-14-08001.

With this appeal process in place, a requestor must submit an administrative appeal to any such designated reviewing body. Instead, Mr. Kozol's May 22nd letter was not submitted under K.C.C. 2.12.290, it did not use the term "Appeal," nor did it seek review of a decision denying inspection or a claimed exemption. In fact, there was nothing to appeal. Therefore, by its intended application the letter cannot post-hoc be reclassified as an administrative appeal. RP1, at 17.

A reviewing court should not resort to the rule of interpretation that construes a [document] against its drafter unless the intent of the party cannot otherwise be determined; "the primary goal in interpreting a [document] is to ascertain the party's intent." Washington Professional

Real Estate LLC v. Young, 163 Wn.App. 800, 818, 260 P.3d 991 (2011)(citation omitted).

This court is not required to consider hypothetical interpretations of a letter by a party under which an interest might have been affected; the possibility that someone reading the letter might have read it in a way that would constitute an alternate meaning is not sufficient. See Hoffer v. State, 110 Wn.2d 415, 442, 755 P.2d 781 (1988), Dore, J. (dissenting)(citing Western Reserve Oil & Gas v. New, 765 F.2d 1428 (9th Cir. 1985)).

Where a trial court's findings of fact stem exclusively from facial substance of documents, rather than from the testimony of witnesses, appellate courts are not bound by such findings. "Where the interpretation of a document must be made from the face of the instrument itself, [the appellate] court is in as good a position as the trial court to interpret its meanings." State v. Rowe, 93 Wn.2d 277, 280, 609 P.2d 1348 (1980).

Accordingly, whether relying upon the specific wording employed in the May 22nd letter, or relying upon Appellant's intent, the letter, when viewed in the light most favorable to Appellant, must be held to be a follow-up request, and not, in fact or by analogy, an administrative appeal.

7. Reclassifying a Clearly Identified Follow-Up Request as an Administrative Appeal Goes Against the Statutory Provisions of the PRA

"To fulfill the statutory purpose, courts are to liberally construe the Act's disclosure provisions and narrowly construe its exemptions." Concerned Ratepayers Ass'n v. Pub. Util. Dist. No. 1, 138 Wn.2d 950, 957, 983 P.2d 635 (1999). Accordingly, "[t]he mandate of liberal construction requires the court to view with caution any interpretation of the statute that would frustrate its purpose." Am. Civil Liberties Union v. Blaine School Dist. No. 503, (ACLU I), 86 Wn.App. 688, 693, 937 P.2d 1176 (1997).

Therefore, when interpreting the PRA, a court will give a term its plain meaning, Ockerman v. King County Dep't of Dev. & Envt'l Servs., 102 Wn.App. 212, 216, 6 P.3d 1214 (2000), or dictionary definition, Servais v. Port of Bellingham, 127 Wn.2d 820, 830, 904 P.2d 1124 (1995); see also Bellevue John Does 1-11 v. Bellevue Sch. Dist., 164 Wn.2d 199, 211, 189 P.3d 139 (2008)(using dictionary to define "personal"); Mechling v. City of Monroe, 152 Wn.App. 830, 845, 222 P.3d 808 (2009)(applying general statutory construction rules to determine meaning of "public employment related records.")

The PRA does not require that a public records request be submitted in any particular format or on any special form. Hangartner v. City of Seattle, 151 Wn.2d 439, 447, 90 P.3d 26 (2004). Nor does the Act require that a request

be in writing or that it cite to the Act. See WAC 44-14-03006.

A requestor need only give an agency reasonable notice that the request is being made pursuant to the Act, WAC 44-14-04002(1), and must request an "identifiable record" or "class of record" before an agency must respond to it. RCW 42.56.080 and 42.56.550(1).

Both criteria are clearly met by Appellant's May 22, 2011 follow-up request, which clearly identified itself as a "Public Records Request," that was seeking "all responsive records" for an identifiable class of records: all documents from the agency's files regarding "State v. Kozol, No. 00-1-09050-8KNT." CP 114. Appellant directed the trial court's attention to this fact, that the May 22nd letter "by itself, constitutes a free-standing records request under the broad interpretation of the PRA." RP2, at 3.

However, Respondent was able to persuade the trial court that Appellant's May 22nd letter was analogous to an administrative appeal merely because the records request contained the words "objecting" and "protest". RP1, at 21; RP2, at 8. If this Court supports this rationale, it will effectively be empowering agencies to selectively determine that a follow-up request is an administrative appeal, whenever it best suits an agency's interests.

As the Washington Supreme Court wisely recognized in the Act's nascent stages:

> Because "leaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization," courts will not defer to the agency's determinations of interpretation of the Act.

Hearst Corp. v. Hoppe, 90 Wn.2d 123, 131, 580 P.2d 246 (1978).

Upholding the erroneous determination in this case, made as a matter of law, will not only lead to absurd results such as occurred here, but because from a statute of limitations perspective the difference between a follow-up request and an administrative appeal is dispositive, see Greenhalgh, supra, compared to Johnson, supra, it would allow an agency to have a hand in determining a requestor's ability to obtain judicial review by a superior court of unlawful agency action under the Act. This, of course, directly conflicts with the legislative purpose of the Act.

Accordingly, this Court should find that a clearly labeled follow-up request, seeking an entirely new or expanded class of records, cannot be reclassified as, or analogous to, an administrative appeal for purposes of determining the filing limitation under RCW 42.56.550(6).

Appellant has concomitantly filed a motion to take judicial notice of the administrative appeal at issue in Greenhalgh. Comparison of that appeal letter against Mr.

Kozol's May 22, 2011 follow-up request sufficiently differentiates the applicable legal standards enumerated by this Court in both the Greenhalgh and Johnson decisions.

In Johnson, the requestor submitted an initial request followed by two "expanded requests" or follow-ups. This Court determined, "The latest possible date on which Johnson's single-document action accrued" was September 3, 2007, which was the date the agency last responded to Johnson's last expanded request. Johnson, 164 Wn.App. at 778.

Because Mr. Kozol's May 22, 2011 follow-up request sought a new, expanded class of records, under Johnson this would be the latest possible date on which Mr. Kozol's one-year time limit to bring suit accrued. Because Mr. Kozol filed his suit within one year of the date the May 22, 2011 follow-up request was mailed to the agency, his action was not time-barred.

C. The Trial Court Erred in Denying Appellant's Motion to Amend the Complaint

1. Standard of Review of a Motion to Amend

The trial court's ruling on a motion to amend the complaint is reviewed for an abuse of discretion. Protect

the Peninsula's Future v. City of Port Angeles, 175 Wn.App. 201, 214, 304 P.3d 914 (2013)(citing Caruso v. Local Union No. 690 of Int'l Bhr. of Teamsters, 100 Wn.2d 343, 351, 670 P.2d 240 (1983). A trial court abuses its discretion when its decision is manifestly unreasonable, based on unreasonable grounds, or made for untenable reasons. Id. at 215 (citing Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). In all cases, the touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party. Herron v. Tribune Publ'g Co., 108 Wn.2d 162, 166, 736 P.2d 249 (1987).

2. Respondent's Failure to Object to the May 22, 2011 Letter

Under CR 15(b) the pleadings may be amended to conform to the evidence under two criteria. First, if new issues are tried by express or implied consent of the parties, they are treated in all respects as if they had been raised in the pleadings. Second, if new evidence is objected to on the ground that it is not within the pleadings, the court shall freely allow amendment if it serves the merits of the case, and if the objecting party fails to establish specific prejudice that cannot be cured by a continuance to meet such evidence. CR 15(b).

Under the second portion of CR 15(b) a proper objection is a prerequisite. At no time, however, did Respondent state a formal objection on the record. RP1, at 20.

Respondent claims it objected. CP 278. However, the verbatim report shows no proper, clear objection, only argument that the document had not been mentioned earlier. RP1, at 20.

Based on the record, Respondent did not object. Thus amendment of the May 22, 2011 letter was not objected to for purposes of CR 15(b). Amendment should have been freely granted.

3. If Respondent Properly Objected to the May 22, 2011 Letter, Amendment Under CR 15(b) Was Nevertheless to Be Freely Granted

If evidence is objected to on the ground that it is not within the pleadings, the court shall freely allow amendment if it serves the merits of the action, unless the objecting party establishes specific prejudice from such amendment that cannot be cured by a continuance. CR 15(b).

Even if Respondent's arguments are found to rise to the level of a proper objection, it failed to establish any specific prejudice that could not be cured by a continuance. Respondent's sole claim of prejudice in this case was counsel merely arguing, "we do believe we would be prejudiced if the complaint were amended at this point given how much time has gone by, and how much effort has been put into this case." RP1, at 20. Even on reconsideration, Respondent presented no showing of specific prejudice. CP 276-284.

To this point, delay, unaccompanied by prejudice to the nonmoving party, is generally not a sufficient reason to deny a motion to amend. To the contrary, it is an abuse of discretion to deny such a motion based solely on the fact that the moving party has delayed seeking amendment. Caruso, supra, 100 Wn.2d at 343. In Caruso, amendment was allowed even though it was five years and four months after the original complaint was filed, it was less than a month before trial, and there was no reason for the delay. Caruso, 100 Wn.2d at 351; Stansfield v. Douglas County, 146 Wn.2d 116, 122, 43 P.3d 498 (2002).

A defendant cannot shield itself from meeting new claims by merely claiming conclusory prejudice. See Culinary Workers and Bartenders Union No. 596 Health and Welfare Trust v. Gateway Cafe, Inc., 91 Wn.2d 353, 588 P.2d 1334 (1979)(Absent any showing of prejudice other than the claim of potential prejudice, amendment of pleadings was proper to include new facts). The test as to whether the trial court should grant leave to amend is whether the opposing party is prepared to meet the new issue(s). Quackenbush v. State, 72 Wn.2d 670, 434 P.2d 736 (1967).

The mere fact that an amendment to a pleading may introduce a new issue is not of itself a sufficient ground for denying it. Bacon v. Gardner, 38 Wn.2d 299, 229 P.2d 523 (1951).

Amendment under CR 15(b) is proper if actual notice of the unplead issue is given, or if there is adequate opportunity to cure surprise that might result from the change in the pleadings. Harding v. Hill, 81 Wn.2d 132, 137, 500 P.2d 91 (1972). Without a specific showing of prejudice it is proper for a court to realign parties and redefine issues not raised in the pleadings. Id. at 137-38. It is not sufficient prejudice if a party only faces the inconvenience of meeting a new claim; something more is required. Thomas v. French, 30 Wn.App. 811, 638 P.2d 613 (1981), rev'd on other grounds, 99 Wn.2d 95 (1983).

Here, not only was trial not scheduled to begin until December 2014, CP 267, but Respondent could have renoted its summary judgment motion if it required more time. There was thus ample time for King County to meet the sole new fact of the May 22, 2011 follow-up request. The party opposing amendment of the pleadings can be adequately protected by a continuance. Winans v. W.A.S., Inc., 52 Wn.App. 89, 100, 758 P.2d 503 (1988), aff'd, 112 Wn.2d 529 (1989).

4. The May 22, 2011 Letter Was Tried by Express or Implied Consent

The civil rules of our state provide a specific mechanism for circumstances where issues outside the pleadings arise at trial/summary judgment. CR 15(b) provides that "[w]hen issues not raised by the pleadings are tried

by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Mukilteo Retirement Apartments, LLC v. Mukilteo Investors LP, 2013 WL 4432233 *6; CR 15(b).

"At the discretion of the trial court, the pleadings may be amended to conform to the evidence at any stage in the action, including at the conclusion of a trial, and even after judgment." Mukilteo Retirement, supra (quoting Green v. Hooper, 149 Wn.App. 627, 636, 205 P.3d 134 (2009).

In determining whether the parties impliedly consented to the trial of an issue, "an appellate court will consider the record as a whole, including whether the issue was mentioned before the [summary judgment hearing], the evidence on the issue admitted at [the hearing], and the legal and factual support for the trial court's conclusion regarding the issue." Mukilteo, supra (citing Dewey v. Tacoma Sch. Dist. No. 10, 95 Wn.App. 18, 26, 974 P.2d 847 (1999).

Here, all of these conditions were met. CP 290-291. The May 22, 2011 letter was presented on Appellant's response on summary judgment. CP 98, 100, 111-114, 117-118, 136. Respondent presented considerable opposition argument, CP 223-229, as well as opposing evidence to the May 22nd letter. CP 231-232. The parties further argued the letter evidence at the summary judgment hearing. RP1, at 10-20. Of paramount importance, the trial court stated summary judgment

would "rise and fall" on the letter. RP1, at 10. Still further, the trial court made a factual determination, as a matter of law, on the May 22nd letter. RP2, at 8. Without question, the May 22nd letter was tried by implied or express consent of the parties.

A virtually identical situation was presented in the controlling case of Denny's Restaurants, Inc. v. Security Union Title Ins. Co., 71 Wn.App. 194, 213-14, 859 P.2d 619 (1993)(issue was "essentially litigated," such that it could be added by amendment, when the plaintiff first raised the claim in opposition to a motion for partial summary judgment, and defendant, while arguing that the issue was not pleaded, responded on the merits in its reply brief); see also Reichelt v. John-Manville Corp., 107 Wn.2d 761, 766-68, 733 P.2d 530 (1987).

Although CR 15(b) provides for the formal amendment of the pleadings where issues not raised in the pleadings are tried by the express or implied consent of the parties, "the rule is essentially self-executing," requires that issues "shall be treated in all respects as if they had been raised in the pleadings," and provides that failure to formally amend pleadings "does not affect the result of the trial on these issues." Karl B. Tegland, Vol. 14 Washington Practice: Civil Procedure §12:38, at 895; CR 15(b).

On summary judgment, Appellant stated, "I don't believe that the County would be prejudiced if I need to move to amend the complaint to add this document in as an element now." RP1, at 19. However, in its ruling, the court said that, "there really isn't a motion before the Court to amend the complaint." RP1, at 20. Nevertheless, because CR 15(b) is essentially self-executing and no formal motion to amend was necessary, the court erred because the May 22nd letter "shall be treated in all respects as if [it] had been raised in the pleadings." CR 15(b).

Pleadings may be deemed amended under CR 15(b) to conform to issues "tried" by the parties or when "the parties acknowledge the existence of an issue during discovery or argument on pretrial motions." Tegland, supra. See Maziorski v. Blair, 83 Wn.App. 835, 924 P.2d 409 (1996)(pleadings were deemed amended based on the parties' argument on the merits and the trial judge's determination of the issue on the merits.)

5. Relation Back of the Amendment Under CR 15(c) is Proper

Appellant properly argued for relation-back of the proposed amendment. CP 268-270. Respondent failed to address any CR 15(c) arguments, and limited its argument to the underlying CR 15(b) issue. CP 278-279. The court made no determination as to the application of CR 15(c), as its analysis did not go beyond its erroneous denial of the proposed CR 15(b) amendment.

In Stansfield v. Douglas County, 146 Wn.2d 116, 43 P.3d 498 (2002), the Washington Supreme Court addressed the question of relation back under CR 15(c), resolving a split of authority among the divisions of the Court of Appeals and disapproving decisions to the contrary. The holding in Stansfield may be summarized as follows: (1) The threshold question is whether the amendment is permissible in the first place. That determination is made by reference to CR 15(a). Here, Appellant's amendment was permissible, as it should have been essentially self-executing under CR 15(b);

(2) Assuming amendment is permissible, an amendment adding a new claim relates back to the date of the original filing so long as the new claim arises out of the same conduct, transaction or occurrence as the original pleading. The amendment relates back even if it was necessitated by inexcusable neglect, or was the result of a conscious decision, strategy or tactic;

(3) An amendment adding a new party is treated differently, and only relates back if (a) the amendment arises out of the same conduct, transaction or occurrence, and (b) the new party had sufficient notice of the pleading action so that the new party is not prejudiced in presenting a defense on the merits. Further, amendment adding a new party shall not be allowed to relate back if the amendment

was necessitated by inexcusable neglect, or was the result of a conscious decision, strategy or tactic.

The Supreme Court viewed Stansfield as falling under rule (2), and thus the plaintiff's new claims related back and were not barred by the statute of limitations.

Stansfield clarified that CR 15(c) "clearly distinguishes between amendments adding new claims [or facts] and amendments adding new parties." Id. at 122. While inexcusable neglect, which includes "a conscious decision, strategy or tactic" prevents relation back of an amendment adding a new party, id. at 122, "[t]he inexcusable neglect rule does not apply to amendments adding claims." Id. at 122.

Here, the May 22, 2011 follow-up request, CP 114, was an extension or expansion of the prior two requests submitted to King County. CP 125, 129. The May 22nd letter requested the County further conduct a comprehensive search, i.e, all the records in case file No. 00-1-09050-8KNT, and produce all responsive records. CP 114. This is clearly sufficient as the same conduct, transaction or occurrence as that presented in the current complaint.

While the County argued that amendment would be futile, the alleged futility was specious, as it was based on an improper finding of fact that the May 22, 2011 follow-up request was analogous to an "administrative appeal," followed by an erroneous application of Greenhalgh. See ante.

"In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc. -- the leave sought should, as the rules require, be 'freely given.'" Culpepper v. Snohomish County Dep't of Planning and Community Dev., 59 Wn.App. 166, 176, 796 P.2d 1285 (1990)(quoting Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)).

6. The Trial Court Abused Its Discretion in Denying Appellant's Motion to Amend the Complaint

The failure of the court to state a reason on the record for denying leave to amend is an abuse of discretion, because the court on appeal cannot tell whether the motion was denied on a legitimate basis. Walla v. Johnson, 50 Wn.App. 879, 883, 751 P.2d 334 (1988).

Here, in neither its oral ruling nor written order, did the court provide any basis for denying Appellant's motion to amend. CP 297-98; RP2 at 7-8. Because the trial court completely failed to exercise any discretion, it therefore abused its discretion in denying the motion to amend. "Although the grant or denial of a leave to amend is within the trial court's discretion, outright refusal to grant leave without any justifying reason is not an exercise of discretion; it is an abuse of that discretion."

Watson v. Emard, 165 Wn.App. 691, 702-03, 267 P.3d 1048 (2011).

D. Appellant Should Be Awarded All Reasonable Costs On Appeal

Pursuant to RAP 18.1 and Title 14, Appellant asks that he be awarded all costs/expenses in litigating this appeal. RCW 42.56.550(4) allows prevailing requestors to be awarded all costs and fees. A party is entitled to attorney fees on appeal if a contract, statute, or recognized ground of equity permits recovery of costs/fees at trial, and the party is the substantially prevailing party. Hwang v. McMahill, 103 Wn.App. 945, 954, 15 P.3d 172 (2000). Should appellant prevail in this appeal, it is proper to award him all costs and expenses, to be enumerated in the Cost Bill.

CONCLUSION

For all the foregoing reasons, Appellant respectfully submits that the trial court erred in denying Appellant's motion to strike Respondent's untimely reply and supporting declaration on summary judgment, that the trial court erred in granting summary judgment dismissal of Appellant's Public Records Act claims, and that the trial court erred in denying Appellant's motion to amend his complaint.

Respectfully submitted this 18th day of February, 2014.

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STATE OF WASHINGTON

DEPUTY

DECLARATION OF SERVICE BY MAIL
GR 3.1

I, STEVEN P. KOZOL, declare and say:

That on the 18th day of February, 2014, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. COA 45542-1-II:

Appellant's Opening Brief;

Motion to Take Judicial Notice;

;

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addressed to the following:

Clerk of the Court	David J. Eldred, SDPA
Washington Court of Appeals	King County Prosecutor's Office
Division Two	CIVIL DIVISION - Litigation
950 Broadway, Suite 300	500 Fourth Ave., Suite 900
Tacoma, WA 98402	Seattle, WA 98104

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

DATED THIS 18th day of February, 2014, in the City of Aberdeen, County of Grays Harbor, State of Washington.

ORIGINAL

Steven P. Kozol

Signature

Steven P. Kozol

Print Name

DOC 974691 UNIT H6-A86

STAFFORD CREEK CORRECTIONS CENTER

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