No. 45542-1-II

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

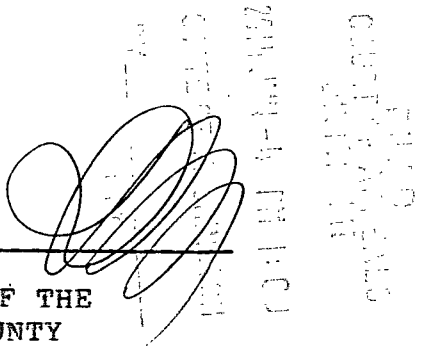
STEVEN P. KOZOL,

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 REPLY BRIEF

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ORIGINAL

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A. ASSIGNMENT OF ERROR

Appellant maintains all previously asserted assignments of error.

B. ISSUES PRESENTED

1. Is a plaintiff's action ex-post facto time-barred when his complaint was timely filed within a statutory period, and after the relied upon accrual of statutory period expired, a defendant moves for dismissal upon a newly decided judicial interpretation of statutory accrual that was not the basis for the statute of limitations affirmative defense pled in the answer?

2. Can a party's amendment to conform to the evidence under CR 15(b) be limited to adding just a pre-existing material fact, or does such an amendment require the moving party to add either a new claim or party?

3. Is CR 15(c) relation back of an amendment to conform to the evidence under CR 15(b) proper when it would prevent the opposing party from eluding its substantive obligation by invoking a statute of limitations?

4. When a party moving for summary judgment elects to serve by mail its reply upon the opposing party and that party received the reply only two days before the summary judgment hearing, is that party entitled to 3 additional days to act or take some proceeding under CR 6(e)?

C. STATEMENT OF THE CASE

Appellant briefly corrects Respondent's misstatements. The record shows, in 2009 a person confessed to committing the crimes Mr. Kozol

was convicted of and incarcerated for since November 2000. When the Respondent promised to DNA test the new exculpatory evidence revealed for the first time by the confession, but then illegally destroyed this evidence without testing it, and then further lied about it having been tested, these facts, by any objective standard, go to establish that Appellant is wrongfully convicted and incarcerated. CP 115-116.

Additionally, because the public records requests at issue in this appeal were submitted solely for the purpose of establishing additional evidence of Respondent's misconduct to be used to support collateral attack of Appellant's conviction, the issue is far from being "irrelevant to this appeal" as Respondent incredulously states. Brf. of Rspnt. at 2. To the contrary, it is the very reason for this appeal, so the litigation can be concluded. As the record shows, this litigation has produced evidence including King County's admission to actions amounting to unlawful withholding of exculpatory evidence under Brady v. Maryland. CP 106.

D. ARGUMENT

1. LEAVE TO AMEND SHOULD HAVE BEEN GRANTED

a. Fact of mailing the May 22, 2011 follow-up request was not required to be included in the initial complaint.

Appellant's complaint in this case asserted a cause of action stemming from Respondent's improper responses to Mr. Kozol's initial public records request dated November 20, 2010 and a follow-up request dated January 12, 2011. CP 125-131. The two orders granting

summary judgment and denying reconsideration, both of which were drafted by Respondent, show the trial court's findings to be in concurrence with this fact: "violation of the Public Records Act arising out of responses to requests for records made by Mr. Kozol dated November 20, 2010 and January 12, 2011." CP 248, 298.

Washington is a notice pleading state. Under Civil Rule 8, Washington's "pleading system requires only a short and plain statement of the claim and a demand for relief." McDevitt v. Harbor View Medical Center, 2013 WL 6022156 *6. See also, Future Select Portfolio Management, Inc. v. Tremont Group Holdings, Inc., 175 Wn.App. 840, 865, 309 P.3d 555 (2013).

Washington's Supreme Court has recognized for over two decades that Washington's notice pleading rule, Civil Rule 8, does not require parties to state all of the facts supporting their claims in their initial complaint. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 222, 829 P.2d 1099 (1992). Notice pleading contemplates that discovery will provide parties with the opportunity to learn more information about the nature of the complaint; therefore courts should be forgiving for factual errors or deficiencies in a complaint before there has been an opportunity to complete discovery. Bryant, 119 Wn.2d at 222.

At the time Mr. Kozol filed his complaint and first amended complaint, he had only received the County's responses to his first and second request letters dated November 20, 2010 and January 12, 2011. CP 118, at ¶18.

After filing the complaint, Mr. Kozol began to request discovery, but up until the County's summary judgment motion its discovery responses never produced any documents responding to the May 22, 2011 letter. CP 118, at ¶19. This was confusing, as the County's discovery productions produced an inter-agency email that stated there were three responses provided to Mr. Kozol's requests in this case. CP 160.

At the time King County moved for summary judgment, discovery was still ongoing, and Mr. Kozol, pro se, was still ascertaining any and all of the County's actionable conduct. It certainly would have been premature for Mr. Kozol to earlier move to amend the complaint to add a new cause of action regarding the May 22, 2011 letter, as discovery at the time showed the County did produce a third response -- not received by Mr. Kozol -- and doing so without sufficient facts could have exposed him to a possible CR 12 motion to strike and/or CR 11 sanctions for filing a claim unsupported by fact or law. See CR 11; Suarez v. Newquist, 70 Wn.App. 827, 855 P.2d 1200 (1993) (sanctions were appropriate because counsel amended the complaint to allege new facts without any additional inquiry, merely to avoid the sovereign immunity bar.)

At best, Mr. Kozol with reasonable information and belief could have only plead a five-day response violation claim regarding his May 22nd follow-up request. RP1 at 18. Without more, this would be redundant since the County already violated the Act.

Although alternate, inconsistent, and hypothetical claims may be pled, double recovery for a single wrong is not permitted. Brick v. Griffith, 65 Wn.2d 253, 259, 369 P.2d 793 (1964). In other words,

duplicative, successive claims asserted upon the County's actions already alleged to violate the Act would have been unnecessary at the time the initial complaint was filed. PRA case law is consistent with this premise, disfavoring imposition of statutory penalties for concurrent violation days stemming from the existence of multiple, concomitant causes of action occurring in response to a requester's set or series of requests. See Double H, L.P. v. Washington Dept. of Energy, 166 Wn.App. 707, 271 P.3d 322 (2012)(only one calculation period for penalty assessment when multiple requests submitted for same subject matter).

Respondent's argument both at the trial court level and on appeal urges that Mr. Kozol was required to plead claims that the County violated the Act by responding/not responding to the May 22, 2011 follow-up request. This argument aims high but misses the mark, as it asks this Court to rule that Mr. Kozol should have flouted the requirements of CR 11, and instead pleaded claims which he had insufficient knowledge or evidence of.

This is the very reason for Washington's liberal application of Civil Rule 15. The purpose of a notice pleading is to facilitate a proper decision on the merits; in pursuit of this, the trial court should freely grant leave to amend when justice so requires. Watson v. Emard, 165 Wn.App. 691, 697, 267 P.3d 1048 (2011).

For a considerable period of the litigation the discovery responses from King County represented that a third response had been sent, presumably to Mr. Kozol's May 22, 2011 (third) request. Appellant not only argued this premise in opposition of summary judgment, but also

moved for CR 11 sanctions for the County allegedly misrepresenting this fact. CP 100, 103. While the County ultimately presented argument and some minimal evidence that its identified three responses to Mr. Kozol's requests were stated in error, and that its position was that only two responses were ever sent, this was only first stated in the course of the summary judgment proceedings. CP 225-226.

Accordingly, Mr. Kozol moved not to amend a new claim or a new party under CR 15(a), but instead moved to amend under CR 15(b) to conform to the evidence presented on summary judgment of the fact the May 22nd letter was mailed. CP 264-270.

This amendment, adding not a new claim but rather only a new fact was appropriate at the time of summary judgment, but did not foreclose Mr. Kozol from in the future moving to amend or supplement new claims stemming from the May 22, 2011 letter, after the appropriate additional discovery was conducted.

> "Alternate, hypothetical, or inconsistent pleading is useful when a party is not yet sure what facts may develop and what legal theories may be relevant, particularly when one must plead quickly to avoid statute of limitations problems or when material information is in the hands of the opponent. Discovery will then allow the pleader to amend the complaint to conform to the evidence."

Wash. St. Bar Ass'n Civil Procedure Deskbook (2d ed. 2002 & 2006 Supp.), at §8.6(1)(d) (citing Philip A. Trautman, Pleading Principles and Problems in Washington, 56 Wash. L. Rev. 687, 694 (1981).)

More significantly, initial pleadings that are unclear may be clarified during the course of summary judgment proceedings. State v. Adams, 107 Wn.2d 611, 620, 732 P.2d 149 (1987); Schoening v. Grays

Harbor Cmty. Hosp., 40 Wn.App. 331, 336-37, 698 P.2d 593, review denied, 104 Wn.2d 1008 (1985). "[A]mendment of the pleadings as may be necessary to cause them to conform to the evidence...may be made upon motion of any party at any time, even after judgment." In re Disciplinary Proceedings Against Bonet, 144 Wn.2d 502, 29 P.3d 1242 (2001).

Because Appellant only sought to add a new fact to his complaint -- as opposed to a new claim or party -- which only became relevant to the action because of Respondent's statute of limitation argument raised in its motion for summary judgment, the trial court should have freely granted leave to amend the new fact, as it was material to the statute of limitations defense.

As conceded by Respondent, Mr. Kozol's May 22, 2011 follow-up request was "not a basis for the complaint. It is not a basis for the factual allegations...." RP1 at 10. Thus, adding the mere fact of the May 22, 2011 letter being mailed could not change the substantive basis of the complaint, and could not prejudice the County.

Accordingly, because Appellant had not yet developed through discovery the factual basis upon which sufficient information and belief existed to plead proper claims of PRA violations related to the May 22, 2011 follow-up request, it was proper to seek amendment of the complaint to add only the fact of the May 22nd letter being mailed in response to the statute of limitations issue raised in the course of summary judgment.

b. CR 15(b) required the trial court to treat the fact of the May 22, 2011 letter as if it were amended into the pleadings.

Respondent argues that because Mr. Kozol raised the May 22, 2011 letter "for the first time just [11] days before the summary judgment hearing," (Brf. of Rspnt. at 19) that amendment to conform to the evidence cannot be allowed under CR 15(b). This argument ignores Washington's long-standing principles of amendment under CR 15(b), and should be rejected.

When hearing a dispositive motion such as a CR 12(b)(6)/CR 12(c), or a CR 56 summary judgment motion, the court can consider evidence raised for the first time.[1] "Plaintiff's allegations are presumed true and a court may consider hypothetical facts not included in the record." Tenore v. AT&T Wireless Servs., 136 Wn.2d 322, 330, 962 P.2d 104 (1998); Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68, 123, 11 P.3d 726 (2000). The court may consider facts alleged for the first time on appeal. Bravo v. Dolsen Cos., 125 Wn.2d 745, 750, 888 P.2d 147 (1995); Davenport v. Wash. Educ. Ass'n, 147 Wn.App. 704, 739, 197 P.3d 686 (2008).

At summary judgment King County did not state a proper objection to the May 22, 2011 letter, instead only pointing out that the document had not been mentioned earlier. RP1 at 20. This is identical to the

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[1] Under CR 12(b)(6) or 12(c), if matters outside the pleadings are considered by the court, the CR 12 motion is converted to a CR 56 summary judgment motion and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by CR 56. CR 12(b); Karl B. Tegland, 3A Washington Practice, Rules Practice: CR 12 (6th ed.2013) at p. 2930.

situation in Denny's Restaurants Inc. v. Security Union Title Ins. Co., 71 Wn.App. 194, 213-14, 859 P.2d 619 (1993), which is controlling.

Moreover, even if this passing comment rises to the level of a proper objection for purposes of CR 15(b), the May 22, 2011 letter was tried by express or implied consent. Mr. Kozol presented the letter as evidence on summary judgemnt. CP 114, 136; RP1 at 12-19. King County presented considerable written and oral argument in opposition of the merits of the letter. CP 224-229; RP1 at 10-12, 19-20. Certainly dispositive is the fact that the court not only stated summary judgment "rises and falls" upon the May 22, 2011 letter, (RP1 at 10), but further made a finding as to the letter. RP1 at 21 ("this is basically an objection to the last response by King County...."); RP2 at 8 ("I determined, as a mater of law, that it was not requesting any additional search or production of any additional documents.")

Therefore, upon either of the two criteria in CR 15(b), the letter "should be treated in all respects as if [it] had been raised in the pleadings," or, the court was to allow "the pleadings to be amended and should do so freely" because the letter was material to the possible dismissal of the action and there was no showing of prejudice by the County that could not be cured with a continuance. CR 15(b).

2. RELATION BACK OF PROPOSED AMENDMENT UNDER CR 15(c)

a. Relation back of proposed amendment to add fact is proper.

CR 15(c) states, in relevant part: "Whenever the **claim** or **defense** asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original

pleading, the amendment relates back to the date of the original pleading." CR 15(c) (emphasis added).

Whether an amendment involves new claims or new parties, CR 15(c) will be liberally construed to permit the amendment to relate back to the original pleading if the opposing party will not be disadvantaged. Kiehn v. Nelson's Tire Co., 45 Wn.App. 291, 296, 724 P.2d 434 (1986), review denied, 107 Wn.2d 1021 (1987). It is an abuse of discretion to deny a motion for leave to amend when no prejudice to the opposing party would result. Estate of Randmel v. Pounds, 38 Wn.App. 401, 685 P.2d 638 (1984).

Here, Mr. Kozol did not seek to add a new claim or party. He only sought to add a new fact, which existed at the time of the original complaint but was overlooked as unnecessary at the time.

This is a unique procedural situation, which requires this Court to carefully recognize the precise amendment sought and consider the proper application of CR 15(c).

First, as Respondent has highlighted, even though Mr. Kozol had knowledge of the May 22, 2011 letter being mailed, he did not include it as a fact or a claim in the complaint or first amended complaint. Brf. of Rspnt. at 20. This is because, as previously stated, discovery was still ongoing (CP 106 n.1), and Appellant could not in good faith assert a claim regarding the May 22, 2011 letter until additional facts were discovered. See, ante.

Second, the issue of fact that the May 22, 2011 letter was mailed was only first presented when it became material to oppose the County's summary judgment motion. The County's discovery productions identifying

that three responses were mailed to Mr. Kozol was suddenly contradicted by the new revelation of the County's claim the third letter was not received.

Third, and most importantly, Mr. Kozol only sought amendment under CR 15(b) to conform the pleadings to the evidence. Because he was only adding a fact, and not a new claim or party, it is impossible for there to be any prejudice to King County, as relation back of the amendment only serves to plead a pre-existing fact to prevent improper use of a statute of limitations as basis for dismissal. It does not substantively change the complaint.

CR 15(c) ensures that the statute of limitations is not used mechanically to prevent adjudication of claims. Tallman v. Durussel, 44 Wn.App. 181, 186-87, 721 P.2d 985, review denied, 106 Wn.2d 1013 (1986).

> "[T]here is a strong public policy implicated in preventing individuals from eluding their substantive obligations by simply invoking the statute of limitations, which supports the application of CR 15(c)."

Public Util. Dist. No. 1 v. Walbrook Ins. Co., 115 Wn.2d 339, 349, 797 P.2d 504 (1990).

Ironically, this is precisely what King County has attempted to do in this case. It was only upon the April 2013 published ruling in Bartz v. Department of Corrections, 173 Wn.App. 522 (2013) that King County moved for dismissal upon a statute of limitations ground.

As Mr. Kozol explained on summary judgment, under the current law at the time he filed his complaint he did not yet identify a need to include claims related to the May 22, 2011 letter, because the legal

landscape at the time of filing was different than under the holding in Bartz. RP1 at 18-19.

Under Tobin v. Worden, 156 Wn.App. 507, 233 P.3d 906 (2010), the one-year statutory filing limitation was only triggered when an agency either claimed an exemption or produced the last record that was being provided on a partial or installment basis. Otherwise, a two-year "catch-all" provision set the statutory limit to file suit.

As of April 2013, this Court declined to adopt Division One's reasoning in Tobin, and instead held that even if only a single document is produced by the agency, this constitutes the agency's last production of a set of records for purposes of beginning the one-year statutory limitation under RCW 42.56.550(6).[2] Bartz, 173 Wn.App. at 537-538.

Thus, King County attempted to utilize a new holding in Bartz to ex-post facto penalize Mr. Kozol under requirements that were not in effect at the time he filed suit. This is a textbook example of why CR 15(c) exists.

This Court would be hard-pressed to find a stronger example of an agency "eluding [its] substantive obligations by simply invoking the statute of limitations" which CR 15(c) was designed to prevent. Walbrook Ins. Co., 115 Wn.2d at 349.

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2 The Division Two Court had been presented with a similar situation in Johnson v. Department of Corrections, 164 Wn.App. 769, 265 P.3d 216 (2011), where the question was whether an agency's production of a single document triggered the running of the PRA's statute of limitations. Id. at 777. However, this Court "did not reach and decide the applicability of the PRA's statute of limitations to production of a single document because Johnson's claim was barred by a two-year catch-all statute of limitations." Bartz, 173 Wn.App. at 536.

b. Neither Herron nor Greenhalgh bar relation-back under CR 15(c).

Respondent argues that Herron v. KING Broadcasting Co., 109 Wn.2d 514, 521 (1987) bars relation back of Mr. Kozol's amendment to conform to the evidence. Brf. of Rspnt. at 21-22. Respondent is wrong.

Herron dealt with, and has been applied in, defamation cases to delineate multiple actionable conduct as separate or "new cause[s] of action." Momah v. Bharti, 144 Wn.App. 731, 753, 182 P.3d 455 (2008). Contrary to King County's erroneous contention on appeal, Mr. Kozol did not seek an amendment to add a **cause of action** stemming from the County's response or failure to respond to the May 22, 2011 letter. Rather, as the record shows, Mr. Kozol only sought to add the **fact** that the May 22nd letter was mailed.

Herron does not apply. All facts do not need to be included in an initial complaint, and unclear pleadings may be clarified during the course of summary judgment. See, ante.

Moreover, Respondent's reliance on Greenhalgh v. Department of Corrections, 170 Wn.App. 137, 148-49 (2012) is also misplaced. In Greenhalgh the Court ruled the one-year statute of limitations accrued from each request seeking different records "because the [agency] claimed the documents were exempt from production in response to both of Greenhalgh's requests...." Id. at 148. Because King County never claimed any exemptions when responding to Mr. Kozol's requests (CP 127, 131), Greenhalgh squarely does not apply.

3. BARTZ DOES NOT APPLY BY ANY MEASURE

Respondent argues that it was entitled to dismissal on a statute of limitations basis. Brf. of Rspnt. at 3. Respondent argues that under Bartz v. Department of Corrections, 173 Wn.App. 522, 297 P.3d 737 (2013), a one-year statute of limitations applies to a single production of record(s) just as it applies to the last installment or partial production of records for purposes of triggering the accrual date. Brf. of Rspndt. at 4.

However, the party asserting a statute of limitations defense bears the burden of proving facts that establish it. Martin v. Dematic, 2013 WL 6980535 *6. In reply to the County's argument, the statutory accrual interpretation in Bartz does not apply to the present facts for several reasons.

a. Bartz does not apply to partial or installment record productions.

The County's production of additional responsive records in 2013 contradicts its claim that it provided a single production of records to Mr. Kozol, which is a strict prerequisite for Bartz to be applicable.

Under Tobin v. Worden, 156 Wn.App. 507, 233 P.3d 906 (2010), the one-year statutory filing period under RCW 42.56.550(6) is not triggered unless the agency (1) claims an exemption, or (2) last produces records on a partial or installment basis. Tobin, 156 Wn.App. at 514; RCW 42.56.550(6). Because neither of these two triggering actions occurred, the Tobin's PRA action was governed by the two-year "catch-all" statute of limitations under RCW 4.16.130.

In Johnson v. Dept. of Corrections, 164 Wn.App. 769, 265 P.3d 216 (2011), it was established that when an agency responds to a public disclosure request by providing a single document production and explains in a letter sent to the requestor that the agency has no other documents responsive to the request, an action for judicial review of the sufficiency of the agency response accrues for purposes of the two-year "catch-all" limitation period of RCW 4.16.130 not later than one week after the letter was sent, which is a reasonable time by which the requester should have received the letter. Johnson, 164 Wn.App. 769 at Headnote 7, 778-79.

In this case King County continued to provide additional responsive records to Mr. Kozol, producing former silently withheld responsive records as recently as March 29, 2013, June 18, 2013, and June 27, 2013. CP 108, 119, 120, 178, 180, 181. One of these production installments included 50 additional responsive pages. CP 108, 209.

Accordingly, Bartz does not apply, because when the County last produced these responsive productions in March and June 2013, it constituted the last production of responsive records on a partial or installment basis, triggering the one-year filing limitation accrual of RCW 42.56.550(6) according to Tobin.

In the alternative, Johnson applies, because King County's January 25, 2011 response to Mr. Kozol's January 12, 2011 same-subject follow-up request provided one 5-page production of records, and as in Johnson, stated there was "nothing additional that is responsive to your request." CP 131. Thus, under Johnson, the two-year

"catch-all" statute of limitations under RCW 4.16.130 gave Mr. Kozol until approximately February 1, 2013 to file suit.

Accordingly, Bartz was never controlling. Rather, under Tobin, Johnson, and RCW 42.56.550(6) Mr. Kozol had one year to file suit from the date King County produced the last installment of responsive records in March or June 2013.

Mr. Kozol introduced evidence of these ongoing installment productions in opposition to the County's summary judgment motion. CP 108, 119, 120, 178, 180, 181, 209. Nowhere in the record does it show the County objected to any of this evidence. Therefore, even though these facts were not initially pled in the complaint or amended complaint (CP 78-91), they are to be treated as if amended into the complaint under CR 15(b). Bartz does not apply and summary judgment should be reversed.

b. Bartz cannot apply retroactively.

King County produced 5 responsive records for Mr. Kozol on January 25, 2011. CP 131. Mr. Kozol's complaint was filed by the Court Clerk on March 7, 2012. CP 78-89. At the time this complaint was filed the Washington Court's interpretation of RCW 42.56.550(6) required Mr. Kozol's complaint to be filed within 2 years under RCW 4.16.130 if the January 25, 2011 records production is viewed as a single production and the only records produced for Mr. Kozol (if not counting the subsequent productions of responsive records on March 29, 2013 and June 18 and 27, 2013). See, Tobin, supra; Johnson, supra. After this two-year period expired, this Court published its decision in Bartz.

Whether in the context of civil or criminal cases, a change in the applied statute of limitation that works to the detriment of the protection interests or statutory ability to access the courts of a party in interest cannot be used to penalize that party whose rights or interests were already clearly established and acted/relied upon. See, e.g., State v. Hodgson, 108 Wn.2d 662, 666-67, 740 P.2d 848 (1987)("When the Legislature extends a criminal statute of limitations, the new period of limitation applies to offenses not already time-barred when the new enactment was adopted and became effective.")

Here, even if this Court views the County's last production of records to be the 5 pages sent with its January 25, 2011 response (CP 131), not withstanding subsequent record productions in 2013, then under the controlling authority at that time in Tobin and Johnson, the two-year statute of limitations under RCW 4.16.130 already ran its course and expired several months before Bartz was published or King County moved for summary judgment dismissal. It is thus inequitable to allow Bartz to be applied ex-post-facto after the former statutory accrual interpretation relied upon had already expired.

4. JOHNSON ACCRUES STATUTE OF LIMITATIONS FROM MAILING OF, OR RESPONSE TO, REQUESTER'S FOLLOW-UP REQUEST

Respondent argues that Johnson does not stand for the proposition that a follow-up request for the same records extends the statute of limitations. Brf. of Rspnt. at 11. However, Appellent is not contending that Johnson allows for an **extension** of the statute of limitations. Rather, Johnson squarely established the accrual of the statute of limitations to begin upon an agency's response to a requester's last follow-up request seeking same-subject matter records.

As a threshold issue, the published case headnotes clearly state this to be the holding. See Appellant's Motion to Take Judicial Notice, at Attachment, Premise Law by West Law Group published dicision of Johnson v. Department of Corrections, 164 Wn.App. 769 (2011). Respondent has misrepresented this case to the Court.

In Johnson v. Department of Corrections, 164 Wn.App. 769, 265 P.2d 216 (2011), the requester submitted an initial request dated August 21, 2006, followed by three follow-up or expanded requests dated September 10, 2006, October 19, 2006, and March 27, 2007. Johnson, 164 Wn.App. at 771-74. The follow-up letters were "requesting the same information he had requested" in the previous letter, id., at 772, and were "apparently a request for the same documents he had requested originally." Id., at 773.

While the agency issued responses to each of Johnson's four letters, this Court ultimately ruled that the latest possible date on which Johnson's action accrued was one week after the agency's August 27, 2007 response to Johnson's last follow-up request. Id., at 778-79.

Therefore, under Johnson, when a requester submits additional requests to an agency in an attempt to obtain records that should have been identified or produced in response to the initial request, the accrual of the one-year statute of limitations under RCW 42.56.550(6) should not begin until either (1) the agency's last response to the last follow-up request, or (2) from the date the agency should have received the last properly mailed or submitted follow-up request to which there was no agency response.

If Johnson does not so hold, Appellant asks this Court to now render such a holding, as it leads to increased judicial efficiency, a decrease in a multiplicity of litigation, and a lesser burden on both the agencies and the requestors. The reasons why such a holding would be practicable are multi-fold.

First, the Act already encourages requestors and agencies to work towards informal resolution of discrepancies in an effort to help agencies produce the records being sought. See WAC 44-14-05003 (Parties should confer on technical issues in an effort to cooperatively resolve them); WAC 44-14-08003 ("parties are encouraged to resolve their disputes without litigation); WAC 44-14-04003 ("Communication is usually the key to a smooth public records process for both requestors and agencies....Similarly, the requestors should periodically communicate with the agency and promptly answer any clarification questions.")

This serves the purpose of limiting the necessity for judicial review, as well as a requestor's inherent need for the records sought. Requestors, in general, should be encouraged to employ a series of follow-up requests, as oftentimes agencies responding to a significant number of requests may be susceptible to inadvertently overlooking responsive records or not understanding certain records to be responsive. This would, in turn, serve to reduce the number of requestors filing a lone request, lying in wait accruing potential penalty days, and then filing an action seeking penalties.[3] While this is technically permissible under the Act, it is not the best practice, and this Court

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[3] A failure to attempt to obtain responsive records sought with a follow-up request before filing suit could serve to mitigate any penalty imposed against an agency.

should continue to implement judicial oversight aligned with the best interests of the requestors and the agencies.

Second, case law has already held that multiple successive requests submitted in an effort to obtain the records initially requested are not to be used to establish multiple, overlapping penalty timelines for purposes of calculating penalty days.

See Double H, L.P. v. Washington Department of Energy, 166 Wn.App. 707, 271 P.3d 322 (2012). There, the plaintiff submitted an initial request for records, and then a refresher request five months later. Id. at 709-10. The refresher request sought all records responsive to the initial request, which was the requestor's way of seeking everything responsive that was not provided at the time of the initial request, as well as any newly responsive records.

In all, the agency produced records on nine occasions that were responsive to both the initial request and the refresher request, over 3000 pages. Id. at 710.

The Court of Appeals rejected Double H's argument that the existence of two separate requests on separate dates, "concern[ing] the same subject matter," should require multiple time frames for multiple penalty calculation. Id.

The trial court ruled that "dividing the records into groups by response dates is artificial and could actually discourage governmental agencies from producing records over time as they were discovered and reviewed." Id. at 711. In affirming the trial court's decision to use a single same-subject group upon which to calculate penalty days, the Court of Appeals cited to the ability to "undercut the risk of

creating multiple penalty-increasing groups." Id. at 715. This also prevented the agency from being penalized more severely for its continuous review and release of records under the circumstances of that case. Id.

Accordingly, under the same principles in Double H that reasoned multiple penalty groupings from multiple requests for the same subject matter were not appropriate or beneficial, this Court should hold that when one or more follow-up requests seeking the same subject matter are submitted to "ferret out" overlooked responsive records, the accrual of any statute of limitations begins either (1) 5 days after a requestor mails his last same-subject-matter follow-up request, or (2) 5 days after an agency mails its response to said follow-up.

Third, accruing a statute of limitations from the date of a same-subject-matter follow-up request, or that agency's response thereto, would not prejudice an agency or expose it to an unfair increase in any penalty days calculated in an action.

The Act already allows for clarification asserted from agencies and requestors, and any such extra period would not be precluded from any penalty calculation in the event a violation occurred. "An agency may take additional time to provide the records or deny the request if it is awaiting a clarification....A clarification could also affect a reasonable estimate." WAC 44-14-04003(7) (citing RCW 42.56.520).

Fourth, not only is this sound policy and in accordance with the statutory purpose of the PRA, but it essentially dovetails with the existing application of the discovery rule, which tolls the date of accrual "until the plaintiff knows or, through exercise of due diligence,

should have known all the facts necessary to establish a legal claim." Martin v. Dematic, 2013 WL 6980535 *6 (citing Giraud v. Quincy Farm & Chem., 102 Wn.App. 443, 449, 6 P.3d 104 (2004)). A plaintiff asserting this discovery rule must show that he or she could not have discovered the relevant facts earlier. Martin, supra; Giraud, 102 Wn.App. at 449.

In In re Estate of Hibbard, 118 Wn.2d 737, 749-50, 826 P.2d 690 (1992) the Supreme Court held that the discovery rule applies to only claims where the plaintiffs could not have immediately known of their injuries due to, inter alia, "concealment of information by the defendant" and to "claims in which plaintiffs could not immediately know of [a cause of action]." Martin, supra, at 6 (citing Schwindt v. Commonwealth Ins. Co., 94 Wn.App. 504, 509 n.10, 972 P.2d 570 (1999)). "Where Washington Courts have applied the rule, the plaintiff lacked the means or ability to ascertain that a legal cause of action accrued." Martin, supra, at 6.

As in Mr. Kozol's case here, often a requestor must employ several follow-up requests before all responsive records are produced. There was clearly many responsive records missed by King County, despite multiple searches by multiple staff, yet it was not until Mr. Kozol initiated litigation that the County was prompted to produce a significant number of responsive records, in excess of 50 pages. CP 108, 120.

It is of no moment that King County claims it did not receive Mr. Kozol's May 22, 2011 follow-up request, because the 50-plus responsive pages produced after the action was commenced clearly validate that

the May 22nd follow-up request was necessary, and would have produced these same 50-plus records responsive to the initial request.

Because the only way for Mr. Kozol to know what further records the County had was for him to submit a follow-up request, application of the discovery rule would appear to be warranted, as the May 22nd follow-up request constitutes his "exercising due diligence" where he "lacked the means or ability to ascertain that a legal cause of action accrued." Martin, supra.

With his first request only yielding 5 responsive pages, Mr. Kozol slightly broadened his request to include "any watches." CP 129. After the agency's perfunctory response again providing the same 5 records (CP 131), Mr. Kozol's May 22, 2011 follow-up request then asked for all the records in the case file. CP 136. As in Double H, this all-inclusive May 22nd follow-up served as a refresher request that required King County to produce records originally or newly responsive to Mr. Kozol's initial November 20, 2010 request and January 12, 2011 follow-up. Still, all three requests included the same subject matter.

Therefore, based upon the above existing companion principles, Appellant asks this Court to hold that the proper mailing of his May 22, 2011 same-subject follow-up request began the accrual of any statute of limitations.

5. MAY 22, 2011 LETTER WAS A PROPER REQUEST

Respondent disputes the facial significance of the May 22, 2011 follow-up request. Brf. of Rspnt. at 22 n.3. Respondent is wrong. The May 22nd letter can only be one of three things, none of which are an administrative appeal: (1) It can be a re-request for all

responsive records previously sought but overlooked; (2) it can be a refresher request for all newly-responsive records since the date of the previous request; (3) it can be asking for an expanded subject group of records that included all previous requests.

Based upon either of these three possibilities, the County's position is thus untenable. If it was a re-request for the exact same records previously sought, Mr. Kozol's action under Johnson would not be time-barred. If it was a refresher request for newly responsive records as previously sought, or was asking for an expanded same-subject group of records, Greenhalgh's administrative appeal analysis, as erroneously applied on summary judgment, would not apply.

6. RESPONDENT'S SUMMARY JUDGMENT REPLY WAS UNTIMELY

Respondent argues that Mr. Kozol was not prejudiced by any untimely service of the reply on summary judgment. Brf. of Rspnt. at 15. This, however, is sharply contradicted by Respondent's argument that Mr. Kozol should have moved for amendment under CR 15(a) prior to summary judgment. Brf. of Rspnt. at 19. As established in the record, receiving the County's reply on September 4, 2013 (CP 260-61), just two days before the summary judgment hearing, left Mr. Kozol no time to file and serve by mail any motion to amend and a motion to shorten time, nor a motion to continue the summary judgment hearing.

Under the Pierce County Superior Court Local Rules: all motions must be filed and served "no later than the close of business on the sixth court day before the day set for hearing," PCLR 7(a)(3)(A); "All Motions to Shorten Time shall be in writing...," PCLR 7(c)(2)(A);

"No hearing upon a motion for summary judgment shall be continued except upon the explicit order of the assigned judge," PCLR 7(a)(10)(A); "No motion shall be heard unless proof of service upon the opposing party is filed or there is an admission of such service by the opposing party." PCLR 7(a)(4).

As an incarcerated, pro se litigant completely dependent upon the U.S. Mail for filing and service, Mr. Kozol could not properly move to continue the summary judgment hearing nor move to amend and to shorten time just two days before the hearing; mail was too slow. Nor could have these been considered if orally presented at summary judgment. This is the very reason for assertion of the CR 6(e) requirement.

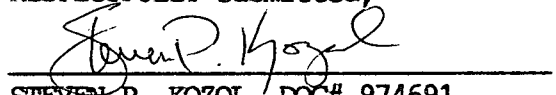
Additionally, if the County was prejudiced by any alleged untimely service by Mr. Kozol, it should have moved for a continuance of the summary judgment hearing to afford the full period it argues it was deprived of. Unlike Mr. Kozol, the County had ample time to do so.

D. CONCLUSION

The summary judgment granted by the trial court should be reversed. Mr. Kozol's complaint was not time-barred by the statute of limitations, as it was not filed more than one year after King County's last installment or partial production of responsive records. In the alternative, any statute of limitations began to accrue five days after the May 22, 2011 follow-up request was mailed.

DATED this 2nd day of June, 2014.

RESPECTFULLY submitted,



STEVEN P. KOZOL, DOC# 974691
Appellant, Pro Per

DECLARATION OF SERVICE BY MAIL
GR 3.1

I, STEVEN P. KOZOL, declare and say:

That on the 2nd day of June, 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. 45542-1-II:

Appellant's Reply Brief;

addressed to the following:

Clerk of the Court
Washington Court of Appeals
Division Two
950 Broadway, Suite 300
Tacoma, WA 98402

David J. Eldred, SDPA
King County Prosecutor's Office
CIVIL DIVISION - Litigation
500 Fourth Ave., Suite 900
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 2nd day of June, 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
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ABERDEEN WA 98520