No. 45601-0-II

COURT OF APPEALS, DIVISION II OF THE STATE

OF WASHINGTON

STEVEN P. KOZOL,

Appellant,

vs.

WASHINGTON DEPARTMENT OF CORRECTIONS, et al,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY
HONORABLE CHRISTOPHER WICKHAM

APPELLANT STEVEN P. KOZOL'S OPENING BRIEF
(Corrected)

ORIGINAL

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INTRODUCTION

A party has a right for state agency to follow statutory requirements. When a state agency acts in violation of statute, code, ordinance, constitution or common law, a party can seek relief under the Uniform Declaratory Judgments Act (UDJA), in situations where the Administrative Procedures Act does not apply.

A party seeking judicial review of agency action under the UDJA can obtain declaratory judgment that the agency's actions were in violation of statute, or a declaratory judgment as to that party's rights, status or other legal relation(s) under a specified statute.

Judicial review under the UDJA is not precluded simply because the party seeking review may have another alternate remedy available.

A writ of certiorari is the proper method to obtain judicial review of a state agency's administration of a statute.

A writ of certiorari is the proper method to obtain judicial review of a state agency's arbitrary, capricious or illegal action.

When moving to amend the pleadings, the trial court shall freely grant leave to amend in such cases where there is no actual and clear prejudice shown by the nonmoving party.

Injuctive relief is a proper method to enjoin future violations of statute, and to compel the performance of an affirmative act.

ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred in granting CR 12(c) dismissal of Appellant's UDJA claims.

Assignment of Error No. 2: The trial court erred in denying leave to amend the complaint.

Assignment of Error No. 3: The trial court erred in dismissing injunctive relief claims.

ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

Issues Pertaining to Assignment of Error No. 1:

Issue 1.1: Was there a lack of subject matter jurisdiction to hear UDJA claims?

Issue 1.2: Did a justiciable controversy exist allowing UDJA review?

Issue 1.3: Is a private cause of action required for UDJA review?

Issue 1.4: Did Appellant have standing to bring UDJA claims?

Issue 1.5: Does the UDJA permit judicial review of an agency's or individual's actions allegedly in violation of statute?

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Issue 1.7: Is UDJA review precluded when statute allegedly violated also carries criminal implications, but party seeking relief does not file criminal complaint?

Issue 1.8: Was there an alternate available remedy of a 42 U.S.C. §1983 action against the Washington Department of Corrections?

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Issue 2.2: Was there any actual prejudice to Respondents that precluded leave to amend being granted?

Issue 2.3: Is it improper to deny leave to amend on the basis that the proposed amendment raises new issues not initially pled?

Issue 2.4: Is a motion to amend untimely when brought after oral ruling granting CR 12(c) dismissal, but before formal entry of order of dismissal?

Issue 2.5: Is a writ of certiorari a proper method to obtain judicial review of arbitrary, capricious, or illegal agency action?

Issue 2.6: Is a writ of certiorari a proper method to obtain judicial review of an agency's administration of a statute?

Issues Pertaining to Assignment of Error No. 3:

Issue 3.1: Is injunctive relief proper to enjoin future violations of statute, or to compel an affirmative action to restore the ongoing denial of property to its owner?

STATEMENT OF THE CASE

Appellant Steven P. Kozol is an inmate incarcerated at the Stafford Creek Corrections Center (SCCC) in Aberdeen, Washington. Mr. Kozol was housed at McNeil Island Corrections Center (MICC) before being transferred to SCCC. While at MICC, Mr. Kozol was allowed to purchase a blue Ibazez S-Model electric guitar (serial# I090204088) and accessories. CP 131. These items were approved and issued to Mr. Kozol by MICC staff, and added to his official MICC musical property matrix. CP 133-134. MICC shipped this guitar and accessories as authorized property when Mr. Kozol transferred to SCCC. CP 136. SCCC staff issued to Mr. Kozol all music equipment except for the guitar, guitar case, and a tuner/effects processor. CP 138-140.

SCCC staff would not issue the guitar and accessories to Mr. Kozol because he couldn't produce a store sales receipt, and then filed a major infraction against Mr. Kozol, alleging violation of WAC 137-28-740.

SCCC staff conducted a hearing on this infraction on April 6, 2011. At this hearing, SCCC hearing officer pro tem Greg Jones stated on the record that Mr. Kozol did not receive most of the evidence against him prior to the hearing. CP 64-65. Mr. Jones also refused to allow Mr. Kozol to submit documentary evidence in his defense. CP 66. The hearing was also conducted without 24 hours notice being given to Mr. Kozol. CP 66.

Mr. Jones found Mr. Kozol guilty of the infraction and imposed 10 days of cell confinement as sanction. CP 84. Mr. Kozol was also forced to ship his guitar and accessories out of the prison. RP1, at 5.

Mr. Kozol filed a timely administrative appeal to the SCCC Superintendent. On April 21, 2011, Associate Superintendent Eric Jackson issued a Disciplinary Hearing Appeal Decision upholding the guilty finding, in which he officially stated that the hearing "was conducted in accordance with Due Process and WAC 137-28," that Mr. Kozol was given "at least 24 hours advance written notice" of the hearing, and that Mr. Kozol was "provided an opportunity to...present documentary evidence on [his] behalf." CP 68. Associate Superintendent Jackson also certified that he had "investigated [Kozol's] appeal," and that "all pertinent evidence was reviewed." CP 69.

Associate Superintendent Jackson signed this document and filed it with the Washington State Department of Corrections. This document is governed by Executive Order 00-03, RCW 42.56 and RCW 40.14. CP 69.

Appellant filed a complaint in superior court for declaratory relief under the Uniform Declaratory Judgments Act, RCW 7.24 et seq, and for injunctive relief under RCW 7.40 et seq. Appellant specifically requested the court enter declaratory

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The Verbatim Report of Proceedings dated October 4, 2013 and November 1, 2013 are designated as RP1 and RP2, respectively. The Verbatim Report of Proceedings dated June 28, 2013 are designated as Supplemental RP3.

judgment declaring the actions of the Respondent Washington Department of Corrections (WDOC) were unconstitutional, unlawful and void, and injunctive relief enjoining the WDOC from using the erroneous infraction against him. CP 4-6.

Respondent filed its answer in which it presented, inter alia, the affirmative defense that Mr. Kozol had failed to state a claim upon which relief can be granted because he "had not alleged facts that rise to the level of a civil rights deprivation under 42 U.S.C. §1983, or a violation [of] law." CP 7-10.

Accordingly, Appellant filed a motion to amend his complaint accompanied by the proposed First Amended Complaint for Declaratory and Injunctive Relief. The proposed amended complaint omitted all reference to "due process" or "constitutional" rights violations, and added two additional named defendants, Greg Jones and Eric Jackson. CP 11-20.

Respondent filed a motion to dismiss pursuant to CR 12(c) in which it categorized Appellant's complaint as a "Civil Rights Action," and requested dismissal on the ground that the State cannot be a party defendant for purposes of a §1983 civil action. CP 21-24. Respondent also filed a response to Mr. Kozol's motion to amend, stating it did not oppose the proposed amendment. CP 25-26.

At the June 28, 2013 hearing, the trial court granted Mr. Kozol leave to amend his complaint as proposed. Supp. RP3, at 3. Additionally, after considering the parties' oral arguments,

the court partially granted the WDOC's motion to dismiss, expressly dismissing with prejudice "any civil rights/42 U.S.C. §1983 claims." CP 27-29.

Accordingly, Mr. Kozol filed and served his First Amended Complaint adding Eric Jackson and Greg Jones as defendants, and removing any claims of constitutional or due process violations. CP 30-36. Respondents filed their Answer to First Amended Complaint. CP 37-41.

Respondents then filed a CR 12(c) motion to dismiss. CP 42-48. Appellant's response and motion to strike was then filed (CP 156-165), whereupon Respondents filed an amended CR 12(c) motion to dismiss. CP 49-57.

In its amended CR 12(c) motion, Respondents asserted that (a) the trial court did not have subject matter jurisdiction over Mr. Kozol's claims for declaratory and injunctive relief for the alleged violations of state statute and Washington Administrative Code, (b) that Mr. Kozol did not have an independent cause of action in his seeking declaratory relief under the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW, nor in seeking injunctive relief under chapter 7.40 RCW, (c) that Mr. Kozol was not permitted to seek judicial review under the UDJA for Respondent's actions in violation of statute, and, (d) the alternate adequate remedy of a Personal Restraint Petition precluded judicial review of Mr. Kozol's UDJA claims. CP 49-57.

Appellant's response argued that (a) the superior court has original jurisdiction to review the claims brought under the UDJA, (b) that no private cause of action is required for judicial review under the UDJA, and (c) the superior court could review the claims under the court's inherent power of judicial review. CP 156-165.

Appellant retained counsel who entered a notice of appearance. CP 150-151. Respondents filed their reply on the CR 12(c) motion, arguing that the superior court did not have jurisdiction to issue declaratory relief on violations of state statute, that the UDJA was improper to review Appellant's claims, and that UDJA review was precluded because Appellant still had the available, adequate remedy of a §1983 action. CP 92-98.

The superior court conducted a hearing on the CR 12(c) motion, and heard oral arguments of the parties. RP1, 1-18. The court orally granted Respondents' motion to dismiss, but set over the signing of an order so as to allow Appellant time to present additional claims or remedies that were not yet considered, stating, "I don't want to foreclose remedies that Mr. Kozol may have that we haven't considered." RP1, at 16.

Appellant filed a motion to amend the complaint, to add claims that (a) WAC 137-28-140 is facially invalid as arbitrary and capricious, (b) Respondents must be enjoined from violating their own administrative code, (c) a writ of certiorari must be issued finding the 740 infraction hearing procedure to be arbitrary and capricious. CP 99-109.

The amended complaint also sought to add declaratory judgment claims that (a) all inmates have the right under WAC 137-28 to present evidence in their defense if it is not unduly hazardous to institutional safety or correctional goals, (b) all inmates have the right under WAC 137-28 to 24 hours notice before a 740 infraction hearing, (c) that all Disciplinary Hearing Appeal Decisions are public records in accordance with RCW 42.56.010(1) and RCW 4.14.010, (d) that all inmates have the right not to have a false Disciplinary Hearing Appeal Decision filed with a public agency pursuant to RCW 40.14.020 and/or RCW 40.14.030, and RCW 42.20.020. CP 107-109.

The amended complaint also sought either a statutory or constitutional writ of certiorari finding Respondents violated Appellant's fundamental right to be free from arbitrary and capricious action denying him the right to review evidence used against him, to be free from the arbitrary and capricious action of not providing 24 hours notice of the hearing, and to be free from the arbitrary and capricious action denying him the right to present evidence in his defense. CP 109. The amended complaint sought injunctive relief enjoining Respondents from using the 740 infraction against Appellant, and that either Appellant's music property be returned and issued to his possession or Respondents pay for replacement property. CP 109.

Respondents filed a response to the motion to amend, arguing that (a) the motion to amend was untimely, and (b) that the motion to amend was futile. CP 110-117. On Reply, Appellant asserted that his motion to amend was neither untimely nor futile, that the requirements had been met for the court to hear the writ petition, and that the 740 infraction hearing was so severely flawed as to require intervention through a writ of certiorari. CP 142-146.

The court conducted a hearing on October 4, 2013, found that Appellant still had the adequate alternate remedy of a §1983 action in which to bring his claims, and granted an order of dismissal and denied Appellant's motion to amend. RP1, at 16. On November 1, 2013, the court entered the written order of dismissal and denial of motion to amend. CP 148-149.

ARGUMENT

A. THE TRIAL COURT ERRED IN GRANTING CR 12(c) DISMISSAL OF APPELLANT'S CLAIMS.

1. Standard of Review of CR 12(c) Dismissal

Washington courts treat a CR 12(c) motion for judgment on the pleadings identically to a CR 12(b)(6) motion to dismiss for failure to state a claim. PE Systems LLC v. CPI Corp., 176 Wn.2d 198, 203, 289 P.3d 638 (2012). The only practical difference between the two motions is timing: a CR 12(b)(6) motion is made after the complaint but before the answer; a CR 12(c) motion is made after the pleadings are closed. Id.

Appellate courts review a CR 12(c) dismissal de novo. Id. A dismissal under CR 12(c) is appropriate only if it appears beyond a doubt that the plaintiff cannot prove any set of facts that would justify recovery. Id., at 203. In undertaking such an analysis, the plaintiff's allegations are presumed to be true and a court may consider hypothetical facts not included in the record. Ent v. Wash. St. Crim. Justice Training Comm'n, 174 Wn.App. 615, 621, 301 P.3d 468 (2013).

A CR 12(c) dismissal should be granted sparingly. Id., at 621. Such dismissals are appropriate only in unusual cases where, on the face of the complaint, there is some insuperable bar to relief. Protect the Peninsula's Future v. City of Port Angeles, 175 Wn.App. 201, 208, 304 P.3d 914 (Div.2, 2013)(citation omitted).

When reviewing a trial court's ruling on a CR 12(c) motion, the appellate court must take the facts alleged in the complaint, as well as hypothetical facts consistent therewith, in the light most favorable to the nonmoving party. Questions of law are reviewed de novo. Davenport v. Wash. Educ. Ass'n, 147 Wn.App. 704, 715, 197 P.3d 686 (Div.2, 2008). Any hypothetical situation conceivably raised by the complaint defeats a [CR 12] motion if it is legally sufficient to support plaintiff's claim. Corp. of Catholic Arch. of Seattle, 162 Wn.App. 183, 189, 252 P.3d 914 (2011).

2. Relief Under the Uniform Declaratory Judgments Act

Washington's Uniform Declaratory Judgments Act (UDJA) provides:

> "Courts of record within their respective jurisdictions shall have power to declare rights, status or other legal relations whether or not further relief is or could be claimed...." RCW 7.24.010;
>
> "A person...whose rights, status or other legal relations are affected by a statute...may have determined any question of construction or validity arising under the...statute...and obtain a declaration of rights, status or other legal relations thereunder." RCW 7.24.020;
>
> "The enumeration in RCW 7.24.020...does not limit or restrict the excercise of the general powers conferred in RCW 7.24.010, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove any uncertainty." RCW 7.24.050.

A plaintiff seeking relief under the UDJA must assert "a legal right capable of judicial protection which exists in a statute, constitution or common law." Wash. Fed'n of State Employees v. State Pers. Bd., 23 Wn.App. 142, 148, 594 P.2d 1375 (1979). Unless a dispute involves "issues of major public importance, a justiciable controversy must exist before a court's jurisdiction may be invoked under the [UDJA]." League of Educ. Voters v. State, 176 Wn.2d 808, 816, 295 P.3d 743 (2013)(citations omitted).

3. There was not a Lack of Subject Matter Jurisdiction.

In its CR 12(c) motion to dismiss, Respondent apparently argued that there was a lack of subject matter jurisdiction precluding judicial review of Appellant's UDJA claims. CP 50-51. Determining subject matter jurisdiction is a question of law reviewed de novo. Williams v. Lenore & Keeble, Inc., 171 Wn.2d 726, 729, 254 P.3d 818 (2011).

Superior courts have original jurisdiction over Appellant's action for declaratory judgment and injunctive relief. RCW 2.08.010; RCW 7.24.010; RCW 7.40.010; Art.IV, §6 Wash Const. Any discussion of state court jurisdiction proceeds from the fundamental premise that superior courts have broad residual jurisdiction to hear all causes and proceedings over which jurisdiction is not vested exclusively in some other court.

Washington State superior courts are courts of general jurisdiction and are not constrained by subject matter jurisdiction under Art.III, §2. To-Ro Trade Shows v. Collins, 100 Wn.App. 483, 489, 997 P.2d 960 (Div.2, 2000). "There is no doubt here that the superior court [has] subject matter jurisdiction in this declaratory judgment action." Casey v. Chapman, 123 Wn.App. 670, 676, 98 P.3d 1246 (2004).

4. A Justiciable Controversy Exists.

In the context of a UDJA action, a justiciable controversy is:

> "(1)...an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interest that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive."

Nollette v. Christianson, 115 Wn.2d 594, 599, 800 P.2d 359 (1990).

The instant case meets all of these prerequisites. Respondents found Appellant guilty of a prison infraction. CP 84-85. Respondents did not allow Appellant to present documentary evidence in his defense. CP 66. Respondents did not provide Appellant notice of all evidence used against him prior to the infraction hearing. CP 64-65. Respondents did not provide Appellant at least 24 hours notice of the hearing. CP 66. Respondents filed a false public record stating the "hearing process was conducted in accordance with Due Process and WAC 137-28." CP 68. Respondents filed a false public record stating at least 24 hours advance notice was provided to Appellant before the hearing. CP 68. Respondent filed a false public record stating Appellant was "provided an opportunity to call witnesses and present documentary evidence on [his] behalf." CP 68.

In conducting the infraction hearing, Respondents were required to give Appellant at least 24 hours notice of the hearing. WAC 137-28-290(1). Respondents were required to provide Appellant with all of the evidence against him prior to the hearing. WAC 137-28-290(2)(f). Respondents were required to allow Appellant to present documentary evidence on his behalf

at the hearing. WAC 137-28-300. Respondent was prohibited from filing a knowingly false public record. RCW 40.16.030.

As a result, Appellant was found guilty of the infraction. CP 84-85. Appellant was further forced to ship his music equipment out of the prison. RP1, at 5.

Respondent has argued that WAC 137-28 "do[es] not create any procedural or substantive rights," and instead are only intended as "guidelines." CP 52. However, WAC 137-28 operates under the statutory authority of RCW 72.01.090, and the Supreme Court has construed WAC 137-28 to have statutory effect and requirements. See In re PRP of Grantham, 186 Wn.2d 204, 217, 277 P.3d 288 (2010)(en banc)(Supreme Court relied upon the "requirement of WAC 137-28-270"); State v. Simmons, 152 Wn.2d 450, 457, 98 P.3d 789 (2004)(Supreme Court stating that "the [WAC 137-28-190(2)] code required...."); In re PRP of Higgins, 152 Wn.2d 155, 165, 95 P.3d 330 (2004)(Supreme Court stating inmate "Petitioner was entitled to...a right to...present documentary evidence. See WAC 137-28-290(2).")

To quote former Justice Talmadge, it is the "height of judicial flapdoodle to say the rules set forth in WAC 137-28" do not conform to nor implicate statutory requirements. State v. Brown, 142 Wn.2d 57, 64-65 (2001)(Talmadge, J., dissenting).

Washington courts give substantial weight to an agency's interpretation of statutes and regulations when it falls within its expertise, but retain ultimate responsibility to see that

rules and statutes are applied consistent with the legislature's policy. State v. Donery, 131 Wn.App. 667, 674 (Div.2, 2006).

Thus, justiciable controversy lies with Respondent's and Appellant's opposing positions of what WAC 137-28 required in the infraction hearing. Additionally, justiciable controversy also lies with whether or not under RCW 40.16.030 Respondents were prohibited from filing a knowingly false public record adverse to Appellant's interests.

5. No Private Cause of Action is Required for UDJA Judicial Review.

Respondents argued that there was no private cause of action allowing Appellant to bring an action under WAC 137-28 et seq. CP 52. Such an argument is ignorant of Appellant's claims brought in his complaint.

Appellant has not brought an action under WAC 137-28 et seq. By the clear language of the First Amended Complaint for Declaratory and Injunctive Relief, the only asserted jurisdiction is invoked either by RCW 7.24.010 or RCW 7.40.010.

The theory upon which Respondents' argument is based would thus produce catagorically absurd results in every action brought under the UDJA. As an example, if an individual brought an action under the UDJA to challenge the facial validity of a statute, or even a WAC as in the instant case, a declaratory judgment action as to the facial validity would be precluded whenever any given statute being reviewed did not expressly allow for

a separate, private cause of action within the statutory language. Such reasoning would clearly lead to absurd results, and therefore is a baseless argument.

Further, the courts have already made clear that a separate cause of action is not necessary to bring a declaratory judgment action. In Pasado's Safe Haven v. State, 162 Wn.App. 746, 259 P.3d 280 (2011), the court clarified that a "taxpayer derivative suit" was not a separate cause of action to which a party could seek declaratory relief.

The court stated:

> "To the contrary, the UDJA establishes the sole cause of action by which a declaratory judgment may be sought....Rather than creating a separate cause of action, taxpayer standing principles simply provide a means to establish standing to bring such a claim....The two means of establishing standing do not equate to there being two different causes of action."

Pasado's, 162 Wn.App. at 752-753 (citation omitted).

It is axiomatic that no cause of action need emanate directly from the statute, ordinance, constitution or common law being subjected to review, as an action brought under the UDJA establishes the proper cause of action.

Declaratory relief requires a showing of standing, but not the existence of a private cause of action. Brown v. Vail, 169 Wn.2d 318, 333, 237 P.3d 263 (2010)(en banc).

Quizzically, Respondent appears to have conceded this issue, citing to Nelson v. Appleway Chevrolet, Inc., 160 Wn.2d 173, 157 P.3d 847 (2007)(no additional private right of action is

necessary for parties to seek declaratory judgment when their rights are affected by statute). CP 52.

6. Appellant has Standing to Bring UDJA Action.

Respondent argued that Appellant lacked standing to bring the UDJA action. CP 95. Respondent also argued that "Mr. Kozol has no standing under RCW 40.16.030." CP 95. There is simply no merit whatsoever to Respondent's argument, as it is belied by the very authority it relies upon, which states that for a party to have standing under the UDJA, "a party must be within the zone of interests to be protected or regulated by the statute in question and the party must have suffered an injury in fact." City of Longview v. Wallin, 174 Wn.App. 763, 778, 301 P.3d 45 (2013)(citation omitted). CP 95.

Certainly, Appellant has suffered an "injury in fact" by having the guilty finding improperly upheld by the filing of the false public record (CP 68-69), as well as having been wrongfully divested of his music equipment. RP1, at 5. There is no question that Appellant has standing for UDJA review.

7. The UDJA Permits Review of a Party's Actions.

Respondents argued to the trial court that Appellant was not permitted under the UDJA to have the court issue a declaratory judgment as to whether Respondents' actions were in violation of statute. CP 53. Relying upon this Court's decision in

Bainbridge Citizens United v. Wash. St. Dept. of Nat. Resources, 147 Wn.App. 365, 198 P.3d 1033 (2008), Respondents purported that the UDJA can only be used to establish a party's rights under a statute, and not for judicial determination that a party's actions violated a statute. Respondents' argument lacks merit, and should be rejected.

In numerous instances, Washington Courts have given UDJA review to whether actions violated statutes, ordinances, constitution or common law. In City of Lakewood v. Koenig, 176 Wn.App. 397, 400, 309 P.3d 610 (Div.2, 2013), the city brought a UDJA action against a public records requestor for a declaratory judgment pursuant to RCW 7.24 declaring that the city complied with PRA requests under RCW 42.56. This Court's de novo review found the statute was violated by the city.

In Wash. St. Comm. Access Project v. Royal Cinemas, Inc., 173 Wn.App. 174, 293 P.3d 413 (2013), the plaintiff sought declaratory judgment and injunctive relief declaring that movie theaters should provide to disabled patrons captioning screening of movies embedded with captions. The appellate court specifically upheld the trial court's order that the "Defendants are required by [RCW 49.60.030] to offer captioning...," id. at 216, and recognized that, "[t]hus, the trial court's conclusions of law implicitly concluded that the theaters violated [RCW 49.60.030] and that those with hearing disability were injured by the violation." Id. at 217. See also, City of Raymond v. Runyon, 93 Wn.App. 127 (Div.2, 1998)(declaratory judgment

granted on city employee's actions violating statute); Wash. St. Coalition for the Homeless v. D.S.H.S., 133 Wn.2d 894 (1997)(affirming declaratory judgment that DSHS had not complied with statutes); Protect the Peninsula's Future v. Clallam County, 66 Wn.App. 671 (Div.2, 1992)(declaratory judgment upheld declaring county commissioners were in violation of state statutes); Walker v. Quality Loan Service Corp., 176 Wn.App. 294, 323, 308 P.3d 716 (2013)(Because plaintiff alleged facts that, if proved, would entitle him to relief, CR 12(c) dismissal was reversed for violations of statutes RCW 61.24 et seq, 15 U.S.C.A. §1692f; RCW 19.86 et seq.)

Squarely controlling is Kitsap County v. Smith, 143 Wn.App. 893, 180 P.3d 834 (Div.2, 2008), where the county sought declaratory and injunctive relief alleging the defendant's actions had violated chapter 40.16 RCW.

While Respondent misrepresented in its CR 12(c) reply that "[t]he County did not seek a declaratory judgment under RCW 40.16" in Kitsap County (CP 93), the record in Kitsap County clearly shows that violations of RCW 40.16 were claimed in the UDJA action. Kitsap County, 143 Wn.App. at 893 n.2. To be clear, the brief filed by the appellant in Kitsap County squarely sought review for declaratory relief for actions violating RCW 40.16, inter alia. Here, Mr. Kozol presented this brief to the trial court (RP1, at 10), and accordingly now moves this Court to take judicial notice of this fact in Kitsap County.

8. Bainbridge Citizens United is not Controlling.

Both Respondent and the trial court erroneously interpreted this Court's ruling in Bainbridge Citizens United v. Wash. St. Dept. of Nat. Resources, 147 Wn.App. 365, 198 P.3d 1033 (Div.2, 2008). Respondent incorrectly claimed that Appellant was seeking "declaratory relief for precisely the same reasons that the plaintiffs did in Bainbridge Citizens United...." CP 54. However, there is a dispositive difference between the claims and relief sought by Appellant and those presented in Bainbridge Citizens United.

In Bainbridge, the plaintiff sought "declaratory and injunctive relief under the UDJA because the Department failed to fulfill mandatory enforcement obligations under WAC 332-30-127 and WAC 332-30-171(8) against vessels trespassing in Eagle Harbor." Bainbridge, 147 Wn.App. at 372.

In its analysis, this Court upheld summary judgment against Citizens United upon a 2-fold reasoning. First, the court reasoned that the trial court lacked jurisdiction to hear the case because all necessary parties were not joined. Id. at 372. The Court laid forth in detail at least three reasons why the alleged trespassers were required to be joined as necessary parties. Id. at 373-74.

Second, the Bainbridge Court found that the attempt to use a declaratory judgment to force a government agency to enforce laws against a third party was an improper application of the

UDJA. This Court denounced citizens "attempt[ing] to act as private attorneys general to dictate a state agency's enforcement decision." Id. at 376. Thus, the Court found this was "not the proper subject for a declaratory judgment and the trial court did not err in granting summary judgment to the Department." Id.

However, these are not the claims nor relief sought by Appellant in the instant case. To be clear, Appellant did not seek declaratory judgment to compel the Respondents to enforce statutes or WACs upon third-party violators outside of the Department of Corrections. Rather, agency action violating statute/WACs firsthand, in terms of infraction proceeding requirements against Appellant, is the issue under review. Thus, UDJA review of internal agency action is proper, and it does not constitute the same type of external agency action at issue in Bainbridge. Thus, Bainbridge is not controlling.

9. Any Criminal Implications That may Arise From Violation of RCW 40.16.030 do not bar UDJA Review.

Respondent argued that the superior court did not have subject matter jurisdiction over Appellant's claims that Respondent Jackson violated RCW 40.16.030 because Appellant is not a prosecuting attorney. CP 51-52. However, in so arguing, Respondent attempted to recast Appellant's claims as being an attempted criminal indictment, which they are not.[1]

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[1] If Appellent makes a prima facie showing of a violation of RCW 40.16.030 to a Superior Court, that court would be required under RCW 10.27.030 to convene a grand jury to indict Eric Jackson. See (unpublished opinion) Eller v. Ladenburg, 1996 WL 520606 (Div.2, 1996, No. 19028-1-II) (discussing the Criminal Investigatory Act of 1971).

Despite Respondents' argument, the mere fact that any given violation of statute might also carry criminal implications does not in fact create an absolute bar to civil litigation of the alleged violation under UDJA review.

Respondents' argument is specious, as turning to the analysis in Kitsap County v. Smith, supra, it is clear that Kitsap County was permitted judicial review in a civil UDJA action of actions allegedly violating chapter 40.16 RCW. Kitsap County, 143 Wn.App. at 893.

While Kitsap County did not pursue criminal charges against Respondent Smith in that case, the fact that it was permitted by statute to do so did not foreclose seeking a declaratory judgment in a civil action based upon Smith's conduct.

The Washington Supreme Court has addressed similar circumstances in other UDJA cases. See Industrial Indemnity Co. v. Kallevig, 114 Wn.2d 907, 792 P.2d 250 (1990)(case originated with complaint for declaratory relief that individual intentionally caused a fire which destroyed high-value property, i.e., "arson"); Miotke v. City of Spokane, 101 Wn.2d 307, 678 P.2d 803 (1984)(civil action sought declaratory judgment that actions of defendants were wrongful and illegal).

10. There was no Alternate Available §1983 Remedy.

Respondent argued to the trial court that Appellant was not allowed to seek UDJA judicial review because he could still

pursue a 42 U.S.C. §1983 action as an alternate available remedy. CP 96-97. Respondent argued there were "other avenues...a §1983 action;" that "there clearly is a §1983 action...;" that claims "could be brought in §1983;" and that "there is another avenue, and that other avenue is a §1983 action." RP2, at 9-11. However, Respondent misrepresented the availability of a §1983 action, as no such remedy existed.

Respondent had already brought a motion to dismiss any and all 42 U.S.C. §1983 claims in this case, arguing the State cannot be a person for purposes of a §1983 action. CP 21-24. As a result, the trial court entered an order dismissing "any civil rights / 42 U.S.C. §1983 claims" against Defendant State DOC, but did not dismiss Appellant's action entirely and allowed it to proceed. CP 27-29.

Further, Respondents knew that Mr. Kozol had previously brought similar claims in a §1983 action that was dismissed with prejudice.[2] CP 111.

Because the State cannot be a person for purposes of a 42 U.S.C. §1983 action, and because any §1983 claims against Department of Corrections had already been ordered dismissed with prejudice in this case, Appellant did not have an alternate available remedy of a 42 U.S.C. §1983 action against Respondent WDOC.

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[2] Despite Respondents' selective wording, Mr. Kozol's §1983 action also raised Fourteenth Amendment Due Process claims based upon the same nucleus of facts against defendants that included Respondents Eric Jackson and Greg Jones.

Additionally, the law of the case and/or RAP 7.2(c) applies here, as Appellant, operating under an extention of time by the Division Two Court Clerk to file a CR 60(b) motion with the trial court, obtained a ruling under RAP 7.2(a) and (e), from the Hon. Gary Tabor on April 11, 2014, that there was in fact no §1983 action available as an alternate adequate remedy to Appellant.

11. There was no Alternate Available Remedy of a PRP.

Respondent argued in its CR 12(c) motion that "Mr. Kozol has another complete adequate remedy in that he can file these claims as a personal restraint petition. See RAP 16.4(d)." CP 54. Respondent also argued Mr. Kozol's "ability to litigate his prison disciplinary claims in a personal restraint petition....[which] provides yet another reason why he is not entitled to declaratory relief on his prison disciplinary claims." CP 55. This argument is false.

First, the result of the prison infraction did not place Appellant "under restraint" as required by RAP 16.4(b). Appellant was not punished with any loss of good time. Rather, he was given 10 days cell confinement, and was divested of his personal music instrument and accessories. CP 68, 84; RP1, at 5.

"A petitioner is 'under restraint' if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is subject to imminent confinement, or the petitioner is under some other disability from a judgment

or sentence in a criminal case." In re Martinez, 171 Wn.2d 354, 363, 256 P.3d 277 (2011)(citing RAP 16.4(b)). See also, In re Monschke, 160 Wn.App. 479, 488 n.7, 251 P.3d 884 (2010). Because the infraction did not result in Appellant's terms of prison confinement being lengthened due to a loss of good time, he was not under unlawful restraint for purposes of RAP 16.4(b),(c). See In re Yates, 177 Wn.2d 1, 16, 296 P.3d 872 (2013)(when reviewing a PRP, "courts may grant relief to a petitioner only if the petitioner is under unlawful restraint as defined by RAP 16.4(c)") Clearly the prison infraction against Appellant does not meet any of the criteria under RAP 16.4.

Even when courts lower the threshold to hear a petitioner's PRP "where the petitioner has not had a prior opportunity for judicial review," the petitioner must still be "restrained under RAP 16.4(b)." In re Bovan, 157 Wn.App. 588, 594 n.8, 238 P.3d 528 (2010); In re Blackburn, 168 Wn.2d 881, 883-84, 232 P.3d 1091 (2010).

Secondly, RAP 16.4(d) and its incorporation by reference of RCW 10.73.090 and RCW 10.73.100 requires a PRP to be brought within one year of Appellant's cause of action, which in this case was an infraction hearing conducted on April 6, 2011 and an administrative appeal that was decided on April 21, 2011. CP 68-69, 84.

As of July 30, 2013, when Respondents misrepresented that a PRP was "another complete adequate remedy," not only was Appellant well past the one-year filing limitation of RAP 16.4(d), but he was not able to meet any of the exceptions under RCW 10.73.100 incorporated by reference.

Noteworthy is the fact that both Appellant's former counsel and Respondents' counsel agreed at oral arguments that there was no "restraint" to permit a PRP (RP1, at 8), and that there was not "a pure PRP personal restraint petition opportunity here." RP1, at 9.

12. No Alternate, Adequate Tort Remedy was Available.

Before filing his former 42 U.S.C. §1983 action, No. C11-5209, Appellant filed a tort claim against the Washington Department of Corrections and/or Washington State for the "unlawful conversion and/or bailment" of his music equipment and accessories. CP 121-127.

Because there is no §1983 action available on the basis that Federal Case No. C11-5209 was dismissed with prejudice, it follows as a matter of law that there could be no alternate tort action available either. Because the tort and §1983 action was dismissed with prejudice, it was barred by res judicata at the time this UDJA action was filed.

In Washington res judicata occurs when a prior judgment has a concurrence of identity in four respects with a subsequent

action. There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made." Schroeder v. Excelsior Management Group, LLC, 177 Wn.2d 94, 108, 297 P.3d 677 (2013).

Res judicata bars the litigation of claims and issues that were litigated, or might have been litigated, in a prior action. Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995). Res judicata bars litigation of a new claim if it relates to a previously dismissed claim based on the "same nucleus of facts." See Ensler v. Pitcher, 152 Wn.App. 891, 904, 222 P.3d 99 (2001). Conversely, res judicata does not bar a later action that requires proof of facts that did not exist at the time of the earlier action. Mellor v. Chamberlin, 100 Wn.2d 643, 647, 673 P.2d 610 (1983).

Here, Appellant's RCW 4.92 Tort Claim was filed against the State/WDOC. CP 123-127. It was pled in the §1983 complaint (CP 121), which was ultimately dismissed with prejudice. Because there were no new facts alleged in this instant UDJA action not already alleged or existing at the time of filing the former §1983 action, any same-subject tort action against the State/WDOC is barred by res judicata. Therefore, as a matter of law, Appellant did not have a tort action as an alternate available remedy against Respondent WDOC at the time this UDJA action was filed.

13. Even if a Tort Action was Available, it Does not Preclude Review of Appellant's UDJA Claims.

"The Declaratory Judgments Act should be liberally interpreted in order to facilitate its socially desirable objective of providing remedies not previously countenanced by our law....However, a plaintiff is not entitled to relief by way of a declaratory judgment if, otherwise, he has a completely adequate remedy available to him." Reeder v. King County, 57 Wn.2d 563, 564, 358 P.2d 810 (1964).

However, after Reeder was decided, Civil Rule 57 was adopted in 1967, providing: "The existence of another adequate remedy does not preclude a judgment for declaratory relief where it is appropriate." CR 57. "And RCW 7.24.050 allows further relief based on a declaratory judgment or decree whenever necessary or proper." Nelson v. Appleway Chevrolet, 129 Wn.App. 927, 941, 121 P.3d 102 (2005).

"The court rule and the case law can be harmonized in this way: Ordinarily, where a plaintiff has another [complete adequate remedy], he or she should not proceed by way of a declaratory judgment action; but declaratory relief may be 'appropriate' in some situations, notwithstanding the availability of another remedy." Wagers v. Goodwin, 92 Wn.App. 876, 880, 964 P.2d 1216 (Div.2, 1998).

> A "defendant's attempt to defend the conclusion that [a plaintiff] was not entitled to seek declaratory relief because he could have sought equivalent relief through a writ of certiorari is not well taken. Such doctrine

> was overruled long ago: The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. CR 57."

Donald v. City of Vancouver, 43 Wn.App. 880, 883 n.2, 719 P.2d 967 (Div.2, 1986)(internal quotes omitted)(citing Ronken v. Board of County Com'rs of Snohomish County, 89 Wn.2d 304, 310, 572 P.2d 1 (1977)). In Ronken, the Supreme Court ruled that the UDJA prohibitive holding in Reeder v. King County, 75 Wn.2d 563, 358 P.2d 810 (1961), "no longer control[s] on the issue." Ronken, 89 Wn.2d at 310.

Here, assuming arguendo that a tort action was available, it certainly would not constitute a "completely adequate remedy available" to Appellant. A tort claim would not serve to establish Appellant's rights under RCW 40.16 to not have a false public document filed adversely against him. Nor would a tort action establish Appellant's rights and or status under RCW 40.14, RCW 42.20, RCW 42.56, or WAC 137-28. Nor could a tort action provide the injunctive relief as pleaded. CP 108-109.

As another matter of law, because Respondents claimed that WAC 137-28 are only "guidelines" and not a binding conduct requirement of infraction hearings (CP 52), no tort action could be sustained on the claims and fact at issue.

Under a tort recovery theory, trespass to chattels and conversion are the two principal intentional torts against personal property. Conversion is the exercise of dominion or ownership over the personal property of another. In contrast,

trespass to chattels is something less than a conversion; it is the intentional interference with possession or physical condition of personal property in the possession of another without justification. Restatement Second, Torts §217.

A conversion is defined as a willful interference with a chattel without lawful justification, whereby a person entitled to possession of the chattel is deprived of the possession of it. Karl B. Tegland, Vol. 16 Washington Practice, Tort Law & Practice, (6th ed. 2013) §14.16, p. 909.

Because Respondents argue that WAC 137-28 is not a requirement but rather only a "guideline" (CP 52), the facial ambiguity of WAC 137-28 language makes it impossible to argue a trespass or conversion claim because both require there to be interference "without lawful justification." This is precisely the reason why Plaintiff amended his claims in the proposed Second Amended Complaint, to challenge the legal sufficiency/validity of WAC 137-28. Accordingly, with no ability to assert a lack of legal justification as to the actions in this case, a tort is not an adequate remedy, as a matter of law. Moreover, even if a tort was a "complete adequate remedy available", companion UDJA review was still available.

14. Kitsap County v. Smith is Controlling.

In response to Respondents' CR 12(c) motion, Appellant argued that Kitsap County v. Smith, 143 Wn.App. 893, 180 P.3d

834 (2008) was controlling in its allowance of the UDJA to be applied to alleged actions prohibited by RCW 40.16. CP 159. Appellant also relied on Kitsap County as controlling authority at oral arguments. RP1, at 5, 9, 10.

Respondent argued that "reliance on Kitsap County is misplaced," because "[t]he County did not seek a declaratory judgment under RCW 40.16." CP 93. Respondent also argued that Kitsap County did not apply because Appellant's UDJA action was not of "great public importance." CP 93; RP1, at 11-12.

In its ruling, the trial court felt that Kitsap County "needs to be largely confined to its facts" and that under Kitsap County "there needs to be great public importance" for UDJA claims to be judicially reviewed. RP1, at 15.

Respondents' arguments are without merit, and the trial court did not appear to fully understand the specific elements in Kitsap County that applied regarding UDJA review of actions violating RCW 40.16.

First, Kitsap County clearly sought a declaratory judgment for actions violating RCW 40.16, as evinced by its opening brief in that case and the published opinion. Kitsap County, 143 Wn.App. at 897 n.2. Accordingly, Appellant has moved this Court to take judicial notice of these facts in Kitsap County.

Second, contrary to the trial court's belief, there does not need to be an element of "great public importance" in order for Kitsap County to be controlling as to Appellant's use of

the UDJA to review actions violating RCW 40.16. This Court in Kitsap County merely ruled that, "absent issues of major public importance, a justiciable controversy must exist before a court's jurisdiction may be invoked under the [UDJA]." Kitsap County, 143 Wn.App. at 903.

As already established, there clearly existed a justiciable controversy in the instant case. In fact it is axiomatic that a justiciable controversy existed if the trial court felt that a tort action, PRP, or §1983 action could provide an alternate adequate remedy.

Kitsap County squarely established that Appellant could seek judicial review under the UDJA for Respondents' violations of RCW 40.16.

15. Declaratory Judgment Would Provide Conslusive Judicial Determination of the Controversy.

Respondent argued to the trial court that a declaratory judgment would not terminate the controversy. CP 94-95. Appellant's CR 12(c) opposition argument -- which Respondent attempted to miscategorize -- merely opined that any nebulous criminal implications stemming from findings of RCW 40.16.030 violations would not be encroached upon in the UDJA civil litigation. CP 159-160.

Finality of a declaratory judgment has been well established. Washington's Supreme Court held that a declaratory order "declaring the rights and liabilities of the parties under

applicable law is final." Ronken, 89 Wn.2d at 310. Moreover, the statutory language in the UDJA expressly states the full and final effect of a declaratory judgment: "such declarations shall have the force and effect of a final judgment or decree." RCW 7.24.010. Accordingly, Respondents argument is baseless.

B. THE TRIAL COURT ERRED IN DENYING LEAVE TO AMEND THE COMPLAINT

After the trial court's oral ruling granting CR 12(c) dismissal, but before the final order was entered, Appellant filed a motion for leave to amend the complaint. RP2, at 3, 14. The proposed amendment sought to (1) restate the UDJA claims in new terms of seeking a declaration of Appellant's rights under specific statutes, codes, constitution or common law (CP 108-109), and (2) add petition claims for a writ of certiorari for Respondents' arbitrary and capricious actions. CP 109.

Respondent argued that the motion to amend complaint was both untimely and futile. As to timeliness, Respondent argued that because the UDJA claims were dismissed with only the possibility of a tort claim still left available, it was too late to amend the pleadings, even though final entry of the order of dismissal had yet to be entered. CP 111-112. Respondent argued that the amendment would also be futile because the restated UDJA claims were already found to have no merit, and because Appellant does not have the ability to request a writ under RCW 7.16 or Art.IV, §6 WASH. CONST. CP 112-113.

The trial court reasoned that because Appellant "has another remedy," and because the amendment of writ of certiorari "is a different case than what was originally presented here by Mr. Kozol...open[ing] a lot more areas than the case originally covered," leave to amend was not appropriate. RP2, at 15.

1. Standard of Review of Denial of CR 15 Amendment.

A 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 Bhd. 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 untenable 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).

Civil Rule 15(a) states in pertinent part that a party may amend a pleading he files in a civil proceeding "by leave of court or by written consent of the adverse party; leave shall be freely given when justice so requires." CR 15(a).

"The purpose of pleading is to facilitate a proper decision on the merits [citation omitted] and not erect a formal and burdensome impediment to the litigation process." Caruso, 100 Wn.2d at 349.

Washington law is liberally construed to favor a party's leave to amend pleadings. Horsley, 137 Wn.2d at 505. Accordingly, "[l]eave to amend should be freely given unless it would result in prejudice to the nonmoving party." Kirkham v. Smith, 106 Wn.App. 177, 181, 32 P.3d 10 (2001).

"The factors a court may consider in determining prejudice include undue delay and unfair surprise." Herron, 108 Wn.2d at 165. However, a party's undue delay in proposing an amendment to its complaint may present a basis for denying the motion "only where such delay works undue hardship or prejudice upon the opposing party." Caruso, 100 Wn.2d at 349.

The party opposing a motion to amend must demonstrate that the amendment would cause actual prejudice. Bare allegations of prejudice are insufficient. Zackman v. Whirlpool Acceptance Corp., 120 Wn.2d 304, 315, 841 P.2d 27 (1992)(leave to amend proper when opposing party did not describe facts it allegedly did not have the opportunity to develop and present); Caruso, 100 Wn.2d at 350-51 (leave to amend granted when opposing party failed to present evidence of actual prejudice or bad faith on part of moving party).

2. Amendment was to be Freely Granted.

Here, Appellant's proposed amendment sought to restate new UDJA claims to properly declare his rights, instead of whether the agency's actions violated statutes, as well as seeking a writ of certiorari for the agency's arbitrary and capricious and/or illegal actions. Because there were no new facts, only new legal claims, there simply was no prejudice to Respondents, and amendment should have been freely granted.

Respondents cannot show any specific prejudice they would suffer from the proposed amendment, other than having to meet the new legal claims. 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).

Nowhere in responding to the motion to amend did Respondents ever assert or allude to any potential prejudice, let alone any specific actual prejudice. CP 110-117.

What is more, the restated new UDJA claims (CP 107-109) were in complete conformity with even the Respondents' position of the limited, specific applications of the UDJA under RCW 7.24.020. CP 53.

Because the proposed restated UDJA claims cured all issues of pleading deficiency upon which CR 12(c) dismissal was granted, it was error to not grant leave to amend.

More importantly, the trial court basing its denial of leave to amend on the basis that the certiorari claims "opened a lot more areas than the case originally covered" (RP2, at 15), is clearly untenable and an abuse of discretion. With all due respect to the trial judge, he clearly abused his discretion, as the very reason for amendment under CR 15(a) is to add new claims, facts, or parties that were not included in the initial pleadings.

As a matter of law, the only requirement in CR 15 for any proposed claims to relate to, or stay constrained within, the confines of the issues initially pled is if the moving party seeks relation-back of an amendment under CR 15(c).

In general, a party will not be required to elect at the pleading stage of the case which legal theory he will rely upon; this would defeat the purpose of allowing inconsistent pleading. Anderson Feed & Produce Co. v. Moore, 66 Wn.2d 237, 242, 401 P.2d 964 (1965).

This is the very reason for Washington's liberal application of Civil Rule 15. The purpose of 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). What is more, 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).

Respondents' argument of untimeliness is completely without merit. Several cases are controlling. See Tagliani v. Colwell, 10 Wn.App. 227, 517 P.2d 207 (1973)(Court of Appeals reversed the denial of a motion to amend that was filed after pleadings were closed and motion for summary judgment had been argued and orally granted but before order granting summary judgment was entered); Sanwick v. Puget Sound Title Ins. Co., 70 Wn.2d 438, 423 P.2d 624 (1967)(Before entry of judgment, trial court did not err in permitting amendment of plaintiff's pleadings after pleadings had closed); Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962)(amendment was allowed after judgment for dismissal for failure to state a claim on which relief could be granted had been formally entered; "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits....the leave sought should, as the rules require, be 'freely given.'")

For all these reasons, amendment should have been granted. It is an abuse of discretion to deny amendment when no prejudice to the opposing party would result. Estate of Randmel v. Pounds, 38 Wn.App. 401, 685 P.2d 638 (1984).

3. Appellant is Entitled to Judicial Review by way of a Writ of Certiorari.

A statutory writ of certiorari only allows review of judicial or quasi-judicial functions. RCW 7.16.040; City of

Bellevue v. East Bellevue Comm. Council, 91 Wn.App. 461, 466, 957 P.2d 267 (1998). In contrast, the superior courts' authority to review arbitrary and capricious state action under a constitutional writ of certiorari arises from the Washington Constitution, art. IV, §6. Seattle-King County Coun. of Camp Fire v. Dept. of Revenue, 105 Wn.2d 55, 58, 711 P.2d 300 (1985)(certiorari is only appropriate means to obtain review of agency's administration of statute(s)).

Under the facts of this case, if UDJA review was not appropriate, then a writ of certiorari was the only available remedy for Mr. Kozol to obtain judicial review of his claims on the merits.

C. AUTHORITY FOR INJUNCTIVE RELIEF

The trial court stated that it "d[idn't] know of any authority for injunctive relief in this case" and summarily dismissed Appellant's injunctive relief claims. RP1, at 17-18. Respondent notified the trial court that Appellant could potentially have an injunctive relief claim under the Washington Constitution. RP2, at 13.

Authority is vested in a trial court to issue broad injunctive relief where sufficient facts are proved. Whatcom County v. Kane, 31 Wn.App. 250, 640 P.2d 1075 (1981). "Restraining orders and injunctions may be granted by the superior court, or by any judge thereof." RCW 7.40.010. Injunctive relief

is authorized by RCW 7.40.020 for issues such as the return of property restricted in an ongoing pattern as in the instant case. Accordingly, the trial court erred in dismissing Appellant's injunctive relief claims.

Limited statutory authority does not so restrict injunctive relief, and an individual may enjoin future violations of statutes, even if such violations do not directly affect that individuals's own property rights. Hockley v. Hargitt, 82 Wn.2d 337, 510 P.2d 1123 (1973). Hence, injunctive relief claims should not have been dismissed here, as such relief could be appropriate to enjoin Respondents from future violations of statutes, which is highly probable given the nature of the violations and the vast number of infraction hearings conducted.

The granting or withholding of an injunction lies in the sound discretion of the trial court. An injunction is to be granted not as an absolute right of a petitioner but rather only where a clear showing of necessity has been made. Where the elements of necessity and irreparable injury are shown, it is the court's duty to grant a requested injunction. Holmes Harbor Water Co., Inc. v. Page, 8 Wn.App. 600, 508 P.2d 628 (1973).

A mandatory injunction compels the performance of some affirmative act, which in this case would be to either allow Mr. Kozol to regain possession of his music equipment previously shipped out of the prison, or for Respondents to pay for the

purchase of new, functionally equivalent music equipment as designated by Mr. Kozol. See, e.g., Hart v. City of Seattle, 45 Wash. 300, 88 P.205 (1907)(ordering restoration of street excavation). Continuing injury is remedied properly by injunction. Radach v. Gunderson, 39 Wn.App. 392, 695 P.2d 128 (1985), reconsideration denied, review denied.

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 7.16.260 and RCW 7.24.100 allows prevailing parties 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 granting CR 12(c) dismissal, and in denying Appellant's CR 15(a) motion to amend the complaint.

Appellant is entitled to some sort of judicial review of his claims, as the merits have never been reached. Because no §1983 remedy lies against Respondent WDOC, dismissal of claims against WDOC, if not all respondents, should be reversed, and Appellant should be allowed to amend his complaint.

Respectfully submitted this 14th day of June, 2014.

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DECLARATION OF SERVICE BY MAIL
GR 3.1

I, STEVEN P. KOZOL, declare and say:

That on the 14th 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. 45601-0-II:

Appellant's Corrected Opening Brief;

Supplemental Statement of Arrangements;

;

.

addressed to the following:

Clerk of the Court	Brian J. Considine, AAG
Washington Court of Appeals	Attorney General's Office
Division Two	Corrections Division
950 Broadway, Suite 300	P.O. Box 40116
Tacoma, WA 98402-4454	Olympia, WA 98504

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

DATED THIS 14th day of June, 2014, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Steven P. Kozol
Signature

Steven P. Kozol
Print Name

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