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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

COA Nos. 32596-2-III
32643-8-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STEVEN P. KOZOL,
Appellant,

vs.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,
Respondent.

REPLY BRIEF OF APPELLANT
(COA No. 32596-2-III)

STEVEN P. KOZOL
Appellant/Plaintiff, Pro Per
DOC# 974691
Stafford Creek Corr. Center
191 Constantine Way
Aberdeen, WA 98520
(360)537-1800

www.FreeSteveKozol.com

- ORIGINAL -

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I. INTRODUCTION

This is a case for injunctive relief and violation of the Public Records Act (PRA). Requestor Steven P. Kozol submitted 21 requests for separate original inmate grievances/complaint forms filed in 21 separate instances. The Washington State Department of Corrections confirmed each request, did not request clarification to any request, and only provided Mr. Kozol with a purported copy of the first page of each two-page original grievance. The Department then decided to destroy each of the requested two-page original grievances, even though no authorization was given to destroy these original records before expiration of the six-year records retention requirement.

Upon Mr. Kozol filing this action, the Department moved for dismissal on the grounds that the 21 claims were time-barred, and on the grounds that the withheld record pages were not "used" and thus were not responsive to Mr. Kozol's requests. Mr. Kozol responded by bringing 21 new claims for unlawful records destruction in violation of RCW 42.56.100, which he amended under CR 15(b),(c). The Department did not object nor reply to this amendment. Before the trial court granted the Department's motion for "show cause" dismissal, Mr. Kozol filed a motion for CR 41(a) voluntary dismissal contingent upon his amending these 21 claims of silent withholding and 21 new claims of unlawful destruction into his companion case no. 12-2-00285-2.

The trial court then entered "show cause" dismissal of this action, on the grounds that the 21 silent withholding claims and the 21 new destruction claims were time-barred, and on the ground that the withheld pages were not "used" and thus were not responsive to Mr. Kozol's requests. Because Mr. Kozol's claims for violations of the PRA are timely, and based upon the new evidence taken in this case under RAP 9.11 proving that the second pages of original grievances are "used" in the Department's grievance process, the Court should reverse the dismissal of Kozol's claims. Alternately, because the trial court was required to grant CR 41(a) dismissal upon Mr. Kozol amending these claims into the companion case, the trial court erred in granting the Department's "show cause" motion to dismiss.

II. STATEMENT OF THE CASE

A. Statement of Facts

The Department submitted a sworn declaration from Lee Young attesting that the second pages of original grievance/complaint forms are never used by the Department or inmates in the filing, processing, or hearing of inmate grievances. CP 742-43. Contrary to this sworn declaration, new evidence establishes that the second page of original inmate grievance forms are in fact used by inmates and staff in the submission of grievances and the processing and hearing of grievances. Appendix A.[1]

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[1] On May 27, 2015 the Commissioner granted Kozol's motion to accept additional evidence on review under RAP 9.11. Kozol's additional evidence is referred to in this consolidated appeal as Appendix A (see Opening Brief of Appellant, COA No. 32643-8).

Further new evidence accepted on review establishes that the Department staff also use the second pages of the original inmate grievances/complaints to route the filed grievances to the appropriate grievance staff via the agency's campus mail system, which includes staff handwriting specific routing information on the second pages. Exhibit 1, Attachment C.[2] This evidence further establishes agency "usage" of the second pages as the Department's own words state that:

> "In order to facilitate the processing on their grievances, the grievances are collected directly from the offender[s]...[t]he collecting staff member may write the grievance office mailbox number 'W40' or the grievance officer's name on the [second page] of the grievance to ensure the grievance is delivered to the grievance office for processing."

Exhibit 1, Attachment C.

III. ARGUMENT[3]

A. Mr. Kozol Established Violations of the PRA

Mr. Kozol has clearly established 21 violations of the PRA in this case. See COA No. 32643-8, Appellant's Reply Brief, at 9-17.

B. 21 Claims Related to PDU-15230 Through PDU-15250 are not Barred by the Statute of Limitations

The trial court, for several reasons, erred in dismissing Mr. Kozol's 21 claims as barred by the statute of limitations.

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2 On July 29, 2015 the Commissioner accepted further additional evidence on review. This evidence is referred to as Exhibit 1, Attachment C (dec. of Lee Young).

3 While the Department states Mr. Kozol has failed to present argument on "several issues" in his opening brief, the Department fails to identify what "issues" it is referring to.

Because Mr. Kozol brought his claims in a timely manner under the applicable statute of limitations, because Mr. Kozol's 21 new claims of unlawful records destruction in violation of RCW 42.56.100 were timely, and because these claims were amended -- first in this case, and then into Mr. Kozol's companion case -- under CR 15(b) and related back under CR 15(c), the Court should find these 21 claims not barred by the statute of limitations and should reverse dismissal of the claims.

i. Under Johnson and Hobbs, the 21 claims are timely

As plead in the Complaint, Mr. Kozol submitted eight different same-subject matter follow-up requests to the Department specifically identifying that the original "DOC 05-165 Back" pages of the original grievances were not produced, and requesting these pages be produced. These follow-up requests, and the Department's responses thereto spanned from March 25, 2013 to November 22, 2013. CP 603-05. The Department admitted to these follow-up requests and responses thereto. CP 609-14. Further, Mr. Kozol eventually received a December 12, 2013 response from the Department to his November 22, 2013 follow-up request. CP 788-89.

Under the holding in Johnson v. Dept. of Corr., 164 Wn.App. 769, 265 P.3d 216 (2011), Mr. Kozol's 21 claims are not time-barred, as any statute of limitations began to run when Mr. Kozol received the final letter from the DOC on his follow-up request. Johnson and the instant case are strikingly similar in that in

both cases the Department of Corrections produced a single set of responsive records, and both Johnson and Mr. Kozol submitted a series of related follow-up requests seeking production of same-subject record pages that the requestor felt were withheld. See COA No. 32596-2, Opening Brief of Appellant, at 13-16.

While the Department in Johnson issued response letters to each of Johnson's four letters, the Court of Appeals determined that the latest possible date on which Johnson's action accrued was one week after (to allow 5 days for mailing) the Department's (August 27, 2007) response to Johnson's last same-subject matter follow-up request. Johnson, 164 Wn.App. at 778-79.

In its response brief, the Department half-heartedly attempts to differentiate Johnson by arguing that Johnson's follow-up requests were new "expanded requests", while Mr. Kozol's follow-up requests were not "expanded" requests. Brief of Respondent, at 14-15. But this argument is based upon nothing more than a convenient misreading of the clear language in Johnson. While the inmate requestor in Johnson had self-termed his follow-up requests to be an "expanded request", Johnson, 164 Wn.App., at 772 n.4, the Court of Appeals clearly determined that Johnson's 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" but felt had been withheld by the Department. Id., at 773. In other words, the confusion exhibited

by the requestor in Johnson is not determinative of the clear nature of Mr. Kozol's follow-up requests.

There is no question that once Mr. Kozol conferred with his attorney and learned that the Department had not produced the second pages of each original complaint/grievance, he then submitted a series of 8 related follow-up requests asking for the second pages to be produced.[4] There is no question here that Mr. Kozol, just like the requestor in Johnson, submitted follow-up requests asking the Department to produce the records he originally requested but felt had been withheld. Specifically, Mr. Kozol's series of 8 follow-up requests sought the complete original grievance forms he had first requested, i.e., including the withheld second/back page of each of the 21 original grievances. Therefore, the Department's argument that Kozol's "facts are very different" from those in Johnson is erroneous.

In Johnson, the Court of Appeals determined the statute of limitations accrued from the date the requestor should have received the Department's last response to the requestor's last same-subject follow-up request, explaining there were no other documents. Id., at 778-79. Here, Kozol's last same-subject follow-up request was mailed on November 22, 2013. CP 788. The Department responded to this follow-up request on December 12,

[4] The Department's record productions were sent to an email account Kozol had set up for him, and the records were then forwarded to his attorney who reviewed them for Kozol. CP 93, 429, 941-42. This was because DOC policy forbids any inmate from possessing another inmate's grievance paperwork. CP 861. Mr. Kozol did not have earlier knowledge these 21 record pages were withheld. CP 81-82.

2013, and requested additional time to respond. CP 789. Six days later Mr. Kozol filed this action, on December 18, 2013. CP 601. Because Mr. Kozol filed his complaint in this case within one year of the Department's last response to Kozol's last follow-up request of November 22, 2013, his action is timely under Johnson.

The Department's statute of limitations argument is further contradicted by the Court of Appeals decision in Hobbs v. State, 183 Wn.App. 925, 335 P.3d 1004 (2014), where the court held that there is "no PRA cause of action until after [the agency] denies the public record requested." Id., at 936. In Hobbs, the agency provided an initial production of records, and the requestor filed suit two days later. However, the agency continued to produce responsive records after the suit was filed. Id., at 928-32.

While the requestor in Hobbs argued that the trial court "erred by allowing the [agency] to supplement its responses after he had filed suit to correct alleged violations of the PRA," the Court of Appeals disagreed, and held that, "[u]nder the PRA, a requestor may only initiate a lawsuit to compel compliance with the PRA after the agency has engaged in some final action denying access to a record." Id., at 935-36 (emphasis in original).

In Hobbs, there was "no dispute that the [agency] was continuing to provide Hobbs with responsive records until March 1, 2012....Therefore, there could be no 'denial' of records

forming a basis for judicial review until March 1, 2012." Id., at 936-37. The court found that "[t]he plain language of the statute does not support Hobbs' claim that a requestor is permitted to initiate a lawsuit before an agency has taken some form of a final denial action in denying the request by not providing responsive documents." Id, at 937.

As applied to the case at bar, Kozol's 21 original silent withholding claims could not be time-barred because under Hobbs his cause of action did not arise until the agency's final response to his same-subject follow-up requests seeking the withheld second pages of the original grievances. The record clearly shows that Mr. Kozol submitted 8 different follow-up requests trying to obtain the withheld second/back pages of the original grievances he earlier requested. The Department completely ignored several of these follow-up requests, thus necessitating Mr. Kozol's continued submission of follow-up requests for the original second pages. Mr. Kozol's last follow-up was dated November 22, 2013. CP 788.

The Department responded on December 12, 2013, but stated it needed additional time to respond, at least until January 2, 2014. CP 789. Similar to the agency's continued record production in Hobbs, here the Department did not yet issue its final response to Mr. Kozol's follow-up requests, and claimed it needed more time to complete its ongoing identification of responsive records. There is no material difference between

the two agency actions, as they each prolonged the agency's final action "forming a basis for judicial review." Hobbs, at 937. Under Hobbs, Mr. Kozol technically did not even have a cause of action until such time as the Department "followed-up with [him] within 14 business days, on or before, January 2, 2014." CP 789. Mr. Kozol's claims would therefore not be time-barred if they had not yet accrued.

Johnson and Hobbs establish that when Mr. Kozol had to submit 8 related follow-up requests in an ongoing attempt to obtain the record pages he originally requested but were silently withheld by the Department, the cause of action accrued at the earliest when the Department issued its December 12, 2013 response, or at the latest when it ultimately claimed no additional responsive records existed on or before January 2, 2014.[5] By either measure, Mr. Kozol filed suit before one year expired from that date.

ii. 21 Claims, Including New Claims of Unlawful Records Destruction, Were not Time-Barred as They Were Amended Under CR 15(b),(c) When Brought in Response to Defendant's "Show Cause" Summary Judgment Motion

The Department received Mr. Kozol's 21 requests on April 15, 2011. CP 629-50. The Department destroyed all 21 original (double-sided) grievance forms in December 2012 and February

[5] Any prior response or production of records was not yet a "final" agency action, because the second pages were silently withheld and no exemption was claimed. Silent withholding is prohibited because it gives the requestor the impression that all records have been produced. Therefore, Kozol was not given earlier notice that the second pages were or were not responsive, or exempt, and had no cause of action until the agency's last response.

2013, after Mr. Kozol requested them. CP 783-84. These 21 destructions of silently withheld records constitute 21 new violations of the Public Records Act. See COA No. 32596-2, Opening Brief of Appellant, at 16-20.

Despite submitting a series of 8 follow-up requests, Mr. Kozol only first learned that the Department had destroyed the original 21 requested grievances when the Department finally provided this information in discovery responses signed by counsel on April 7, 2014. CP 783-86. Accordingly, Mr. Kozol amended his 21 originally plead silent withholding claims to now include 21 violations of RCW 42.56.100 for unlawful destructions.

It is clear that Mr. Kozol brought the 21 new claims of unlawful records destructions in his response to the Department's "show cause" summary judgment motion. CP 765-67, 783-84. It is also clear that the Department failed to file any reply to Plaintiff's Opposition to Defendant's Motion to Show Cause, and therefore did not object; no oral objections occurred either, because there was no oral argument in this case.

On appeal, nowhere in the Department's briefing does it argue that these 21 destruction claims were not amended under CR 15(b).[6] Accordingly, because the Department did not object to these destruction claims, they amended under the first part

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[6] The Department only argues that the 21 destruction claims were not amended when Kozol brought them in his other case on May 11, 2015. Brief of Respondent, 34-35.

of CR 15(b). Also, because the claims were tried by express or implied consent, they amended under the second part of CR 15(b).

These 21 new claims were not time-barred because the destructions were a continuation of the PRA violations originally plead in the complaint. CP 601-07. The complaint was brought within one year of the date the unlawful destructions occurred, when viewed in the light most favorable to Mr. Kozol as the non-moving party. See COA No. 32596-2, Opening Brief of Appellant, at 22. Therefore, the 21 new destruction claims related back under CR 15(c) as a continuation or extention of the events that "arose out of the conduct, transaction or occurrence" in the complaint. CR 15(c). It was error to dismiss these claims as time-barred as they related-back under CR 15(c) and were thus brought within one year of when the destruction violations occurred.

In opposition to CR 15(c) relation back, the Department now argues that Mr. Kozol's 21 claims cannot relate back under CR 15(c) because Kozol originally plead them in the complaint as separate claims, and thus under Greenhalgh v. Dept. of Corr., 170 Wn.App. 137, 150, 282 P.3d 1175 (2012), they each must be "treated as a single request." Brief of Respondent, at 29-30. However, the Department's argument is misapplied because it conflates the isolated requirements of CR 15(c) relation back with the distinguishable holding in Greenhalgh.

The Greenhalgh court's determination that each written PRA request for records is "treated as a single request" has no legal relevance because the portion of the decision cited by the Department pertains only to whether multiple requests for different records made simultaneously within a single written request constitute separate PRA requests. Greenhalgh, 170 Wn.App. at 149-50. Greenhalgh, does not address or reference CR 15(c) relation back, nor even a Plaintiff's amendment of claims, and therefore is not instructive whatsoever.

The Department's argument further lacks merit because the test for CR 15(c) relation back is whether factually the new destruction claims arose out of the "same conduct, transaction or occurrence" originally plead. CR 15(c). On appeal, courts review this issue de novo. Perrin v. Stensland, 158 Wn.App. 185, 193, 240 P.3d 1189 (2010), as amended (Nov. 10, 2010) (issue of whether amendment relates back is reviewed de novo.)

Here, there can be no question that the 21 amended destruction claims arose out of the same conduct, transaction, or occurrence as that pertaining to the 21 silent withholding claims initially plead. CP 601-07. The same records silently withheld were then wrongfully destroyed to prevent disclosure. Mr. Kozol's 21 new claims for unlawful destruction of records in violation of RCW 42.56.100 relate back under CR 15(c).

iii. When One-Year Statute of Limitations in RCW 42.56.550(6) is not Triggered, the Applicable Alternate Statute of Limitations is Three Years under RCW 4.16.115, or Alternately Two Years Under RCW 4.16.130

The Department has provided no opposition in its brief to Mr. Kozol's argument that his 21 new unlawful destruction claims are timely under the three-year statute of limitations in RCW 4.16.115, which applies in a PRA action where neither of the two "triggering" actions in RCW 42.56.550(6) has occurred. COA No. 32596-2, Opening Brief of Appellant, at 23-27.

Because the Department's 21 unlawful destructions of responsive records occurring in December 2012 and February 2013 (CP 783-84) were not a trigger of the one-year statute of limitations in RCW 42.56.550(6), Mr. Kozol's 21 unlawful destruction claims were timely when he brought them by CR 15(b) amendment in his opposition to defendant's motion for "show cause" summary judgment. CP 765-68. These amended claims were brought on May 3, 2014 (GR 3.1). CP 771. Accordingly, these destruction claims were brought within three years (RCW 4.15.115) of the destruction violations, or in the alternative, the claims still were brought within two-years (RCW 4.16.130) of the destruction violations occurring. Therefore, because the claims were not time-barred on their face, the trial court erred in dismissing Mr. Kozol's claims.

iv. Discovery Rule Should Apply

In the alternative, the discovery rule should apply to toll the statute of limitations on Mr. Kozol's 21 claims for unlawful destruction. Here, it is established that the Department did not disclose these destructions had occurred until finally providing this information in its April 7, 2014 discovery responses. CP 783-86. Because the Department concealed from Mr. Kozol the fact that the silently withheld records he was already suing to obtain had then been destroyed, and these facts were only first revealed on April 7, 2014, the Court should apply the discovery rule to prevent the Department from benefiting from its illegal destruction of public records (which itself was performed to conceal other PRA violations).

The Department first had silently withheld the second pages of the grievances which Mr. Kozol sought to obtain proof of the DOC's misconduct. The Department then tried to establish through a sworn declaration of Lee Young -- which is now proven to be false -- that the pages were not "used" and thus were not responsive to Mr. Kozol's requests. The Department destroyed the first and second (front and back) pages of each original grievance without written authorization.[7] The Department's egregious violations of the law should not be rewarded by allowing

[7] Here, DOC Policy 280.525(III)(D) required DOC to obtain written signature approval before destroying each of the 21 original front and back pages of the grievances Kozol requested. CP 794. Yet the Department stated in its Answer to Interrogatory No. 3 that no documents existed pertaining to the destruction of the 21 original grievances. CP 782. The Department's record retention schedule

it to conceal the fact of illegal record destructions, and then use this concealment as a shield from judicial review. Application of the discovery rule is wholly appropriate in this situation.

v. Kozol's Claims Were Amended Into Another Action

In the alternative, Mr. Kozol's claims are not time-barred, because before the trial court entered its order of dismissal on May 12, 2014 (CP 809-11), Mr. Kozol had moved for CR 41(a) voluntary dismissal of the claims, contingent upon his amending them into Case No. 12-2-00285-2. CP 753-55. Then, before the trial court's ruling and order of May 12, 2014, Mr. Kozol amended his 21 claims under CR 15(b),(c) when they were brought without objection, or were tried by express or implied consent, in Case No. 12-2-00285-2. CP 240-402. These amended claims were filed on May 11, 2014. CP 404.

Because the CR 41(a) dismissal in this case was required to be granted upon the self-executing amendment under CR 15(b),(c) in the other case, the 21 claims ultimately were not time-barred because they were amended under CR 15(b) and related back to the one claim (PDU-15229) in Kozol's other case under CR 15(c). See COA No. 32643-8, Appellant's Reply Brief, at 17-22.

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states that "Public records must not be destroyed if they are subject to an existing public records request in accordance with chapter 42.56 RCW," (CP 796), and that all original grievance documents must be retained for 6 years. CP 797. Under RCW 40.14.060(c) the Department was required to copy the front and back pages of these 21 original grievances before destroying them prior to the six-year retention period. CP 799. And RCW 42.56.100 prohibits the destructions that occurred here.

C. Department's Email Evidence is Not Part of This Case

While the Department cites to various email evidence that appears in the record in Mr. Kozol's other case, no. 12-2-00285-2, the evidence was never filed in this instant case. Accordingly, any reference to these emails (CP 884-935) must be disregarded in this appeal.

IV. CONCLUSION

Mr. Kozol's 21 originally plead silent withholding claims were filed within the one-year statute of limitations as accrued under Johnson and Hobbs. Mr. Kozol's 21 new claims of violation of RCW 42.56.100 were amended into this case under CR 15(b) and related back under CR 15(c) and were not time-barred. All claims in this case were amended under CR 15(b) into Case No.12-2-00285-2, and related back under CR 15(c) to the single claim on request PDU-15229, and were not time-barred. Accordingly, Appellant respectfully requests that the Court grant this appeal and reverse the trial court's order of dismissal.

RESPECTFULLY submitted this 11th day of October, 2015.

STEVEN P. KOZOL
DOC# 974691
Appellant/Plaintiff, Pro Per
191 Constantine Way
Aberdeen, WA 98520
Ph:(360)537-1800
www.FreeSteveKozol.com

DECLARATION OF SERVICE BY MAIL
GR 3.1

I, STEVEN P. KOZOL, declare and say:

That on the 11th day of October, 2015, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. COA No. 32596-2-III:

Reply Brief of Appellant;

;

;

.

addressed to the following:

Clerk of the Court	Candie M. Dibble, AAG
Washington Court of Appeals	John C. Dittman, AAG
Division III	Attorney General's Office
500 N. Cedar ST.	1116 W. Riverside Ave., #100
Spokane, WA 99201	Spokane, WA 99201

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

DATED THIS 11th day of October, 2015, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Steven P. Kozol
Signature

STEVEN P. KOZOL
Print Name

DOC 974691 UNIT H6-A86
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520