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COURT OF APPEALS
PIERCE COUNTY

10 JUN 24 PM 12:24

STATE OF WASHINGTON

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#40286-6-II
THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

JEFFERY MCKEE

Appellant

and

KITSAP COUNTY PROSECUTOR'S OFFICE

Respondent

On Appeal from PIERCE COUNTY SUPERIOR COURT

Pierce County Cause # 09-2-14012-5

APPELLANT'S OPENING BRIEF

Jeffery McKee
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Appellant Pro Se

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Introduction

On September 30, 2009; the Appellant, JEFFERY MCKEE (MCKEE), filed an action for violation of the Public Records Act (RCW 42.56) in Pierce County Superior Court, Case No: 09-2-14012-5. The caption of the Summons and Complaint filed with the Court named KITSAP COUNTY PROSECUTOR'S OFFICE (KITSAP COUNTY) as the defendant. On December 11, 2009 the trial court granted KITSAP COUNTY'S motion to dismiss on the grounds that the action should have been brought against "KITSAP COUNTY" as the Defendant and ordered that the matter shall be set for entry of findings and conclusions and Order of Dismissal on January 8, 2010. On January 8, 2010 the trial court entered Findings of Fact (FOF), Conclusions of Law(COL) and an Order of Dismissal of this action.

Appellant MCKEE hereby appeals the dismissal of this action by the trial court.

Assignments of Error

Did the trial court abuse discretion by dismissing this action with prejudice?

Issues

1. Did the trial court err by finding that MCKEE did not name the correct party as the defendant? Error assigned to CP Order of Dismissal with Prejudice, FOF #11 and COL #13.
2. Did the trial court err by finding that MCKEE did not move the Court to permit amendment of his Complaint to modify the caption to identify “Kitsap County” as the party defendant, or otherwise communicate to the Court that he intended to amend the Complaint? Error assigned to CP Order of Dismissal with Prejudice, FOF #11 and FOF #12.
3. Did the trial court err by not permitting MCKEE to amend the pleadings to name “Kitsap County” as the party defendant? Error assigned to CP Order of Dismissal with Prejudice, COL #11.
4. Did the trial court err by dismissing this action with prejudice? Error assigned to CP Order of Dismissal with Prejudice.

5. Statement of the Case

On September 30, 2009; the Appellant, JEFFERY MCKEE (MCKEE), filed an action for violation of the Public Records Act (RCW 42.56) in Pierce County Superior Court, Case No: 09-2-14012-5. The caption of the Summons and Complaint filed with the Court named KITSAP COUNTY PROSECUTOR’S OFFICE (KITSAP COUNTY) as the

defendant. MCKEE filed the case in neighboring Pierce County pursuant to RCW 36.01.050(1) permitting actions against a “county” to be filed in the neighboring county. (VRP 12/11/2009 at 15). MCKEE served the Summons and Complaint upon the Kitsap County Auditor as required in an action against a county. (CP Summons and Complaint). The first paragraph in the body of the Complaint, entitled “Parties”, identified “Kitsap County” as a necessary party. (CP Complaint at 1).

KITSAP COUNTY filed a Motion to Dismiss for failure to state a claim on which relief can be granted pursuant to Washington Civil Rule 12(b)(6) and for judgment on the pleadings pursuant to CR12(c).(CP Kitsap County’s Motion to Dismiss). On December 11, 2009 the trial court heard oral argument on the Motion to Dismiss. (VRP 12/11/2009). During oral argument MCKEE asked that if the Court found that he did not properly name “Kitsap County” that he be able to change the caption on the Complaint to name the County.(VRP 12/11/2009 at 15). The trial court granted KITSAP COUNTY’S motion to dismiss on the grounds that the action should have been brought against “KITSAP COUNTY” as the Defendant and ordered that the matter shall be set for entry of findings and conclusions and

Order of Dismissal on January 8, 2010.(CP Order of Dismissal with Prejudice at 4).

On January 8, 2010 the trial court permitted additional oral argument before entry of the Order of Dismissal. (VRP 1/08/2010). MCKEE once again asked the Court for permission to amend the Complaint. (VRP 1/08/2010 at 4). KITSAP COUNTY argued that sufficient time had passed in which MCKEE could have filed a motion to amend the Complaint. (VRP 1/08/2010 at 5). On January 8, 2010 the trial court entered Findings of Fact (FOF), Conclusions of Law(COL) and an Order of Dismissal of this action.(CP Order of Dismissal with Prejudice).

Argument

Did the trial court err by finding that MCKEE did not name the correct party as the defendant?

Did the trial court err by not permitting MCKEE to amend the pleadings to name “Kitsap County” as the party defendant?

MCKEE did name “Kitsap County” in the ‘Parties’ Section on Page 1 of his Complaint and the Kitsap County Auditor was properly served as required in an action against a county. There are serious

questions as to the correctness of dismissing a case because a party was served in his personal, instead of his representative, capacity. This is particularly true where the correct individual was served and there has been no prejudice. Dismissal should not be granted on a mere technicality easily remedied by amendment. See CR 4(h). Modern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties. *In re the MARRIAGE of Karen Rae MORRISON*, 26 Wn.App. 571, 613 P.2d 557 citing *Fox v. Sackman*, 22 Wash.App. 707, 709, 591 P.2d 855, 857 (1979). See also CR 17(a); CR 21; CR 60; RAP 1.2(a); *Rydman v. Martinolich Shipbuilding Corp.*, 13 Wash.App. 150, 534 P.2d 62 (1975); *In re Estate of Crane*, 9 Wash.App. 853, 856, 515 P.2d 552 (1973); *In re Estate of Boyd*, 5 Wash.App. 32, 35, 485 P.2d 469 (1971). Where the real defendant is identifiable from the record or has actually been personally served, some error in the name is not fatal. *Cooney v. Milwaukee R.R.*, 34 F.R.D. 508, 509 (S.D.Iowa 1964). The test is whether the defendant has been prejudiced by not being properly named. *United States v. A. H. Fischer Lbr. Co.*, 162 F.2d 872 (4th Cir. 1947); *Bowles v. Marx Hide & Tallow Co.*, 4 F.R.D. 297 (W.D.Ky. 1945). In *Heatherton v. Playboy, Inc.*, 60 F.R.D. 372, 377 (C.D.Cal. 1973), the court stated that for dismissal, the trial court should look to the parties' relation to the case, its effect on their interests, and

whether judgment is sought against them. The plaintiff should be given leave to amend to include the proper party. See Fed.R.Civ.P. 10; *Miller v. Director, Middletown State Hosp., Middletown, N.Y.*, 146 F.Supp. 674 (S.D.N.Y. 1956), *aff'd per curiam* 243 F.2d 527 (2d Cir. 1957). In *Keeton v. Proconier*, 468 F.2d 810 (9th Cir. 1972), cert. denied 411 U.S. 987, 93 S.Ct. 2276, 36 L.Ed.2d 965 (1973), the court stated the proper remedy was to give plaintiff the opportunity to amend. In *Lippmann, Inc. v. Hewitt-Robins, Inc.*, 55 F.R.D. 439 (E.D.Wis. 1972), the plaintiff had served the right person but named the wrong corporation. The court held that there should be no dismissal but plaintiff should be given an opportunity to submit an order to substitute the correct name of the defendant.

Did the trial court abuse discretion by finding that MCKEE did not move the Court to permit amendment of his Complaint to modify the caption to identify "Kitsap County" as the party defendant, or otherwise communicate to the Court that he intended to amend the Complaint?

Findings of Fact #11 and #12 are blatantly false. On December 11, 2009; in oral argument and before the trial court issued an order of dismissal, MCKEE did ask the trial court for permission to amend his Complaint if the Court found that naming the County in the body of the

Complaint and service upon the correct party was not sufficient.(VRP 12/11/2009 at 15). On January 8, 2010; MCKEE, once again, asked the Court for permission to amend the Complaint pursuant to CR15 citing case law from *In re the MARRIAGE of Karen Rae MORRISON* 26 Wn.App. 571, 613 P.2d. 557.(VRP 1/08/2010 at 4). KITSAP COUNTY, at that time, argued against McKee’s oral motion asserting that sufficient time had passed in which MCKEE could have filed a motion to amend.(VRP 1/08/2010 at 5). We review the trial court's denial of a motion to amend for an abuse of discretion. *Wilson v. Horsley*, 137 Wash.2d 500, 505, 974 P.2d 316 (1999). CR 15 governs a motion to amend and provides that “leave shall be freely given when justice so requires.” CR 15(a). This rule's purpose is to “facilitate proper decisions on the merits;” however, “[t]he touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party.” *Wilson*, 137 Wash.2d at 505-06, 974 P.2d 316. **Thus, a motion's timeliness alone, without more, is generally an improper reason to deny a motion to amend.** *Herron v. Tribune Publ'g Co.*, 108 Wash.2d 162, 166, 736 P.2d 249 (1987); *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters, Chauffers, Warehousemen & Helpers of Am.*, 100 Wash.2d 343, 349, 670 P.2d 240 (1983). (emphasis added). KITSAP COUNTY has never asserted that their case has been prejudiced by an

improper caption in the Complaint or would be prejudiced by amending the Complaint.

Did the trial court abuse discretion by dismissing this action with prejudice?

We review a trial court's order of dismissal for an abuse of discretion. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wash.2d 674, 684-85, 41 P.3d 1175 (2002). We review de novo the construction of statutes and rules and evaluate their plain language to determine legislative intent. *Diehl v. W. Washington Growth Mgmt. Hearings Bd.*, 153 Wash.2d 207, 103 P.3d 193, 195 (2004); *Campbell v. Dep't of Social & Health Servs.*, 150 Wash.2d 881, 894 n. 4, 83 P.3d 999 (2004). Overemphasis on a summons' caption violates the civil rules' emphasis that substance trumps formality. See CR 8(f) (“All pleadings shall be so construed as to do substantial justice.”); CR 4(h) (allowing “[a]t any time” an amendment of “any process or proof of service ... unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.”); see also 14 KARL B. TEGLAND, WASHINGTON PRACTICE: SERVICE OF PROCESS § 8.2 (Supp.2004) (“Although the courts have *rigorously enforced* the statutes governing the *manner of service*, the courts have been *relatively*

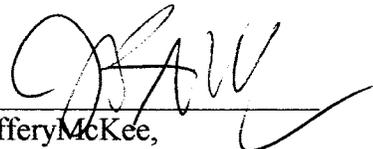
lenient with respect to the form and content of the summons.”) (emphasis added). *QUALITY ROCK PRODUCTS, INC. v. THURSTON COUNTY* 126 Wn. App. 250, 108 P.3d 805. Dismissal for failure to state a claim upon which relief can be granted should be granted sparingly and with care. *Swinomish Indian Tribal Community v. Skagit County*(2007) 138 Wn.App. 771, 158 P.3d 1179.

Conclusion

Appellant, JEFFERY MCKEE, respectfully requests that this Court REVERSE the Order of Dismissal and REMAND this case to the trial court for a decision on the merits.

The Appellant requests statutory attorney’s fees are allowed to the prevailing party.

Respectfully submitted this 23rd day of June, 2010.



Jeffery McKee,

Appellant

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RETURN OF SERVICE

I, KAY GOLDENSTEIN, of MCS GLOBAL LEGAL SERVICES, Process Server Registration License #201002040235, registered in Kitsap County in the State of Washington, personally served the following documents:

Pierce County Superior Court cause # 09-2-14012-5
Court of Appeals, Division II cause # 40286-6-II

Appellant's Opening Brief

upon: Kitsap County Prosecutor's Office
Civil Division

at: 614 Division Street
Port Orchard, WA 98366

on: June ²⁴~~23~~, 2010

DECLARATION OF SERVER

The undersigned process server, declares under the penalty of perjury, under the laws of the State of Washington, that I am over the age of eighteen, competent to be a witness and not a party to the above action. I declare that the foregoing return of service is true and correct.

Dated this 24 day of June, 2010.

Kay Goldenstein
Kay Goldenstein

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BY [Signature]
TRINITY

RETURN OF SERVICE

I, KAY GOLDENSTEIN, of MCS GLOBAL LEGAL SERVICES, Process Server Registration License #201002040235, registered in Kitsap County in the State of Washington, personally served the following documents:

Pierce County Superior Court cause # 09-2-14012-5
Court of Appeals, Division II cause # 40286-6-II

Appellant's Opening Brief

upon: Court of Appeals, Division II

at: 950 Broadway, Suite 300
Tacoma, WA 98402

on: June 24, 2010
24 KG

DECLARATION OF SERVER

The undersigned process server, declares under the penalty of perjury, under the laws of the State of Washington, that I am over the age of eighteen, competent to be a witness and not a party to the above action. I declare that the foregoing return of service is true and correct.

Dated this 24 day of June, 2010.

Kay Goldenstein
Kay Goldenstein

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