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SUPREME COURT OF THE STATE OF WASHINGTON

Allan Parmelee

Petitioner,

v.

Eric Burt, et al., and
Washington State Department of Corrections,

Co-Respondents.

**SUPPLEMENTAL BRIEF OF RESPONDENT DEPARTMENT OF
CORRECTIONS**

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I. NATURE OF THE CASE

Fifteen Department of Corrections' employees sued the Department under RCW 42.56.540 of the Public Records Act (PRA) to enjoin disclosure of personal records to inmate Allan Parmelee.¹ Mr. Parmelee was denied intervention in the case on timeliness grounds and he appealed that ruling.

The Court of Appeals properly rejected Mr. Parmelee's argument that the pro se staff members had violated CR 11 in signing the complaint, amended complaint, and certain motions. *See, Burt v. Department of Corrections*, 141 Wn. App. 573, 578, 170 P.3d 608 (2007) (Slip Op. at 4-5). The Court of Appeals also properly rejected Parmelee's argument that he was erroneously denied intervention. *Id.* at 578-80 (Slip Op. at 6-7). Department staff had notified Parmelee months before that a lawsuit in superior court was challenging his records request. Department staff updated Parmelee when plaintiffs had a pending motion seeking an order enjoining release. Parmelee, however, moved to intervene three weeks after allowing the case to proceed to a judgment.

¹ Cliff Pease, Cheri Sterlin, John Moore, Joann Irwin, Gary Edwards, Laura Coleman, Richard "Jason" Morgan, Charles Crow, David Snell, Sherry Hartford, Paul-David Winters, Alan Walter, Dustin West, Hal Snively and Eric Burt ("staff members"). CP 28-29.

II. ISSUES PRESENTED

A. Eleven pro se Washington State Penitentiary employee members signed an original complaint to enjoin disclosure of public records. Four additional employees signed an amended complaint that was identical, but added the additional employees as parties.

1. Did the Court of Appeals correctly rule that the pleadings were sufficient and there was no basis for relief under CR 11?

2. Did Mr. Parmelee preserve this issue when he raised it for the first time on appeal, long after the alleged violation could be corrected?

B. Mr. Parmelee was informed that staff members would seek to enjoin disclosure over three months before the hearing was held, yet he waited until more than three weeks after the case was adjudicated to seek to intervene as a matter of right under CR 24. Did the trial court abuse its discretion in denying the motion to intervene as untimely?

C. Mr. Parmelee did not timely intervene and never filed a joinder motion under CR 19. Did the trial court err in adjudicating the case without requiring Parmelee to be joined as an indispensable party?

III. STATEMENT OF THE CASE

Mr. Parmelee was incarcerated at the Washington State Penitentiary (the WSP) in Walla Walla when he made the public records request that led to the lawsuit by the 15 WSP employees.

On October 6, 2004, Mr. Parmelee was infraacted with a violation of prison disciplinary rules for threatening and intimidating staff member Dave Snell. CP 85-90. Snell was the grievance coordinator at the WSP. Dissatisfied by Snell's resolution of a grievance, Mr. Parmelee threatened to have a "released prisoner" serve Snell with the lawsuit "at home, usually late at night" or that he would have Snell followed and served at a time that "would or could be most embarrassing" to him. CP 94.

On the next day, Mr. Parmelee made a public disclosure request to Megan Murray, then public disclosure coordinator for the WSP. CP 28-29. Parmelee asked for a photograph of Snell and 11 other WSP staff members, as well as "employment, income, retirement, expense, and/or disability type document(s)" and any administrative grievance or internal investigation of the staff members. *Id.* Murray timely responded to Parmelee's request and sought clarification. CP 35-36.

On December 5, 2004, Mr. Parmelee was again infraacted for threatening and intimidating staff. CP 101. This infraction arose when Parmelee addressed a letter to a non-staff member Barry Powell, asking

Powell to obtain home address information “on a couple of pigs here.” He sought home addresses of three of the staff members herein, Dave Snell, Eric Burt, and Charles Crow. *Id.* Parmelee wrote that he wanted the addresses so he could have “a couple big, ugly dudes to come to Walla Walla for some late night service on these punks. Obviously, a show of some muscle needs to be sent.” *Id.*

On December 22, 2004, Ms. Murray wrote Mr. Parmelee regarding the status of his request and informed him that a lawsuit was to be filed against his request in the Walla Walla County Superior Court, in the county where the WSP is located. Specifically, Ms. Murray informed Mr. Parmelee that the staff members who were the subject of his disclosure request would seek to enjoin disclosure pursuant to RCW 42.17.330 (recodified as RCW 42.56.540). CP 499. Murray wrote that “[t]he documents will not be disclosed until a hearing date is scheduled and a decision made by Walla Walla Superior Court as to whether the Department shall or shall not disclose the documents.” *Id.* (emphasis added). Murray wrote Parmelee again on December 29, 2004, reiterating this information and advising him that other records that he had requested were ready for disclosure upon payment of copying and postage expenses. CP 268.

On February 1, 2005, Ms. Murray wrote Mr. Parmelee a third time. She informed him that a hearing date had been set for February 22, 2005. CP 500. The superior court record indicates Mr. Parmelee took no steps to intervene or otherwise participate in the action at this time.

On January 26, 2005, the staff members filed a complaint to enjoin the Department from disclosing the information following the existing statute (now codified at RCW 42.56.540). CP 1-6; 7-12. On February 22, 2005, the judge assigned to hear the matter recused himself and the matter was assigned to the Honorable Robert L. Zagelow. Judge Zagelow re-set the hearing for February 28, 2006. CP 324. On that date, Judge Zagelow did not rule but requested additional briefing on the issue of enjoinder. *Id.* The Department filed that briefing on March 15, 2005. CP 12-19.

On March 16, 2005, Judge Zagelow entered an order granting the staff members' motion and enjoining the Department from disclosing the records requested by Parmelee. CP 110-114. Three weeks later, on April 7, 2005, Parmelee filed a Limited Notice of Appearance, CP 123, a Motion to Intervene, CP 124-195, and a Motion to Reconsider, CP 196-215. Mr. Parmelee asked to intervene as a matter of right under CR 24(a). Slip Op. at 5 Mr. Parmelee did not cite to CR 19, nor did he provide legal argument that he was entitled to intervention as an indispensable party in his motion to intervene. CP 124; *Burt*, 141 Wn. App. at 578 (Slip Op at

6). He falsely asserted that he had never been given notice of the action. CP 124. The Department objected to the intervention, pointing out that Parmelee had been kept apprised regarding the status of his records request and that he was told of the lawsuit over his request and the hearings. CP 316-322.

On May 11, 2005, Judge Zagelow issued a letter opinion. Concerning the notice issue, Judge Zagelow wrote “it is undisputed that he [Mr. Parmelee] had actual knowledge that litigation had been commenced in Walla Walla County Superior Court” on December 22, 2004. Judge Zagelow concluded that Mr. Parmelee had presented no exceptional circumstances to justify his delay in seeking to intervene. CP 324. Pointedly, Judge Zagelow noted, “[i]ndeed, it is clear from his supporting documents that Mr. Parmelee is fully aware of how to participate in legal proceedings of all kinds, and there is no explanation as to why he failed to do so in this instance.”² *Id.* On June 7, 2005, Judge Zagelow entered a written order denying Mr. Parmelee’s Motion to Intervene. CP 483-484. A timely notice of appeal followed.

² Mr. Parmelee even acknowledged the extent of his legal experience in his Declaration in Support of his Motion to Intervene, claiming he had “litigated in both state and federal court” and had “prevailed in many such cases [he has] litigated.” CP 217.

IV. ARGUMENT

A. THE LOWER COURTS PROPERLY ACCEPTED THE PLEADINGS BY THE PRO SE LITIGANTS WHERE THERE WAS NO PRIOR CR 11 OBJECTION

On its face, CR 11 requires pro se parties to sign pleadings. The purpose for the requirement is for the party to certify that the pleading has been read and, to the best of the party's knowledge and belief, after reasonable inquiry, the pleading is well grounded in fact, is warranted by existing law and is not interposed for any improper purpose. CR 11(a).

As noted by the Court of Appeals, 11 staff members signed the original complaint; 4 additional staff members signed an identical amended complaint that added the 4 new staff members. All 15 have certified under CR 11 that the complaint was grounded in fact, warranted by existing law, and not interposed for an improper purpose. *Burt*, 141 Wn. App. at 576, 578 (Slip Op. at 2-3, 4-5).

As the Court of Appeals noted, the Department did not object when the staff members filed pleadings that did not contain every plaintiff's signature. *Id.* (Slip Op. at 4-5). Certainly, one remedy for irregularities in the pleadings might have been a motion to strike. *Greene v. Union Pacific Stages, Inc.*, 182 Wash. 143, 145, 45 P.2d 611 (1935). The Department identified no substantive need to strike any pleadings and did not object. In the absence of any objection, the staff members had no

reason or opportunity to fix the allegedly inadequate verifications. The CR 11 compliance by the staff members was raised, for the first time, in Mr. Parmelee's appeal.

Given the timing of the objection by Mr. Parmelee, the alleged lack of verification would be material only if it deprived the court of jurisdiction. This Court has determined that it does not. *Griffith v. Bellevue*, 130 Wn.2d 189, 192, 922 P.2d 83 (1996). In *Griffith*, this Court held that the purpose of the civil rules, including CR 11, was to place substance over form and to resolve cases on the merits. *Id.* at 192. This court commented:

“[T]he basic purpose of the new rules of civil procedure is to eliminate or at least to minimize technical miscarriages of justice inherent in archaic procedural concepts once characterized . . . as ‘the sporting theory of justice.’” Thus, whenever possible, the rules of civil procedure should be applied in such a way that substance will prevail over form.

Id. (quoting *Curtis Lumber Co. v. Sortor*, 83 Wn.2d 764, 767, 522 P.2d 822 (1974)). “[A] signed verification is not a jurisdictional requirement.”

Id.

Mr. Parmelee's reliance on CR 11 does not demonstrate any error by the lower courts.

B. THE MOTION TO INTERVENE WAS UNTIMELY BECAUSE MR. PARMELEE WAS FAIRLY NOTIFIED ABOUT THE STAFF MEMBERS' LAWSUIT AND HE EXERCISED NO DILIGENCE

Civil Rule 24 governs motions to intervene and requires timely intervention. The rule provides:

Upon *timely* application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

It is well established that "[t]imeliness is a critical requirement of CR 24(a)." *Kreidler v. Eikenberry*, 111 Wn.2d 828, 832, 766 P.2d 438 (1989); *Martin v. Pickering*, 85 Wn.2d 241, 243, 533 P.2d 380 (1975). Post judgment intervention requires a strong showing that intervention is necessary considering all of the circumstances including prior notice, prejudice to the other parties, and reasons for the delay. *Kreidler*, 111 Wn.2d at 833; *Martin, supra* at 243-44 ("A strong showing must be made to intervene after judgment.")

This Court reviews a trial court's evaluation of timeliness for abuse of discretion. *Kreidler* at 832. "Abuse of discretion occurs where the trial court's action is manifestly unreasonable, or exercised on untenable

grounds, or for untenable reasons.” *Olver v. Fowler*, 161 Wn.2d 655, 663, 168 P.3d 348 (2007) (internal citations omitted). “A manifestly unreasonable decision results if the court adopts a view that no reasonable person would take.” *Id.* (internal citations and ellipsis omitted).

Mr. Parmelee cannot meet these rigorous standards. Mr. Parmelee has argued that the trial court erred because he did not have adequate notice of the lawsuit. He does not deny the factual record recited above. Instead, he argues that “the agency must provide proper notice to the requestor which includes providing the caption and the case number.” Petition for Rev at 19. Mr. Parmelee cites no authority for this proposition. His lack of diligence is not excused because he was not given the caption and case number.

Under the totality of the circumstances, the trial court’s finding that Mr. Parmelee’s motion to intervene was untimely is reasonable. The court heard that the Department had notified Parmelee of the lawsuit in letters dated December 22, 2004, December 29, 2004, and February 1, 2005, all prior to the hearing originally set for February 22, 2005. CP 268, 499. These notifications were specifically addressed to his records request. Thus, the record shows how Parmelee could have easily obtained information regarding the employee’s injunction action, including the

cause number, hearing information, and copies of pleadings or orders filed in the case.

As in *Kreidler*, Mr. Parmelee's Motion to Intervene was untimely and the court did not abuse its discretion in denying it.³ The trial court did not abuse its discretion when it held that Parmelee offered no good cause for his untimely motion to intervene.

C. THE SUPERIOR COURT DID NOT ERR WHERE IT ADJUDICATED THE CASE WITHOUT MR. PARMELEE AND NO PARTY MOVED TO JOIN HIM

Neither Mr. Parmelee nor any party made a joinder motion under CR 19. Mr. Parmelee attempts to buttress his argument by claiming he was an "indispensible party" pursuant to CR 19(a). Petition for Rev. at 11. Mr. Parmelee's reliance, however, on CR 19 is flawed because the trial court was never presented with a joinder motion under CR 19. He argues he could be considered "necessary" to the case under CR 19(a). He then affixes the label of "indispensible" but does not distinguish what indispensable means under CR 19.

³ In *Kreidler*, this Court upheld the trial court's ruling rejecting legislators who moved to intervene in a ballot title case seven days after the ruling on the title. Those legislators had "ample opportunity to intervene before the Superior Court made its decision, but they failed to do so. They had notice, were aware of the suit, and no extraordinary circumstances justify delay." *Id.* at 833.

The issue in his case is *not* whether Mr. Parmelee could have been joined under CR 19 or CR 20 because neither Mr. Parmelee nor any party sought such relief in the trial court.⁴

As the Court of Appeals observed, Mr. Parmelee only “mentioned joinder in the caption of his motion and cited CR 19 in his reply memorandum.” *Burt*, 141 Wn. App. at 579 (Slip Op. at 6); CP 124, 330.⁵ He now argues that he is an indispensable party, but he failed after he received notice of the case to timely move to intervene until after the trial court had issued an order resolving the case. Therefore, Mr. Parmelee is attempting to invalidate the trial court’s judgment, apparently concluding that the trial court erred by adjudicating the case without *sua sponte* including him.

If an indispensable party argument is raised for the first time on appeal and does not involve fundamental rights, an appellate court can properly reject the claim. *Draper Machine Works v. Hagberg*, 34 Wn. App. 483, 488, 663 P.2d 141 (1983).

⁴ If a motion had been made, CR 19(a) arguably requires joinder of an identified records requester in a case seeking a protective order against a request. In general, a requester is likely to “claim[] an interest relating to the subject of the action [a request] and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest” CR 19(a).

⁵ Thus, as a threshold matter, the Department contends that Parmelee did not preserve his claim that CR 19 is violated. The superior court was given no briefing or argument by Parmelee to analyze the point. See, Brief of Respondent, *Burt v. Department of Corrections*, No. 24076-2-III.

A records requester like Mr. Parmelee is not indispensable. There is an adequate and functioning remedy without joining the requester. The injunction against release is enforceable against the record holding agency and it adequately vindicates the rights claimed by the persons objecting to the release. If a requester were considered indispensable, then a person with a legitimate right to an injunction under RCW 42.56.540 could be left with no remedy in a scenario where a records requester could not be joined. Thus, the records requester is not indispensable, and Parmelee cannot show that the case should be reversed based on his absence.

Mr. Parmelee apparently argues that regardless of the indispensability analysis, the Court should simply conclude that requesters be named in every case under RCW 42.56.540. Joining the records requester is not required in RCW 42.56.540. If the Legislature intended the requestor to be a mandatory party in an action under RCW 42.56.540, it could have said so. The statute and civil rules, however, do not make the requester mandatory or indispensable.

A judicially created rule, as suggested by Mr. Parmelee, is also unnecessary in light of the provisions of the PRA that protect requesters. For example, a requester is entitled to prompt responses to requests. RCW 42.56.520. As in this case, this requester was then told that his request was delayed because of a suit under RCW 42.56.540. When a suit arises,

the PRA gives the requester the choice to intervene after they are notified by the agency, as Mr. Parmelee was, that their request is the subject of an injunction action. CP 268, 499.

In contrast, if all requestors must be joined to all enjoinder actions under the PRA, when the statute does not require it, requestors would be required to incur litigation expenses they may not otherwise choose to incur. Thus, where the requester is not named by the parties, the statute and civil rules fairly leave the requester with the freedom to intervene or not. Moreover, if the requester is denied this choice by not getting notice of the lawsuit, the requester's right to intervene can be protected by a court recognizing that a motion to intervene would be timely in circumstances where the requester received inadequate or late notice of the case.⁶

Thus, Parmelee mischaracterizes the issues in this case when he claims "[i]t is not in the public's interest to have an agency and its employees *keep out* interested parties, especially the original records requestor." Petition for Rev. at 14. Record requestors can undoubtedly

⁶ A judicially created rule would also raise questions that should be unnecessary, such as who must be joined if there are multiple or overlapping or sequential requests, requests by an organization, or requests by a person immune from suit.

become a party to an enjoinder action by intervening under CR 24(a).⁷ Requesters, however, cannot sit by and allow litigation to proceed to a final order and then move to intervene when dissatisfied with those results.

For all these reasons, the Court of Appeals properly rejected Mr. Parmelee's reliance on CR 19. The Court of Appeals properly concluded Mr. Parmelee's absence from the suit did not prevent the trial court from affording complete relief. *Burt*, 141 Wn. App. at 579-80 (Slip Op. at 6-7). The employees still had the burden of demonstrating that the records requested by Mr. Parmelee should not be disclosed to him. *Spokane Police Guild*, 112 Wn.2d at 35.

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⁷ *Tiberino v. Prosecuting Attorney*, 103 Wn. App. 680, 686-87, 13 P.3d 1104 (2000) (discharged employee of the Prosecutor's Office sought to enjoin disclosure to Spokane Television, Inc. of personal e-mails she sent during work hours. Spokane Television allowed to intervene prior to oral arguments); *Bellevue John Does 1-11 v. Bellevue School District #405*, 129 Wn. App. 832, 839, ¶¶ 2-4, 120 P.3d 616 (2003) (37 school teachers sought to enjoin disclosure to the Seattle Times of records maintained by school districts relating to accusations or investigations for sexual misconduct); *Spokane Police Guild v. Washington State Liquor Control Bd.*, 112 Wn.2d 30, 31-32, 769 P.2d 283 (1989) (Police Guild sought to enjoin release of Liquor Board report to Cowles Publishing about liquor license violations at Guild club. Cowles allowed to intervene).

V. CONCLUSION

For the reasons outlined above and in its Response to the Petition for Review, the Department respectfully requests that this Court affirm the Court of Appeals.

DATED this 6th day of October, 2008.

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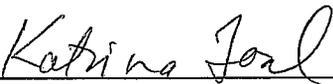
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I certify under penalty of perjury of the laws of the State of
Washington that the foregoing is true and correct.

EXECUTED this 6th day of October, 2008, at Olympia,
Washington.



KATRINA TOAL