

80998-4
NO. 24076-2-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

ERIC BURT, et al.,

Respondents,

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,

Respondent.

BRIEF OF RESPONDENT DEPARTMENT OF CORRECTIONS

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I. ASSIGNMENTS OF ERROR

Defendant/Respondent contends the trial court committed no error when it denied Appellant's Motion to Intervene as being untimely.

II. COUNTER STATEMENT OF THE ISSUES

A. Whether challenges to the Plaintiffs' trial court pleadings are properly before this Court when Appellant did not move to strike those pleadings in the trial court and no orders were entered thereon.

B. Whether the trial court abused its discretion in denying Appellant's Motion to Intervene as untimely, when the application to intervene came over three months after Appellant had actual notice of the motion to enjoin disclosure and over three weeks after the trial court had issued its order on the motion.

C. Whether Appellant should be allowed to advance a theory in this Court that he was an indispensable party to the trial court proceedings when he made no such argument in the trial court and the trial court did not issue any orders on the issue.

D. Whether Appellant is entitled to attorney's fees when he has not prevailed against DOC in an action in court seeking to compel disclosure of a public record.

III. COUNTER STATEMENT OF THE CASE

A. FACTUAL AND PROCEDURAL BACKGROUND

1. Parties

Appellant, Allan Parmelee, was incarcerated by the Washington Department of Corrections (DOC) at the Washington State Penitentiary (WSP) in Walla Walla, Washington, when the events occurred that are the subject of this appeal. Appellant made a public disclosure request to DOC for information relating to 15 staff members at WSP who are the Plaintiffs-Respondents in this matter, 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, hereinafter, Plaintiffs. CP 28-29. Plaintiffs sought to enjoin DOC, Defendant-Respondent herein, from disclosing the information sought by Appellant pursuant to the process outlined in RCW 42.17.330.¹ CP 1-6; 7-12.

2. Background

Appellant was convicted of two counts of Arson in the First Degree. CP 24-26, 40. Appellant was given an exceptional sentence due to level of planning and sophistication of the crime which included

¹ RCW 42.17.330 was recodified to RCW 42.56.540 on July 1, 2006. DOC will continue, however, to refer to the statutory section as RCW 42.17.330.

intimidation of the victims. CP 43. Appellant had developed a pattern of sophisticated planning and intimidation of victims in previous convictions for stalking and protection order violations. CP 50-55. The intimidating and manipulative behavior continued after his incarceration at WSP. CP 51.

On October 6, 2004, Appellant was charged with a violation of prison disciplinary rules for threatening and intimidating a staff person, one of the Plaintiffs herein, Dave Snell. CP 85-90. Mr. Snell was the grievance coordinator at WSP and had apparently resolved a grievance filed by Appellant to his dissatisfaction. Appellant wrote two letters to Mr. Snell threatening to sue him over this incident. CP 93-94. In the latter letter, Appellant threatened to have a "released prisoner" serve him with the lawsuit "at home, usually late at night" or that he would have Mr. Snell followed and served at a time that "would or could be most embarrassing" to him. CP 94.

The day after being charged with this infraction, October 7, 2004, Appellant made a public disclosure request to Megan Murray, the public disclosure coordinator for WSP. CP 28-29. In it, Appellant asked for a photograph of Mr. Snell and 11 other WSP staff members, Plaintiffs herein, as well as "employment, income, retirement, expense, and/or disability type document(s)" and any administrative grievance or internal

investigation of the Plaintiffs. *Id.* Ms. Murray timely responded to Appellant's request seeking clarification. CP 35-36.

On December 5, 2004, Appellant was again infracted for threatening and intimidating staff. CP 101. A letter from Appellant addressed to a Barry Powell, asked Mr. Powell to obtain home address information "on a couple of pigs here." Appellant sought the home address of three of the Plaintiffs herein, Dave Snell, Eric Burt and Charles Crow. *Id.* Appellant sought these 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 Appellant and informed him that the staff members who were the subject of his disclosure request would seek to enjoin their disclosure pursuant to RCW 42.17.330. CP 499. Ms. 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). Thus, Appellant was aware on this date that an enjoinder action would be filed and in which court. Ms. Murray wrote Appellant again on December 29, 2004, reiterating this information and also advising him that certain 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 Appellant and informed him that the hearing date had been set for February 22, 2005. CP 500. On that date, the judge assigned to hear the matter recused himself and the matter was re-assigned to the Honorable Robert L. Zagelow, who 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 from DOC. *Id.* That briefing was provided to Judge Zagelow on March 15, 2005. CP 12-19. The next day, Judge Zagelow entered an order granting Plaintiffs' Motion to Enjoin DOC from disclosing the documents requested by Appellant. CP 110-114. Appellant filed a Notice of Appeal of this decision on April 18, 2005. CP 311-315.

Despite being aware, on December 22, 2004, that a court action was being commenced in Walla Walla County Superior Court to enjoin his public disclosure request, Appellant took no action to intervene until over three and one-half months later, and over three weeks after the court had entered its order enjoining disclosure. On April 7, 2005, Appellant

filed a Limited Notice of Appearance, CP 123, a Motion to Intervene,² CP 124-195, and a Motion to Reconsider.³ CP 196-215. Appellant claimed he should be allowed to intervene because he had never been given notice of the action between Plaintiffs and DOC. CP 124. Nowhere in his Motion to Intervene or Declaration in Support thereof, does Appellant complain about placement in administrative segregation preventing him from attempting to intervene in this matter earlier. CP 124-130; 216-220.⁴ DOC responded contending that Appellant had been kept apprised of the litigation over his disclosure request and that his motion was, therefore, untimely. CP 316-322.

On May 11, 2005, Judge Zagelow issued a letter opinion ruling on Appellant's motions. Concerning the notice issue, Judge Zagelow wrote "it is undisputed that he [Appellant] had actual knowledge that litigation had been commenced in Walla Walla County Superior Court" on December 22, 2004. He then summarized the key dates discussed above. Judge Zagelow concluded that Appellant had actual notice of the suit and

² Although denominated a "Motion to Intervene and Join Indispensible Party" the motion is only made pursuant to CR 24, Intervention, and not CR 19, Joinder of Persons Needed for Just Adjudication. CP 124. Appellant never provided any argument or authorities to the trial court that he was an indispensable party pursuant to CR 19, only that he should be allowed to intervene.

³ Although denominated a "Motion to Reconsider," the motion is not made pursuant to CR 59, New Trial, Reconsideration and Amendment of Judgments but is made pursuant to CR 60(b), Relief From Judgment or Order.

⁴ The Declaration's last page is p. 8. Pages 5-7 were never filed with the court or served on the parties.

hearing date and that he 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 Appellant 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.”⁵ *Id.*

Because Appellant’s Motion to Intervene had been denied, Judge Zagelow determined all of his other motions were moot. CP 324. On June 7, 2005, the order was entered by Judge Zagelow denying Appellant’s Motion to Intervene. CP 483-484. On June 30, 2005, Appellant filed a Notice of Appeal of the June 7, 2005, order. CP 493-495.

IV. SUMMARY OF THE ARGUMENT

Appellant sought public disclosure of certain information about WSP staff members, Plaintiffs herein. The staff members sought to enjoin this disclosure pursuant to RCW 42.17.330. That statute provides a mechanism by which a person named in a requested record can seek to have the agency enjoined from disclosing the record. The statute is silent as to the requestor’s status in the enjoinder process. DOC agrees it may

⁵ Appellant 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 I have litigated.” CP 217.

be appropriate to allow the requestor to intervene in the enjoinder process if the requestor meets the requirements for intervention and timely application is made. That did not occur here.

The sole question before this Court is whether the trial court abused its discretion in denying Appellant's Motion to Intervene as being untimely when he had over three months actual notice that Plaintiffs would seek to enjoin disclosure and did not seek to intervene until over three weeks after the trial court had entered its final order thereon.

Appellant also now claims he should be considered as an indispensable party pursuant to CR 19 but, again, he never raised this issue in the trial court and provided no argument or authority that he was an indispensable party. The trial court entered no order on that issue and it is not properly before this Court. Similarly, Appellant never moved to strike Plaintiffs' pleadings in the trial court that he now contends are insufficient. He raises this issue for the first time on appeal and it is not properly before this Court.

Finally, Appellant did not prevail in an action to compel DOC to disclose records, therefore statutory attorney fees are not available to him. Appellant is also not entitled to attorney fees based upon equitable considerations because he did not prevail in having an allegedly wrongful injunction dissolved.

V. ARGUMENT

A. APPELLANT NEVER SOUGHT TO STRIKE THE PLEADINGS OF PLAINTIFFS IN THE TRIAL COURT, THEREFORE ANY CHALLENGES THERETO ARE NOT PROPERLY BEFORE THIS COURT

Appellant claims there were deficiencies in Plaintiffs' pleadings in the trial court and that they should have been struck. Appellant's Brief, pp. 10-11. Specifically, he contends Plaintiffs failed to include an address on their pleadings and that only one Plaintiff, Alan Walter, signed the Motion for Protective Order.⁶ *Id.* It is undisputed Appellant never sought to strike the pleadings in the trial court, therefore, no orders were entered concerning the sufficiency of the pleadings. Appellant raises the issue for the first time on appeal.

The proper remedy for irregularities in the pleadings is a motion to strike. *Greene v. Union Pacific Stages, Inc.*, 182 Wash. 143, 145, 45 P.2d 611 (1935). Appellant made no motion to strike Plaintiffs' pleadings in the trial court and raises the issue for the first time here. Arguments not raised in the trial courts generally will not be considered on appeal. *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 853, 50 P.3d 256 (2002).

⁶ Eleven Plaintiffs signed the original Complaint and the other four Plaintiffs signed the Amended Complaint. CP 6, 122.

The only way the issue of lack of verification by all Plaintiffs could come before this Court is if it deprived the court of jurisdiction. However, the Washington Supreme Court has determined that it does not. *Griffith v. Bellevue*, 130 Wn.2d 189, 192, 922 P.2d 83 (1996).

In *Griffith*, several neighboring property owners challenged a decision by the city of Bellevue to rezone a parcel of land owned by Greacen Construction by filing a writ of certiorari. *Griffith*, 130 Wn.2d at 191. The statutory writ process required verification of the writ application and directed the courts to apply the civil court rules in writ proceedings. *Id.* at 192. The neighboring property owners failed to verify their pleadings and Greacen moved to dismiss for lack of subject matter jurisdiction. *Id.* at 191. The superior court granted the motion. *Id.* at 192.

In analyzing the case, the Supreme Court found that the proper rule to determine whether a matter should be dismissed for lack of a signature was CR 11. *Id.* at 194. “The purpose of the verification requirement is to assure the truthfulness of the pleadings and to discourage claims without merit, which is also the purpose of CR 11.” *Id.*

The purpose of the civil rules, the court noted, was to place substance over form and to resolve cases on the merits. *Id.* at 192.

“[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)).

With this premise in mind, the Supreme Court reversed the lower courts and stated “we hold a signed verification is not a jurisdictional requirement.” *Id.* This is consistent with the wording of CR 11 itself, which, as Appellant concedes, only requires an unsigned pleading to be stricken if it is not “signed promptly after the omission is called to the attention of the pleader or movant.” CR 11(a); Appellant’s Brief, p. 11.⁷

Here, since Appellant did not move to strike Plaintiffs’ pleadings in the trial court for lack of an address or verification by all Plaintiffs, and since a pleading signed by only one Plaintiff does not deprive this Court of jurisdiction over the remaining Plaintiffs, Appellant’s contention that the pleadings should be stricken is without merit. Appellant’s contention elevates form over substance in an effort to win dismissal on technical grounds, rather than resolving the issues on the merits.

⁷ It is DOC’s understanding that Plaintiffs are making an effort to get each person’s signature on the motion and other pleadings to file with the trial court.

B. THE ONLY ISSUE BEFORE THIS COURT IS WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO INTERVENE AS BEING UNTIMELY

1. Appellant's Application to Intervene Was Untimely.

Appellant sought to intervene as of right in this matter pursuant to CR 24(a). There are four requirements that must be satisfied before intervention may be allowed: (1) timely application for intervention; (2) an applicant claims an interest which is the subject of the action; (3) the applicant is so situated that the disposition will impair or impede the applicant's ability to protect the interest; and (4) the applicant's interest is not adequately represented by the existing parties. *Westerman v. Cary*, 125 Wn.2d 277, 302, 892 P.2d 1067 (1994). All four of these requirements must be met to justify reversal. *Id.* at 303.

"Timeliness 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). Abuse of discretion is the proper standard of review for a trial court's determination of timeliness. *Kreidler*, 111 Wn.2d at 832. Abuse of discretion occurs when an order is manifestly unreasonable or based upon untenable grounds. *Washington State Physicians Ins. Exchange v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). "A reviewing court will find abuse 'only

when no reasonable person would take the position adopted by the trial court.” *Id.*; *Board of Regents v. Seattle*, 108 Wn.2d 545, 557, 741 P.2d 11 (1987).

At issue in *Kreidler*, were the ballot titles of two competing initiatives to the people, one proposed by a citizens group and one proposed by the Legislature. The citizens group objected to the ballot language the Attorney General’s Office had given to the Legislature’s initiative in superior court in May, 1988. *Kreidler*, 111 Wn.2d at 830-31. Notice of the objections was provided to the Legislature. The trial court instructed the group and the Attorney General to try to reach agreement on compromise language. On June 13, 1988, the trial court adopted the ballot title the parties had agreed on. Seven days later, on June 20, 1988, several legislators attempted to intervene in the action and asked the court to reconsider its decision. *Id.* at 831. The trial court denied the legislators’ motion and they appealed. The Supreme Court upheld the trial court’s ruling stating “Petitioners 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.

As in *Kreidler*, Appellant here had ample opportunity to intervene before the Court made its decision and he failed to do so. The court in

Kreidler found the seven day delay after its ruling by the applicants to seek intervention was untimely. Here, Appellant had notice of the court action as early as December 22, 2004, yet he waited until 22 days after the Court entered its order to seek intervention. As in *Kreidler*, Appellant's Motion to Intervene was untimely and the court did not abuse its discretion in denying it.

2. **Appellant Was Provided With Sufficient Notice Of The Enjoinment Action.**

Appellant contends that he did not have adequate notice of the action between Plaintiffs and DOC. He argues that notice similar to what is required in underinsured motorist cases is required here. Appellant's Brief, pp. 13-16. He makes the conclusory statement that he is entitled to the due process protection of notice without citing any authority that a public records request is entitled to such protections. Appellant's Brief, p. 14. Assuming, for the sake of argument, that Appellant does have a property or liberty interest in a public disclosure request, case law does not support his contention that he must be provided with a copy of Plaintiff's complaint to have adequate notice of the enjoinder action.

In a case cited by Appellant, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), the U.S. Supreme Court decided that no specific method was required to give

notice as long as the method is “reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. 339 U.S. at 314; *State v. Thomas*, 25 Wn. App. 770, 773, 610 P.2d 937 (1980). “In civil cases, the purpose of notice statutes is to fairly and sufficiently apprise those who may be affected of the nature and character of the action, and notice is deemed adequate in the absence of showing that anyone was actually misled by the notice.” *Dept. of Natural Resources v. Marr*, 54 Wn. App. 589, 596, 774 P.2d 1260 (1989), citing *Nisqually Delta Assoc. v. DuPont*, 103 Wn.2d 720, 727, 696 P.2d 1222 (1985).

Not even the underinsured motorist cases cited by Appellant require service of a complaint on the insurer when it’s insured sues an uninsured tortfeasor. In *Lenzi v. Redland Insurance Co.*, 140 Wn.2d 267, 996 P.2d 603 (2000), the plaintiff was injured by an uninsured motorist and filed a claim with his insurance company for underinsured motorist coverage. *Id.* at 270. The plaintiff and the insurance company could not reach a settlement on the claim so the plaintiff sued the at-fault motorist, and obtained a default judgment against him. *Id.* at 271-272. The plaintiff had tendered the action to the insurance company which took no action on the offer. Although the plaintiff’s attorney in *Lenzi* had sent a copy of the summons and complaint to the insurance company with a letter tendering

the case to it, the Supreme Court held that “[n]either the *Finney-Fisher* rule nor ordinary notions of fair play and substantial justice dictate the Lenzis had any duty to Redland other than timely notifying Redland of the filing of the summons and complaint.” *Id.* at 276.

Here, the DOC timely notified Appellant of the Plaintiffs’ enjoinder action by letter dated December 22, 2004. DOC did not have to provide Appellant with a copy of the Plaintiffs’ complaint to satisfy notice requirements. Rather its letter fairly and sufficiently apprised Appellant that Plaintiffs were seeking to enjoin his public disclosure request in Walla Walla County Superior Court. That Appellant chose to not avail himself of this information to seek to intervene until over three weeks after the Court entered its order, is not the fault of DOC or Plaintiffs.

3. **The Enjoinment Statute Is Silent As To The Status Of The Requestor.**

The statute that Plaintiffs used to enjoin disclosure was RCW 42.17.330 which reads in pertinent part:

The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially

and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.

Here, the persons named in the record, the Plaintiffs, sought to enjoin DOC from disclosing a public record in its possession that pertained to the Plaintiffs. Those are the two parties contemplated by the statute. The statute is silent as to what role, if any, the requestor of the record must play in the injunction action. It does not require the movant to serve notice on the requestor or to take any other steps to affirmatively bring the requestor into the action.

Nevertheless, DOC three times notified Appellant in writing that the Plaintiffs were taking action in Walla Walla County Superior Court to enjoin disclosure of the documents he had requested about them. On December 22, 2004, Ms. Murray wrote “[a]ffected staff have notified me that they will be seeking protection of the records. . . . The documents will not be disclosed until a hearing date is scheduled and a decision is made by Walla Walla Superior Court” On December 29, 2004, she reiterated the same information. On February 1, 2005, she wrote Appellant stating “[a] hearing date has been set for February 22, 2005.” The actual order was not entered until March 16, 2005, but during this entire time, Appellant made no effort, despite his experience in litigation,

to obtain any information about the action, such as a case name or cause number from Ms. Murray, the Clerk of the Court or any other individual.⁸

Appellant contends that “[i]t is standard for courts to permit the intervention of all interested parties when an action has been filed under RCW 42.17.330.” Appellant’s Brief, p. 16. DOC does not dispute this but in all of the cases cited by Appellant, application to intervene was made prior to a decision on the enjoinder action. *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); *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 790, 791 P.2d 526 (1990) (Superintendent of Public Instruction sought declaratory judgment that it did not have to comply with Cowles’ request for records specifying reasons for teacher certificate revocations. No

⁸ Appellant infers he had difficulty in accessing the courts during this timeframe (Appellant’s Brief, p. 8) but DOC counts at least eight letters he wrote to eight different individuals during this time citing numerous reported cases. CP 226-255.

application to intervene); *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). All of these cases are distinguishable from the situation here because timely application was made by the requestor to intervene in each case.

C. APPELLANT NEVER SOUGHT TO BE JOINED AS AN INDISPENSABLE PARTY IN THE TRIAL COURT, THEREFORE, THE ISSUE IS NOT PROPERLY RAISED FOR THE FIRST TIME ON APPEAL

Appellant finally contends that he was an indispensable party to the action between Plaintiffs and DOC, relying on CR 19(a). Again, Appellant did not raise this issue before the trial court. Although Appellant filed a motion denominated "Motion to Intervene and Join Indispensable Party," the motion is only made pursuant to CR 24, Intervention. CP 124. CR 19 is never mentioned and all argument and authorities relate to CR 24. CP 124-130. The Court's order on Appellant's motion only references intervention. CP 483-484. Issues raised for the first time on appeal which do not involve fundamental rights, including claims that indispensable parties were not joined, will not be considered by the appellate courts. *Draper Machine Works, Inc. v. Hagberg*, 34 Wn. App. 483, 488, 663 P.2d 141 (1983); *Lindberg v. Kitsap*

County, 133 Wn.2d 729, 746, 948 P.2d 805 (1997). Further, “[t]he indispensable party doctrine is not jurisdictional, but founded on equitable considerations.” *Lindberg*, 133 Wn.2d at 744-45. As with the verifications issue discussed above, Appellant failed to raise the claim he was an indispensable party before the trial court and it is not a jurisdictional issue, therefore, this Court should decline to address it here.

Even if this Court chooses to address the issue, Appellant cites no cases, and DOC is aware of none, which holds that the requestor of a public record is an indispensable party in an injunction action between a named staff person and the agency to which the request was made. Further, as stated above, RCW 42.17.330 provides no guidance as to the status of the requestor in an injunction action or any obligation on the part of the parties to affirmatively bring in the requestor via court rules.

The issue of indispensable parties in a public records context was raised in the *Lindberg* case, *supra*, however, the analysis did not focus on the requestor as the indispensable party, but, rather, the holder of a copyright for documents in the possession of Kitsap County that requestors had sought. *Lindberg*, 133 Wn.2d at 740-41. The Supreme Court held that the copyright holders were not indispensable parties. “Persons who may be involved in the subject matter of an action are not

necessary parties where no recovery is sought against them and they would not be prejudiced by the judgment.” *Id.* at 745.

Here, it is obvious no recovery is being sought against Appellant and DOC does not see how Appellant is prejudiced by not receiving photographs and employment related information concerning the Plaintiffs. Appellant’s arguments that he should have been joined as an indispensable party are without merit.

D. APPELLANT IS NOT ENTITLED TO ATTORNEY’S FEES AS HE HAS NOT PREVAILED AGAINST DOC IN AN ACTION IN COURT SEEKING TO COMPEL DISCLOSURE OF PUBLIC RECORDS

Appellant requests attorney’s fees be awarded to him either pursuant to the Public Records Act or pursuant to equitable considerations. Neither contention is well taken.

1. Attorney’s Fees Under the Public Disclosure Act

The attorney’s fees section of the Public Records Act provides in pertinent part:

Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.

RCW 42.17.340(3).⁹ However, Appellant has not prevailed against DOC in an action in court seeking to inspect or copy a public record.

At no time has DOC claimed that any of the records requested by Appellant were exempt from disclosure under the Act. If it had, Appellant could have sought to compel DOC to disclose the documents under the Act. RCW 42.17.340(1) (now RCW 42.56.550(1)). If he had prevailed, then he would have been entitled to attorney's fees under the Act but that is not the procedural posture this case has followed.

Rather, following Appellant's request, DOC notified the affected staff so that they might pursue their right to enjoin disclosure under the statute. As noted by Judge Zagelow in his Findings of Fact, this apparently indicated that DOC did not believe an exemption from disclosing the records existed. CP 111. Obviously, if DOC believed an exemption applied precluding disclosure, there would be no reason to notify staff so that they could seek to enjoin the disclosure. In fact, DOC did offer copies of records to Appellant that were not related to the information sought about Plaintiffs. CP 268.

Here, DOC is merely the possessor of a record that one party wants and that another party does not want released. DOC followed its statutory authority and notified the affected staff and the staff used their statutory

⁹ Now RCW 42.56.550(4).

right to seek enjoinder of disclosure. DOC was aware Appellant had been informed repeatedly of this fact and was aware that Appellant was perfectly capable of representing his interests in such an action.

Appellant contends DOC and the Plaintiffs were “sitting at the same table, eating out of the same dish,” apparently inferring DOC has some affirmative duty under the Act to actively advocate Appellant’s position for him. Appellant’s Brief, p. 24. However, this is not correct. DOC simply informed the court that it had no opposition to Plaintiff’s motion to enjoin disclosure, knowing Appellant was capable of representing his own interests if he so desired. Yet he never attempted to do so until it was too late.

As noted by Appellant, the attorney’s fees provision of the Act is “inapplicable to cases in which an individual – rather than the agency – opposes disclosure of records, and where the action was brought to prevent, rather than compel, disclosure. *Confederated Tribes v. Johnson*, 135 Wn.2d 734, 757, 958 P.2d 260 (1998). Here, Plaintiffs, not DOC, sought to prevent disclosure of the records requested by Appellant. Appellant did not seek to compel their disclosure. Therefore, attorney’s fees are not available to Appellant under the statute.

2. Equitable Considerations Regarding Attorney's Fees

In *Confederated Tribes*, the requestor also sought attorney's fees based on equitable considerations, as Appellant does here, where an injunction may have improperly blocked disclosure of a public record. *Id.* at 758. First, the Supreme Court noted the award of attorney's fees to a party who prevails in dissolving a wrongfully issued injunction is discretionary, not mandatory. *Id.* Second, they noted such an award is inappropriate in situations, such as public disclosure requests, where injunctive relief prior to trial on the merits is necessary to preserve the parties' rights pending resolution of the action. *Id.* As stated by the Supreme Court "[h]ere, the trial on the merits would have been fruitless if the records had already been disclosed." *Id.*

In this case, there was no "trial on the merits" as Appellant chose not to participate in the enjoinder action until after it had been concluded. The issue here, then, is whether he should have been allowed to intervene at such a late date, not whether the injunction was wrongfully issued. Thus, the equitable rule for a discretionary award of attorney's fees in such cases is not present here. Therefore Appellant's request should be denied.

VI. CONCLUSION

The only issue before this Court is whether the trial court abused its discretion in denying Appellant's untimely Motion to Intervene. This Court would have to conclude no reasonable person would have taken the position adopted by the trial court to find an abuse of discretion. Here, the record reflects Appellant was notified by letter on at least three different occasions about the pendency of this action. The trial court found this was sufficient notice to apprise Appellant of the pendency of the action and to afford him an opportunity to be heard. Nevertheless, Appellant waited until over three weeks after the trial court had entered its order enjoining disclosure of the records. Case law holds that even a seven day delay in seeking to intervene is untimely. The trial court did not abuse its discretion.

Appellant also challenges pleadings filed by the Plaintiffs and contends he was an indispensable party. However, Appellant filed no motions to strike or to dismiss for failure to join an indispensable party in the trial court and raises the issues, here, for the first time on appeal. Therefore, they should not be considered here.

Finally, Appellant did not prevail in the trial court in an action to compel disclosure of public records, therefore he is not entitled to statutory attorney's fees. Similarly, Appellant did not prevail in having a

wrongfully issued injunction dissolved, therefore, the equitable rule in awarding attorney's fees in such a situation is inapplicable here.

For these reasons, DOC respectfully requests this Court affirm the trial court's denial of Appellant's Motion to Intervene as untimely.

RESPECTFULLY SUBMITTED this 9th day of November, 2006.

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CERTIFICATE OF SERVICE

I certify that I served a copy of BRIEF OF RESPONDENT DEPARTMENT OF CORRECTIONS on all parties or their counsel of record on the date below as follows:

X U.S. Mail, Postage Prepaid

TO:

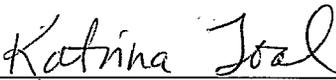
ALAN WALTER
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 9th day of November, 2006, at Olympia, Washington.



KATRINA TOAL

COURT OF APPEALS, DIVISION III OF THE STATE OF WASHINGTON

ERIC BURT, et al,)
Plaintiffs / Respondents,)
v.)
WASHINGTON STATE DEPARTMENT)
OF CORRECTIONS)
Defendant / Respondents.)

COA NO. 24076-2-III

ERIC BURT, et al JOINDER IN
STATE DEFENDANT'S
STATEMENT RE APPEAL AND
CROSS-APPEAL QUESTIONS

ERIC BURT, et al hereby joins in the response filed by the Defendant / Respondent Department of Corrections.

DATED this 13 day of November, 2006.

Alan Walters
Howard Smalley
Sherry Hartford
Laura Coleman
April Smith
Eric Burt
% Charles Crow
John Brown
Richard J. Myer
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Paul David Widens
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