NO. 45542-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STEVEN P. KOZOL,

Appellant,

v.

KING COUNTY,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY

THE HONORABLE STEPHANIE A. AREND

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DAVID J. ELDRED
Senior Deputy Prosecuting Attorney
Attorneys for Appellant

King County Prosecuting Attorney
King County Administration Building
500 Fourth Avenue, Suite 900
Seattle, Washington 98104
(206) 296-8820

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A. ASSIGNMENT OF ERROR

Respondent King County makes no assignments of error regarding the trial court's orders in this matter.

B. ISSUES PRESENTED

1. The Public Records Act provides that an action must be commenced within one year of an agency's last production of a record. Mr. Kozol commenced this action more than one year after he received King County's last production of a record. Should the court of appeals affirm summary judgment?

2. CR 56(c) and CR 5(b)(2)(a) provide that service of King County's reply in support of summary judgment was to be mailed on the Friday before the hearing date. Does CR 6(e) change this calculation?

3. Amendments to the complaint at or after summary judgment are improper if the opposing party objects to the unpled evidence, amendment would be futile, or the amendment cannot relate back to the original date of filing. King County objected to the unpled evidence, the proposed amendment was futile, and it could not relate back. Did the trial court properly reject the belated attempt to amend the complaint?

C. STATEMENT OF THE CASE

Mr. Kozol makes numerous assertions in his Statement of the Case which are not supported by references to the record. In addition, he makes factual assertions which unfairly characterize the evidence before the trial court.

For example, Mr. Kozol claims that he was wrongfully convicted and incarcerated. Appellant's Opening Brief at 4. This is irrelevant to this appeal and unsupported by the declaration he cites (CP 115). Mr. Kozol claims that his trial attorney was never informed about a watch being found at the crime scene. Appellant's Opening Brief at 4. This is unsupported by the declaration he cites (CP 115) and incorrect according to the letter he provided from his former attorney (CP 123) which actually states, "I remember absolutely nothing about the existence of a Rolex watch which was 'allegedly' found at the crime scene." The attorney, Mr. Savage, stated that he did not remember a watch, and never stated that he was not informed about a watch.

More relevant to this appeal, Mr. Kozol claims that King County responded to his requests for records about a watch by producing five pages of records and claiming that "no other responsive records existed." Appellant's Opening Brief at 5. However, Mr. Kozol was told that five pages of records were "identified" (CP 128) and later that, "we found nothing additional that is responsive to your request". CP 132. No representation was made that "no other responsive records existed."

Mr. Kozol claims that he submitted a "follow-up" request for "all records in the KCPAO's case file No. 00-1-09050-8KNT". Appellant's

Opening Brief at 5. However, the referenced letter makes no request for anything beyond further searching regarding the original request. CP 136.

Finally, Mr. Kozol claims that the County opposed his motion to set a trial date. However, he provides no reference in the record for this irrelevant claim.

D. ARGUMENT

1. *THE TRIAL COURT CORRECTLY DISMISSED MR. KOZOL'S COMPLAINT ON STATUTE OF LIMITATIONS GROUNDS.*

The Public Records Act (PRA) requires a plaintiff to commence an action within one year of either (1) an agency's claim of exemption from the PRA's disclosure requirements or (2) an agency's last production of a record on a partial or installment basis. RCW 42.56.550(6). Because King County did not claim an exemption to Mr. Kozol's PRA requests, the first portion of the statute of limitations does not apply. Instead, the second portion of the statute of limitations applies. This is because Mr. Kozol commenced this lawsuit more than one year after he received King County's last response to his PRA requests. The last response to the PRA requests was sent on or about January 25, 2011. CP 1-2. This action was not commenced until March 7, 2012. CP 78-89.

This rule applies even though the productions were not made on a partial or installment basis. In *Bartz v. Department of Corrections*, 173

Wash.App. 522 at 535-38, 297 P.3d 737 (Div. 2, 2013), this Court squarely held that the one year statute of limitations applies to a single production of records just as it applies to installment or partial productions of records. In this case, not only did Mr. Kozol receive the production of records he complains about more than one year before he commenced this action, but he was aware of the basis for his claim at the time he received those records. CP 81, ¶ 6. As a result, this action is time barred and was properly dismissed with prejudice.

Mr. Kozol concedes that he signed the Complaint in this matter on February 27, 2012 and filed it with the Court on March 7, 2012. CP 101. Mr. Kozol does not dispute that these events occurred more than one year after he received responses to his November 20, 2010 and January 12, 2011 public disclosure requests. He claims, however, that the statute of limitations did not start to run until the County allegedly responded to a purported third letter from him dated May 22, 2011. CP 101. He asserts that this letter was mailed on May 25, 2011. *Id.*

However, the County never received a letter from Mr. Kozol dated on or around May 22, 2011. CP 60-61. Mr. Kozol disputed this in the trial court and there is a genuine issue of material fact regarding whether it was ever sent or received. This was not a basis for the trial court's ruling. RP1 21.

a. The Trial Court Did Not Make A Finding Of Fact Regarding The May 22, 2011 Letter.

Mr. Kozol claims that there was a question of fact regarding whether his letter of May 22, 2011 extended the date the statute of limitations began to run. However, this is a legal and not a factual question. Just as this Court reviewed and interpreted another prisoner's submission and held that as a matter of law it did not extend the statute of limitations regarding the denial of his original requests for records, the trial court properly reviewed and interpreted Mr. Kozol's May 22, 2011 letter and reached the same conclusion. *See, Greenhalgh v. Department of Corrections*, 170 Wash.App. 137, 282 P.3d 1175 (Div. 2, 2012). Under *Greenhalgh* the dispute is about the legal implications of the May 22, 2011 letter and not about any facts associated with it. There is no issue of fact about the implication of this letter and this ground for reconsideration should be rejected.

b. The Purported May 22, 2011 Letter Is Not A Subject Of This Lawsuit.

Consistent with the facts that the County never received or responded to a letter dated May 22, 2011, Mr. Kozol did not raise such a letter in the Complaint or the Amended Complaint. While they both identify the November 20, 2010 and January 12, 2011 requests and even include copies of them, there is not even a mention of the purported May

22, 2011 letter in the Complaint and Amended Complaint. CP 78-89 and CP 90-91. Because the May 22, 2011 letter is not a subject of this lawsuit it cannot continue the statute of limitations. *Herron v. KING Broadcasting Co.*, 109 Wash.2d 514, 521, 746 P.2d 295 (1987) (Five-o'clock and eleven o'clock broadcasts of the same news story were separate occurrences under the law of defamation. Failure to plead the 11 o'clock occurrence could not be cured by amendment and could not form the basis for the plaintiff's claim).

c. Even If Amendment Were Permitted, The Purported May 22, 2011 Letter Could Not Extend The Statute Of Limitations.

The letter produced by Mr. Kozol indicates that he is "officially objecting to [the County's] claims to have provided all responsive records to me, and I hereby protest your assertion." The letter goes on to insist on a "comprehensive search throughout your agency". CP 136. This is an objection to the County's responses and not a new request for records. Unlike the November 20, 2010 letter making an initial request for records related to a Rolex watch or the January 12, 2011 letter expanding the request to any watches, the May 22, 2011 letter asserts only an objection and demands further searching.

An objection or an appeal to a response to a public records request does not extend the one year statute of limitations. A similar assertion was

rejected by this Court in *Greenhalgh.* 170 Wash.App., at 152-55. Greenhalgh submitted a public records request to the DOC for records explaining why it charged inmates twenty cents per page for PRA copies but only charged ten cents per page for legal copies. *Id.,* at 140-41. The DOC provided some records and asserted a privilege regarding additional responsive documents. *Id.* Like Mr. Kozol, Greenhalgh then submitted a second request seeking additional records: the formulas used to determine the two copy charges. *Id.* The DOC responded indicating that it did not possess any responsive documents regarding PRA copy costs and asserted a privilege regarding the legal copy cost documents. *Id.* Greenhalgh then filed an administrative appeal in which he sought the records he had originally requested and the ones that the DOC had withheld. *Id.*, at 141. Like Mr. Kozol he also insisted that there must be public records regarding the disparity. *Id.* Greenhalgh's request went further than Mr. Kozol's letter in which he merely objected to the County's response and demanded a "comprehensive search throughout your agency". The DOC administrator denied Greenhalgh's appeal.

Greenhalgh filed a lawsuit against the DOC less than a year after the administrator's denial of his appeal, but more than a year after the original responses were provided. *Id.* The DOC sought dismissal of Greenhalgh's complaint as time barred under the one year statute of

limitations. *Id.*, at 142-43. The trial court dismissed the complaint as time barred. *Id.*

On appeal, Greenhalgh argued that the response to his appeal started the statute of limitations rather than the original responses to his requests. He based this argument on the fact that the DOC had an administrative rule providing that final action for purpose of judicial review of a public records response will not be considered to have occurred until a decision was rendered on the administrative appeal. His theory was that the DOC was equitably estopped from asserting that the statute of limitations was triggered by its responses to the requests because the DOC induced reliance on the administrative rule. The Court of Appeals rejected this argument and held that the statute of limitations is triggered by the agency's claim of an exemption or the production of documents and not the response to the appeal. *Id.* At 152-55. If Mr. Greenhalgh could not rely on a published agency rule indicating that agency action was not final until after the conclusion of an administrative appeal, then Mr. Kozol cannot rely on the alleged absence of a response to a May 22, 2011 letter to extend the statute of limitations. Unlike the DOC, King County made no representations to Mr. Kozol about tolling the statute of limitations while it considered the purported objection to the County's responses.

Even assuming for purposes of summary judgment, that the May 22, 2011 letter was received by King County, under *Greenhalgh* the statute of limitations still begins to run when the claim of exemption or the last installment of documents is received. As a result, there is no genuine of material fact precluding summary judgment and this action was properly dismissed with prejudice for failure to comply with the one year statute of limitations.

d. *Johnson v. Department of Corrections* Is Not In Disagreement.

Mr. Kozol incorrectly asserts that this Court held in *Johnson v. Department of Corrections,* 164 Wash.App. 769, 262 P.3d 144 (Div. 2 2012) that "the one year limitation under RCW 42.56.550(6) would begin to run when a requestor receives an agency's last response to his follow-up request." Appellant's Opening Brief at 16. In other words, Mr. Kozol believes that the *Johnson* case stands for the proposition that a follow-up request can extend the statute of limitations. *Johnson* does not contain such a holding. In that case, a state prisoner, Robert Earle Johnson, sought records from the Washington Department of Corrections in August, 2006. The DOC provided one page of records in response. *Id.,* at 771-72. (In September, Mr. Johnson sent another "expanded request" which the Court of Appeals characterized as being for the same records he requested in

August. *Id.* The DOC responded indicating that it would forward the request to the headquarters office. *Id.* In October, Johnson wrote another letter because he did not receive DOC's September response. *Id.* The DOC responded in November, apologizing that the previous letter had come back and again promising to forward the request to headquarters and indicating that DOC would search its files again. *Id.* By March, 2007, Johnson had not heard back from DOC, so he sent another letter requesting the same documents he originally sought. DOC responded in August, 2007 noting that the one page document it had previously provided was all it possessed. *Id.* Johnson then filed a lawsuit in December, 2009. *Id.* The Court of Appeals considered whether the one year statute of limitations under RCW 42.56.550(6) applied, the general two-year statute of limitations, or none at all. The Court concluded that either the one-year or two-year statute of limitations applied, but rejected that theory that no statute of limitations could apply. *Id.,* at 776-78. The Court then determined that the latest possible date on which Johnson's cause of action accrued was when he received the last response to his follow-up requests. The Court did not hold that the follow-up requests extended the statute of limitations because it did not need to reach the issue. As a result, *Johnson* is not helpful to Mr. Kozol. Certainly,

Johnson does not stand for the proposition suggested by Mr. Kozol that a follow-up request for the same records extends the statute of limitations.

e. Mr. Kozol Did Not Request New Or Different Records In The Purported May 22, 2011 Letter.

In this appeal, Mr. Kozol asserts that the May 22, 2011 letter was a vast expansion of his previous two requests for records about watches. He asserts that the May 22, 2011 request was for all records contained in the prosecutor's file concerning his criminal prosecution. Appellant's Opening Brief at 32. This is a frivolous assertion. The letter states, "[t]his is a follow-up to the last correspondence exchanged with your office." "I am officially objecting to your agency's claims to have provided all responsive records to me, and I hereby protest your assertion." CP 136. This is a specific reference to the previous responses, and a protest that all of the records have been provided.

Mr. Kozol goes on to write, "Please conduct a comprehensive search throughout your agency, and provide me with all responsive records". CP 136. In no way would anyone interpret this to be a new request or a request for a copy of the entire file. It clearly demands a comprehensive search for records responsive to the previous two requests. Certainly, it is not a request for any other "identifiable record" as required by the Public Records Act. *See* RCW 42.56.080.

The trial court properly granted summary judgment because Mr. Kozol did not comply with the statute of limitations and, under *Greenhalgh*, the May 22nd letter could not extend the date the statute of limitations began to run.

2. *KING COUNTY TIMELY FILED ITS SUMMARY JUDGMENT REPLY.*

At the summary judgment hearing, Mr. Kozol made an oral motion to strike King County's Reply and the Second Declaration of Christie Johnson. RP1 5. The trial court denied this motion, finding that the Reply was timely mailed. RP1 6-7. Mr. Kozol sought reconsideration which was also denied. CP 276-78, CP 197-98.

The denial of a motion to strike is reviewed for abuse of discretion. *King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King County,* 123 Wash.2d 819, 826, 872 P.2d 516 (1994). Indeed, the trial court has considerable latitude in managing its court schedule to insure the orderly and expeditious disposition of cases. *Woodhead v. Disc. Waterbeds, Inc.,* 78 Wash.App. 125, 129, 896 P.2d 66 (Div. 1 1995); *Wagner v. McDonald,* 10 Wash.App. 213, 217, 516 P.2d 1051 (Div. 1 1973). Here, the trial court determined that the County's reply and supporting declaration were timely mailed. RP1 6-7.

The trial court was correct. Civil Rule 56 provides the rule for filing a rebuttal regarding a summary judgment motion: "The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing." "If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday or legal holiday." In this case, the summary judgment hearing was scheduled for Friday, September 6, 2013. Five days before the hearing was Sunday, September 1st. Because this was a Sunday, the rule requires that the rebuttal be filed on the next day nearer the hearing which is neither a Saturday, Sunday or legal holiday. Monday, September 2nd was a legal holiday. Thus, the reply was due on Tuesday, September 3rd.

A party may serve another party by U.S. Mail. CR 5(b)(2). Service by mail is effective on the third day after placing the pleading in the mail unless the third day falls on a Saturday, Sunday or legal holiday. *Id.* The defendant's reply was placed into the mail on Friday, August 30th. CP 230. The third day following that was Monday, September 2nd. Since the third day was a legal holiday, service was effective the next day. Service was therefore effective on Tuesday, September 3rd. This is the

same day that the reply was due. Mr. Kozol's argument that the reply was untimely is wrong.

Mr. Kozol posits that CR 6(e) changes this calculation. CR 6(e) provides: "[w]henever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period." On its face, CR 6(e) is the corollary of CR 5(b)(2). Thus, even assuming that Mr. Kozol had a right or was required to do some act after the county served its reply, CR 6(e) provided three days concurrent with the three days already provided for service by mail under CR 5(b)(2)(A).

It makes sense that because a document will take approximately three days to arrive in the mail, a party should get that time either to file a pleading (CR 5(b)(2)) or to extend another deadline following notice (CR 6(e)). However, there is no logical reason for the two rules to operate to double that time to six days.

Mr. Kozol disagrees, arguing that the two three-day periods are cumulative. According to Mr. Kozol he was entitled to an additional six days from the date of the County's mailing in which to submit any required response or do an act. Mr. Kozol cites to no authority for his

interpretation of the rules and King County has found no authority regarding this issue.

Regardless of whether CR 5 and CR 6 provide concurrent or cumulative time, Mr. Kozol's position that the County's Reply should have been stricken still fails for many reasons. First, the remedy, if any, would have been a continuance of the hearing. Second, Mr. Kozol did not comply with his own proposed rule in serving his Response on the County by mail. Therefore, under Mr. Kozol's own theory, the County was entitled to three additional days under CR 6(e). Third, there is no prejudice because Mr. Kozol had ample opportunity to make his legal and factual arguments both at the summary judgment hearing and subsequently on his motion for reconsideration following the dismissal of his complaint.

a. Appropriate Remedy.

Rather than seeking a continuance of the hearing, Mr. Kozol suggests that the County needed to have mailed its Reply brief earlier. He therefore sought to have the County's Reply stricken. However, on its face, CR 6(e) gives a party an additional three days to "do some act or take some proceedings" after notice by mail. The rule does not require the party serving by mail to deposit its pleadings into the mail three days

earlier. Thus, the remedy under CR 6(e) would be additional time to do the requested act, not to strike the opposing parties pleading.

b. Mr. Kozol Did Not Comply With His Own Rule.

Mr. Kozol fails to acknowledge that his Response was deposited into the mail on August 23rd, 2013. CP 110, Supp. CP ___ (Dec of Service by Kozol on 8/23). Thus service of his own Response was effective three days later on Monday, August 26th pursuant to CR 5(b)(2)(A).[1] However, Mr. Kozol did not add a second three-day period to make service timely under his CR 6(e) theory. Therefore, according to Mr. Kozol's CR 6(e) theory, King County had the right to add an additional three days to the deadline for its Reply to the time allowed by CR 56. This would have made King County's Reply due on Wednesday, August 4th, a full day after service of the Reply was actually effective on Mr. Kozol.

c. Mr. Kozol Had Ample Opportunity To Make His Arguments At The Summary Judgment Hearing And At The Reconsideration Hearing.

Mr. Kozol was not prejudiced in his ability to argue the summary judgment motion. Mr. Kozol challenged the key legal and factual arguments presented by King County at the summary judgment hearing. RP1 12-19. Moreover, he filed a lengthy motion for reconsideration after

[1] In reality, Mr. Kozol's response did not arrive until August 27th. RP1 7, Supp CP ___. (Dec of Eldred re Motion to Shorten Time).

having an additional six days to formulate arguments and provide the trial court with authority. CP 247-48 (Summary Judgment Order) and CP 249-63 (Motion for Reconsideration).

3. *MR. KOZOL'S ATTEMPT TO AMEND THE COMPLAINT WAS PROPERLY REJECTED.*

Mr. Kozol argues that the trial court should have amended his complaint to conform to the evidence pursuant to CR 15(b).[2] The Court of Appeals reviews a trial court's denial of leave to amend a complaint for an abuse of discretion. *Rodriguez v. Loudeye Corp.,* 144 Wash.App. 709, 728–29, 189 P.3d 168 (Div. 1 2008). A court abuses its discretion if its decision is not based on tenable grounds or tenable reasons. *Haselwood v. Bremerton Ice Arena, Inc.,* 137 Wash.App. 872, 889–90, 155 P.3d 952 (Div. 2 2007), *aff'd,* 166 Wash.2d 489, 210 P.3d 308 (2009).

Mr. Kozol first claims that a trial court's failure to announce its reasoning in denying a motion to amend is an automatic abuse of discretion, citing *Walla v. Johnson*, 50 Wash.App. 879, 883, 751 P.2d 334 (Div. 1 1988) *and, Watson v. Emard*, 165 Wash.App. 691, 702-03, 267 P.3d 1048 (Div. 2 2011). Neither case requires such a result. In *Walla*, the Court of Appeals noted that the trial court did not announce the reason

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[2] This argument was made both in the motion for reconsideration and in a separate motion to amend pursuant to CR 15(b). These motions were made after summary judgment was granted. Mr. Kozol did not make an oral or a written motion to amend prior to summary judgment. CP1 20.

for its denial of the motion to amend. 50 Wash.App. at 883. Nevertheless, the Court of Appeals went on to analyze the potential grounds for the trial court decision. *Id.* Similarly, in *Watson*, the Court of Appeals noted that a trial court's failure to explain its reason for denying leave to amend *may* amount to an abuse of discretion *unless the reasons for denying the motion are apparent in light of circumstances shown in the record.* 165 Wash.App., at 688-89 (emphasis added), *citing Rodriguez v. Loudeye Corp.*, 144 Wash.App., 709, 729, 189 P.3d 168 (Div. 1 2008).

Similarly, an appellate court reviewing a discretionary order or judgment of the trial court will not reverse it merely because the trial court gave the wrong reason for its rendition. *Ertman v. City of Olympia*, 95 Wash.2d 105, 107-08, 621 P.2d 724 (1980). The rule is often stated as: the appellate court may affirm on any grounds supported by the record. In this case, there is a written record indicating the arguments presented by the parties and there is no difficulty determining the reasons the trial court denied the motion to amend or finding a basis to affirm the trial court's decision.

Mr. Kozol sought to amend the complaint to conform to the evidence pursuant to CR 15(b). CP 252-53 (Motion for Reconsideration). He claimed that the County allowed the evidence of the May 22, 2011 to be presented without objection. In essence, Mr. Kozol suggests that by

raising the letter for the first time just days before the summary judgment hearing, his complaint was automatically amended. However, not only did King County object to the May 22, 2011 letter on the grounds that it was never received, but the County objected to the failure to plead anything about the letter and asserted this objection as an explicit basis for summary judgment. RP1 19-20; CP 226-27. Amendments to conform to the evidence pursuant to CR 15(b) are improper when a party objects to the evidence. *Rainier National Bank v. Lewis*, 30 Wash.App. 419, 423, 635 P.2d 153 (Div. 1 1981). Mr. Kozol asserts that *Denny's Restaurants, Inc. v. Security Union Title Ins. Co.* requires a different result. In that case, however, there was apparently no objection to the evidence on the grounds that the issue had not been pled. Instead, according to the Court of Appeals, the parties litigated it on summary judgment and the defendant only "*point[ed] out* that the issue had not yet been pleaded." 71 Wash.App. 194, 213-14, 859 P.2d 619 (Div. 1 1993) (emphasis added).

The proper method for amending the complaint to add such a theory would have been by motion pursuant to CR 15(a), which Mr. Kozol did not make prior to summary judgment (RP1 at 20) and which he did not seek on reconsideration. CP 249-63. Even assuming that a motion pursuant to CR 15(a) had been made, it was well within the trial court's discretion to deny such a motion. When, as here, a motion to amend is

made shortly before or after the adverse granting of summary judgment, the normal course of proceedings is disrupted and the trial court should consider whether the motion could have been timely made earlier in the litigation. *Doyle v. Planned Parenthood of Seattle-King County, Inc.*, 31 Wash.App. 126, 130-31, 639 P.2d 240 (Div. 1 1982); *see also*, *Wallace v. Lewis County*, 134 Wash.App. 1, 25-26, 137 P.3d 101 (Div. 2 2006) (denial of motion to amend proper where party waited to file an amended complaint until shortly before a dispositive summary judgment hearing, despite previously having had over a year to seek such an amendment); *and see, Trust Fund Services v. Glasscar, Inc.*, 19 Wash.App. 736, 745, 577 P.2d 980 (Div. 1 1978) (A motion to amend is not incidental to a motion for summary judgment and, when made in the course of summary judgment consideration, is an "untimely attempt to insert a new circumstance into the proceedings too late in the game").

According to Mr. Kozol, he was aware of the May 22, 2011 letter when he sent it. CP 117-18. He was also aware that he never received a response. CP 118. This is because the County never received it. CP 60-62. He had in his possession all of the facts necessary to plead a cause of action related to the letter when he filed the Complaint and the Amended Complaint in this matter. He similarly had those facts throughout the year

this litigation had been pending. Amendment under CR 15(a) was therefore untimely.

Further, amendment of the complaint pursuant to either CR 15(a) or (b) would have been inappropriate because such an amendment would be futile. A trial court may refuse to grant leave to amend when the leave would be futile. *Protect the Peninsula's Future v. City of Port Angeles,* 175 Wash.App. 201, 214, 304 P.3d 914 (Div. 2 2013). Mr. Kozol's proposed amendment is futile because, as the trial court determined and this Court should find, the May 22, 2011 letter did not change the date the statute of limitations began to run. *Greenhalgh*, 170 Wash.App., at 152-55.

Finally, the proposed amendment cannot relate back to the date of the filing of the Complaint and Amended Complaint and would therefore be time barred. CR 15(c) allows an amendment to relate back to the date of the original pleading "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. . . ." An amendment stating a time-barred new cause of action is not allowed where the amendment involves a separate event occurring at a different time. *Herron v. KING Broadcasting Co.*, 109 Wash.2d, at 521 (Relation back was not possible because the five-o'clock and eleven o'clock broadcasts of

the same news story were separate occurrences under the law of defamation. Failure to plead the 11 o'clock occurrence could not be cured by amendment).

This Court has determined that each written request for records is separate for purposes of determining the applicable statute of limitations. *Greenhalgh*, 170 Wash.App., at 148-49 (each letter containing multiple requests for records was one request for purposes of applying the statute of limitations).

Here, Mr. Kozol asserts that he made a third request on May 22, 2011 and commenced this action within one year of that request. The amendment sought to add this letter to the complaint and thereby cure the failure to comply with the statute of limitations. Indeed, Mr. Kozol's own theory is that the May 22nd letter was a separate request triggering a new statute of limitations period.[3] Appellant's Opening Brief at 32. If so, amendment of the complaint is barred under *Herron* because it would be a separate occurrence which cannot relate back to the original filing under CR 15(c). *Herron,* 109 Wash.2d at 521.[4]

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[3] In fact, Mr. Kozol claims that the May 22nd letter expanded his original narrow request related to watches to the entire criminal prosecution file. Appellant's Opening Brief at 32.

[4] Unlike Mr. Kozol, the County does not believe that the purported May 22nd 2011 letter was a request for records at all. Thus, under the County's theory the amendment would be futile since the letter cannot serve to extend the statute of limitations under *Greenhalgh's other holding*, 170 Wash.App., at 152-55. Either way amendment was properly denied.

Because the motion to amend did not conform to the evidence under CR 15(a), was untimely and either futile under CR 15(b) or could not relate back to the filing of the original complaint under CR 15(c), the trial court did not err in denying the amendment.

4. *FEES AND COSTS ON APPEAL ARE INAPPROPRIATE BECAUSE MR. KOZOL IS NOT THE PREVAILING PARTY.*

Mr. Kozol seeks fees and costs associated with this appeal. The Public Records Act provides for fees and costs for a party who prevails in an action seeking to obtain public records. RCW 42.56.550(4). However, Mr. Kozol is not yet the prevailing party, regardless of the outcome of this appeal. This is because, at most, this case could be returned to the trial court for further proceedings which will determine the prevailing part. This Court should deny Mr. Kozol's request for fees and costs in this appeal.

E. CONCLUSION

The summary judgment granted by the trial court should be affirmed. Mr. Kozol's Complaint is barred by the statute of limitations

because it was filed more than one year after King County's last response to him.

DATED this 17th day of March, 2014.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By: _____
DAVID J. ELDRED, WSBA 26125
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent
WSBA Office #91002

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2014, I electronically filed the foregoing Brief of Respondent with the WA Court of Appeals Division II via JIS, and served the same via U.S.P.S Certified Mail, postage prepaid, to the following:

Steven P. Kozol, Plaintiff Pro Se
DOC # 974691 Unit H6-A86
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

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

DATED this 17th day of March, 2014, at Seattle, Washington

Karen L. Richardson
Karen Richardson
Legal Secretary
King County Prosecuting Attorney's Office

KING COUNTY PROSECUTOR

March 17, 2014 - 2:21 PM

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