NO. 45601-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STEVEN P. KOZOL,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

REPLY BRIEF OF APPELLANT
(Corrected)

STEVEN P. KOZOL
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ORIGINAL

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2. Are Mr. Kozol's claims outside the scope of the Uniform Declaratory Judgments Act?

3. Has Mr. Kozol's claim raised a justiciable controversy, and will a declaratory judgment be a final determination?

4. Did the trial court improperly deny leave to amend the complaint?

II. ARGUMENT

A. Res Judicata Does not Bar UDJA, Injunctive Relief, or Certiorari Claims.

Respondent asserts that because Mr. Kozol's former civil rights claim and tort claim brought in prior federal case (No. C11-5209) are res judicata and barred him from bringing a tort claim in the instant case, this also bars Mr. Kozol's instant claims. Brf. of Rspnt., at 9. Respondents are mistaken.

1. Claims are different.

A tort claim and/or 42 U.S.C. §1983 claim being barred now by res judicata does not bar Mr. Kozol's instant claims for declaratory judgment, injunctive relief, or writ of certiorari. For res judicata to apply, a prior judgment must

have the same (1) subject matter, (2) cause of action, (3) persons or parties, and (4) the quality of persons for or against whom the claim is made (identity of interest). Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995).

In his former federal case, Mr. Kozol's tort claim (first presented in his RCW 4.92 Tort Claim) was based upon individual defendants having committed "unlawful conversion and/or bailment" for withholding Mr. Kozol's property in a series of events occurring from September 1, 2010 to December 2, 2010. CP 120-127. In contrast, the instant UDJA and injunctive relief claims in Mr. Kozol's First Amended Complaint are based upon Respondents' series of actions occurring from March 23, 2011 to April 21, 2011. CP 31-32. Further, the proposed writ of certiorari claims are also based upon these different facts. CP 106-107.

Accordingly, even though the instant and proposed amended claims relate to Appellant's guitar -- as did the former tort and §1983 claims in Case No. C11-5209 -- this underlying common denominator is not dispositive of res judicata as to the instant claims merely because res judicata applies to the tort and §1983 claims.

In Civil Serv. Comm'n v. City of Kelso, 137 Wn.2d 166, 969 P.2d 474 (1999) res judicata did not apply where two standards and issues in the two proceedings were not the same,

even though they both involved the same underlying issue of whether the officer's suspension was valid. Id., at 172. Two different rights were at issue, id., at 172, and the evidence also differed. Id., at 175. Thus, one decision, albeit correct under one set of rules, was not dispositive of whether the police department's actions were authorized under the union contract. Id.

The Supreme Court stressed the holding in Reese v. Sears, Roebuck & Co., 107 Wn.2d 563, 731 P.2d 497 (1987), where the court stated, "The distinctly separate nature of [two different] rights is not vitiated merely because both were violated as a result of the same factual occurrence." City of Kelso, 137 Wn.2d at 175 (quoting Reese, 107 Wn.2d at 576)(in turn, quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 49-50, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974)). See also Yakima County v. Yakima County Law Enforcement Officers Guild, 157 Wn.App. 304, 331, 237 P.3d 316 (2010)(despite the same factual "genesis", the rights at issue were distinctly separate, rendering res judicata inapplicable).

Because the instant claims are based upon Appellant's rights under WAC 137-28, chapter 40.16. RCW, and article IV, section 6 of the Washington Constitution, and are based on different occurrences from that in federal case No. C11-5209, they do not involve the same rights, issues or evidence.

2. Not the same persons or parties, nor in privity.

The instant claims are further not barred by res judicata because Respondent DOC was never a party, and Respondents Greg Jones and Eric Jackson were never formally parties in federal case No. C11-5209. See Kozol v. May, C11 5209 BHS/KLS, 2011 WL 5006515 (W.D. Wash. Sept. 12, 2011) Civil Rights Complaint by a Prisoner Under 42 U.S.C. §1983.[1]

Moreover, Respondent DOC could not be a party in privity for purposes of res judicata. As established below, because DOC cannot be a person for purposes of a 42 U.S.C. §1983 action, it thus as a matter of law could not be bound by any judgment in federal case No. C11-5209. Therefore, no privity could exist for purposes of res judicata.

3. Respondent DOC's Res Judicata Arguments are Barred by Judicial Estoppel and/or Res Judicata.

Additionally, Respondent DOC is barred by judicial estoppel and/or res judicata from now claiming the instant claims against the DOC are res judicata. Respondent DOC filed a motion which the trial court granted, entering an order dismissing any §1983 due process claims expressly because DOC cannot be a person for purposes of §1983 actions.[2] CP 21-23, 27-29. DOC is bound by this order, and cannot now argue

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[1] Appellant moves the Court to take judicial notice of the record in Kozol v. May, C11-5209 BHS/KLS.

[2] This order only applied to Respondent DOC.

that Appellant's claims in former federal case No. C11-5209 bar the instant UDJA, injunctive relief and proposed certiorari claims.

Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. Miller v. Campbell, 164 Wn.2d 529, 539, 192 P.3d 532 (2008). See Anifson v. FedEx, Inc., 174 Wn.2d 851, 866, 281 P.3d 289 (2012)(judicial estoppel may apply to facts, and questions of law, as "to a party's stated...legal assertion.")

Respondent DOC is therefore either judicially estopped because of its motion (CP 21-23), or barred by res judicata because of the order (CP 27-29), and cannot now argue the instant claims are barred by res judicata because of Case No. C11-5209.

Yet further, Washington courts have long held that, under the Civil Rules, a plaintiff is not required to join every cause of action in one lawsuit. See Seattle First Nat. Bank v. Kawachi, 91 Wn.2d 223, 226-27, 588 P.2d 725 (1979).

B. Claims not Outside Scope of UDJA Review Merely Because Statute Permits Criminal Penalty.

Respondent argues that Mr. Kozol cannot seek UDJA review of actions violating chapter 40.16 RCW because the statute carries criminal implications. CP 44-45; CP 51-52; CP 93-94;

Brf. of Rspnt. 12-13. However, such argument is erroneous.

In City of Raymond v, Runyon, 93 Wn.App. 127, 967 P.2d 19 (1998), declaratory judgment was sought that a city employee violated statute; the statute contained provisions for both civil and criminal liability. RCW 42.23.050.

In Industrial Indem. Co. of the Northwest, Inc. v. Kallevig, 114 Wn.2d 907, 792 P.2d 520 (1990) UDJA review was permitted, even though the actions at issue carried potential criminal implications, i.e., "intentionally caused a fire...," id., at 910, the "local fire authorities' determination that the fire was caused by arson," id., at 920, and the "unanimous jury found that David Kallevig had not started the fire." Id. at 914.

In Safeco Ins. Co. of Am. v. JMG Restaurants, Inc., 37 Wn.App. 1, 680 P.2d 409 (1984), Safeco filed a declaratory judgment action, after the insured was criminally charged with "arson and attempted grand larceny." Id., at 3. At the declaratory judgment trial, the jury found by special interrogatory that the insured did not intentionally set the fire. Id., at 3.

In Miotke v. City of Spokane, 101 Wn.2d 307, 678 P.2d 803 (1984), the plaintiffs sought declaratory judgment, id., at 316, and the trial court concluded that "defendants violated five environmental statutes...[including] the water pollution

control act (WPCA), RCW 90.48...." Id., at 321. On review the Supreme Court concluded that the defendants violated the statute. Id., at 321, 328. The statutory language concomitantly provided for both criminal and civil penalties. See RCW 90.48.140, then see RCW 90.48.144.

In Kitsap County v. Smith, 143 Wn.App. 893, 180 P.3d 834 (2008), the County sought declaratory judgment as to whether a former county employee violated "the Privacy Act, chapter 9.73 RCW...." Id., at 896. The penal sections of that chapter, RCW 9.73.050, .080(1) state that violations of RCW 9.73.030 are criminal (gross misdemeanors).

The County also sought declaratory judgment that the same employee violated chapter 40.16 RCW.[3] Id., at 897. This Court reversed the trial court's denial of the County's declaratory judgment action under chapter 40.16 RCW and remanded for trial. Id., at 919. UDJA review was permitted to determine violation of statutes, even though both statutes, chapters 9.73 and 40.16 RCW expressly contain criminal penalty provisions.

As in Kitsap County, Miotke, and Runyan, Appellant has not brought a civil action for purposes of criminal prosecution. The purpose of this action was to obtain a declaration of

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[3] Though sparsely mentioned in the published opinion, the County's pleadings, as referenced in the County's opening appeal brief, sought declaratory judgment that Smith violated chapter 40.16 RCW. Appellant now moves the Court to take judicial notice of the record in Kitsap County, supra.

Appellant's rights under statute and/or WAC which rise to a justiciable controversy by way of Respondents' encroachment upon such rights through their violative actions. In the alternative, Appellant proposes a simple, equitable solution, where the Court can permit him to proceed on his claims, but while striking the word "felony" from the First Amended Complaint, thus conforming to UDJA review of "violations" of statute, rather than "felony violations."

C. Claims not Outside Scope of UDJA Review

Respondents argue UDJA review can only be applied to determine validity of statutes or WACs. Brf. of Rspnt. at 11. However, several cases have applied UDJA review to actions in violation of, or prohibited by, statute or WAC. Opening Brf. of Appellant, at 18-20. In Runyon, this Court affirmed the trial court's ruling in a declaratory judgment action that a city employee's actions violated statute. The statute in Runyon did not expressly provide for a freestanding cause of action, see RCW 42.23.030, but the statute did provide for penalties. See RCW 42.23.050.

In an unique situation such as this, where Respondent has pointed out that the WAC provides no express cause of action (CP 52), and where Mr. Kozol could not pursue relief through a Personal Restraint Petition, a 42 U.S.C. §1983 action, nor tort claim (Opening Brf. of Appellant, at 23-28), UDJA review is appropriate to review actions in violation of statute and WACs.

Even when a statute has expressly provided for an independent cause of action, this Court has permitted UDJA review. In City of Lakewood v. Koenig, 176 Wn.App. 397, 400, 309 P.3d 610 (Div.2, 2013), the City brought a declaratory judgment action against a public records requestor for a declaration that the City had not violated the Public Records Act, chapter 42.56 RCW. While this Court's de novo UDJA review found the City violated the PRA, the City could have brought an action directly under chapter 42.56 RCW.

From a statutory perspective, RCW 7.24.050 expressly states to not place the limit on UDJA review that Respondent urges in its selective reliance on the language of RCW 7.24.020. "The enumeration in RCW 7.24.020...does not limit or restrict the exercise of general powers conferred in RCW 7.24.010, in any proceeding where declaratory relief is sought...." RCW 7.24.050.

It is axiomatic that a party's rights generally must have first been violated before a declaration of rights could be sought under the UDJA. There thus must be another party's actions that allegedly violated the petitioning party's rights. By this logic, UDJA review can be applied to declare that a petitioner's rights were violated by another party's actions, which violated a statute, a WAC, etc.

While the array of cases cited by Respondents may appear at first blush to limit UDJA review to determining "only the

facial validity of the statute itself" (Brf. of Rspnt. at 12), the UDJA statutory language twice emphasizing the ability to obtain a "declaration of rights" (RCW 7.24.010, .020) should prove dispositive of the legislature's intent for UDJA review to be proper in cases such as Appellant's

Respondent's reliance on Bainbridge Citizens United v. Wash. St. Dept. of Nat. Res., 147 Wn.App. 365, 374-75 (2008) continues to be misplaced. Again, the Bainbridge decision was applied in the strict context of a plaintiff seeking a court to compel a state agency to enforce WACs against third-party citizens not party to the litigation, with the court denouncing the attempt to "dictate a state agency's enforcement decision." Id., at 376.

This is not controlling to the instant case, where Appellant seeks UDJA declaration of his rights which can only be established in this justiciable controversy by reviewing whether Respondents were prohibited from taking the actions they did against Appellant. As stated above, the violative actions are part and parcel of declaring rights under WAC 137-28 and RCW 40.16.020, because there must be a justiciable controversy to warrant review.

Also misplaced is Respondents' reliance on Seattle-King County Council of Camp Fire v. State Dept. of Rev., 105 Wn.2d 55, 711 P.2d 300 (1985). In Camp Fire, while the Supreme Court limited its review to "determine only the facial validity of

the statute itself, not the executive branch's administration of that statute," this was because "RCW 84.68 and RCW 84.69 provide adequate remedies for any harm resulting from the alleged improper administration," and "[i]n this state, a plaintiff is not entitled to relief by way of declaratory judgment if, otherwise, he has a completely adequate remedy available to him." Id., at 58 (citation and internal quotation omitted).[4]

Here, Respondents have argued that there is no right, remedy or cause of action in the language of WAC 137-28 (CP 52-53), and none appears for Appellant in the language of chapter 40.16 RCW. Thus, unlike in Camp Fire, WAC 137-28 and chapter 40.16 RCW do not "provide adequate remedies for any harm resulting from the alleged improper administration." Camp Fire, supra. This lack of adequate remedy actually supports UDJA review, based upon the reasoning in Camp Fire.

Moreover, the court's limitation in Camp Fire to only determine facial invalidity was explicitly limited because the complaint only sought UDJA review "concerning the proper construction and the constitutionality of RCW 84.36.810." Id., at 57. In contrast, Mr. Kozol expressly requested determination that Respondents' actions violated WACs and statute. CP 34-35.

[4] While the court in Camp Fire cited to Reeder v. King County, 57 Wn.2d 563, 564 (1961), the preclusion doctrine announced in Reeder has since been overruled. See Appellant's Opening Brief, at 29-30.

D. Claims Raise a Justiciable Controversy and Will be a Final Determination

Mr. Kozol's UDJA claims present a true justiciable controversy. Chapter 40.16 RCW provides that it is unlawful for any person to "knowingly...offer any false...instrument to be filed or recorded in any public office" (RCW 40.16.030), or "falsify any record or paper appertaining to the officer's office." RCW 40.16.020.

There is no question that Respondent Eric Jackson knowingly filed a false Disciplinary Hearing Appeal Decision. The unrefuted evidence shows that Mr. Kozol was not allowed to present documentary evidence in his defense, was not presented with most of the evidence against him prior to the hearing, and was not given 24 hours advance notice of the hearing. CP 64-66. Eric Jackson acknowledged that Mr. Kozol raised these issues in his administrative appeal. CP 68. Eric Jackson also stated that "I have investigated your appeal and find that, all pertinent evidence was reviewed." CP 69. Thus, because Eric Jackson stated to have reviewed all issues and evidence, he must have known that the Hearing Appeal Decision was false. If not, then the only other possibility is that he denied the appeal without reviewing the issues and evidence, and simply rubber-stamped the appeal denial.

WAC 137-28 requires that inmates in administrative hearings be given 24 hours notice of the hearing, be provided

all evidence used against them prior to the hearing, and be allowed to present documentary evidence in their defense. But Respondents contend that WAC 137-28 is merely permissive (CP 52), and, that neither Mr. Kozol, nor apparently any Washington Citizen, has standing to civilly challenge a false public record being filed against them, or to determine what constitutes a public record for purposes of chapter 40.16. RCW. Brf. of Rspnt. at 13-14.

Respondents' contentions, and Mr. Kozol's efforts to address them, presents an actual controversy. The controversy here is not about the legal consequences of some act that may or may not occur. All of the acts that create liability under WAC 137-28 and chapter 40.16 RCW have already occurred. The Court is being asked, as in any litigation, to determine the legal consequences of Respondents' actions: did their acts violate WAC 137-28 and/or RCW 40.16?

This is not a case where the court is being asked to render an advisory opinion or pronouncement upon abstract or speculative questions as in Walker v. Munro, 124 Wn.2d 402, 879 P.2d 920 (1994)(citizens' action challenging initiative measure was dismissed because the initiative measure had not yet taken effect.)

Nor is this a case like Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965), where in the nascent stages

of the United States' embargo against Cuba, the plaintiff sought a declaratory judgment declaring, inter alia, "that his travel to Cuba and the use of his passport for that purpose would not violate statute, regulation, or passport restriction." Zemel, 381 U.S. at 4.

Specifically, the complaint asked the court "to decide whether appellant can be criminally prosecuted...[under law] for travel in violation of the area restriction" to Cuba. Zemel, 381 U.S. at 18. Clearly, Mr. Kozol is not asking this Court for such a preemptive declaration, tantamount to a permission slip to avoid criminal prosecution. Zemel does not apply.

The rights or requirements under WAC 137-28 and RCW 40.16, and Respondents' violations of these rights, affect citizens' fundamental rights. These public interests are direct and substantial. If Respondents are correct that an inmate, who in this case has no available remedy of a PRP, a 42 U.S.C. §1983 action, nor tort action, cannot be afforded any form of judicial review for violation of fundamental rights, then the DOC can (and from Appellant's experience, certainly will) continue to successfully pigeonhole inmates into situations where they cannot seek a meaningful, i.e., not falsely rendered or upheld, administrative appeal, or judicial review.

The DOC has repeatedly learned that it will be judicially corrected when denying an inmate the opportunity to present

evidence in his defense in an infraction hearing, provided a loss of good time has been imposed. In such situations, a PRP can be used. See In re Malik, 152 Wn.App. 213, 215 P.3d 209 (2009); In re Leland, 115 Wn.App. 517, 61 P.3d 337 (2003); In re Gronquist, 89 Wn.App. 596, 950 P.2d 492 (1997).

The DOC has adroitly adapted its techniques, and has learned that if loss of good time is not imposed as sanction for guilt of a serious infraction, then an inmate cannot utilize a PRP to obtain judicial review due to the lack of being "under restraint" as required by RAP 16.4.

If Respondents are wrong --and considering our State's long history of protecting fundamental rights, Appellant thinks they are -- then the trial court's refusal to determine rights under WAC 137-28 (and enabling statute RCW 72.01.090) left unresolved the real, direct, and substantial risk that continued abuses of fundamental and statutory rights will continue to occur.

Without judicial determination of WAC 137-28, Respondents -- including third-party out of state prisons contracting to house Washington State inmates, which must operate under WAC 137-28 -- may continue to violate fundamental rights of inmates, and build harmful infraction histories against them; records which affect inmates' classification, housing, job and education eligibility, and other important factors contributing to successful rehabilitation.

A justiciable controversy, perhaps of more significant public importance, is also present in Respondents' actions violating RCW 40.16. Under Respondents' theory, no citizen has standing to bring a civil action seeking remedy for a false public record filed against them by a state employee. Brf. of Rspnt. at 13-14. While Respondents attempt to differentiate cases such as Miotke, by framing the judicial determination as civil and not "determin[ing] if a criminal violation occurred," this actually supports Appellant's arguments. Brf. of Rspnt. at 15-16. As presented above, Miotke involved declaratory judgment determination of civil liability for action violating statute, which concurrently provided for criminal penalty.

While Respondents argue that "RCW 40.16.030's sole purpose is criminal and it provides no civil remedy" (Brf. of Rspnt. at 16), this does not render Appellant to be without a civil remedy. First, as has occurred several times in cases cited above, UDJA review can provide judicial review even when actions under review carry criminal penalty through statutory language.

Second, in the alternative, even if RCW 40.16 does not explicitly create a freestanding cause of action, " a cause of action may be implied from a statutory provision when the legislature creates a right or obligation without a

corresponding remedy." Schatz v. D.S.H.S., 178 Wn.App. 16, 29, 314 P.3d 414 (2013)(citing Ducote v. D.S.H.S., 167 Wn.2d 697, 703, 222 P.3d 785 (2009)).

To determine whether a cause of action exists, courts consider (1) whether the plaintiffs are within the class of persons for whose benefit the statute was enacted, (2) whether legislative intent supports, creating or denying a remedy, and (3) whether implying a remedy is consistent with the underlying purpose of the legislation. Schatz, 178 Wn.App. at 29-30 (citing Wash. St. Coal. for the Homeless v. D.S.H.S., 133 Wn.2d 894, 912-13, 949 P.2d 1291 (1997)).

It would produce an absurd result to find that (1) citizens are not within the class of persons whose benefit RCW 40.16 was enacted, (2) the legislative intent was to not create a remedy, and (3) implying a remedy is inconsistent with the underlying purpose of the legislation. To sustain such reasoning, it could only be predicated upon a belief that all knowingly false filings of public records would always be criminally prosecuted and remedied whenever a citizen filed a complaint with the police or prosecuting attorney's office. Of course, it can be fairly assumed that these would not be high-priority, in light of the need to pursue more serious offenses, resulting in very few actual "remedies" via the criminal mechanism Respondents urge to be entirely sufficient.

In Kitsap County, the County asserted rights to recover documents under RCW 40.14 and 40.16, even though 40.16 was merely penal in nature, and neither statute explicitly containted civil penalty/remedy provisions. This Court in Kitsap either permitted the civil remedy through application of the UDJA, or allowed for a cause of action implied from the statutory provision. By either measure, Mr. Kozol is entitled to pursue litigation for Respondents' action.

E. Claims not Outside UDJA Review as No Alternate Tort Remedy was Available

In addition to a tort claim being barred by res judicata, no tort claim was available for Appellant to alternately pursue, as there was no tort claim filed with the State as required by RCW 4.92.100.

Even though the trial court, based upon paragraph 4.11 of the first amended complaint, identified that "if [Mr. Kozol] is attempting to proceed under some kind of tort theory, then I think he may have a claim" (RP1, at 16), Respondents' counsel filed a declaration establishing that no RCW 4.92 Tort Claim was filed. CP 120-121.

Therefore, Appellant had no choice but to drop any tort claim for damages when seeking leave to amend the complaint. CP 105-109. At the next hearing, Appellant's counsel notified the court that , "There was the issue of damages, and a tort claim, and we have dropped that in this case...." RP 2, at 4.

Respondents' counsel then argued, "...so the one avenue that the Court left open is now closed...." RP2, at 9.

The court concluded, based upon the arguments, and declaration of Respondents' counsel, that "there cannot be a tort claim as part of this case." RP2, at 14. As such, there was no alternate tort claim for Appellant to pursue, neither as pled, nor through amendment.

F. Appellant has Standing Under the UDJA

Respondent asserts that appellant lacks standing to bring a UDJA action for violation of RCW 40.16.030. Brf. of Rspnt. at 13. Apparently, this is now a concession that violation of a statute is a proper subject for UDJA review.

Further, Appellant unquestionably has standing, as not only is he a state inmate which is the only class of citizens WAC 137-28 et seq applies to, but he is also a Washington State citizen for purposes of RCW 40.16.030. Appellant is therefore within "the zone of interests to be protected or regulated by the statute [or WAC]," and has "a statutory legal right capable of judicial protection." Biggers v. City of Bainbridge Island, 124 Wn.App. 858, 864, 103 P.3d 244 (2004). Moreover, Appellant's injury meets the test of "the challenged actions must have caused the challenger an injury in fact, economic or otherwise." Wash. Ass'n for Substance Abuse v. State, 174 Wn.2d 642, 653, 278 P.3d 632 (2012).

G. A Public Record is at Issue

Respondent now argues that the false public record filed by Eric Jackson is not properly considered an instrument for purposes of RCW 40.16.030, and that its filing was not permitted or required by law. Brf. of Rspnt. at 14. This is false.

When an inmate files an appeal in a serious infraction, "[t]he clerk shall promptly transmit the appeal and the hearing record to the Superintendent." WAC 137-28-380(2). Next, "[t]he Superintendent shall act on the appeal within ten working days of its receipt." WAC 137-28-380(3). Finally, "[t]he inmate shall be notified promptly of the decision of the Superintendent." WAC 137-28-380(4). All WAC 137-28 provisions operate under the statutory authority of RCW 72.01.090.

Further, Respondent chooses to overlook that the document filed by Eric Jackson plainly states that "[t]he contents of this document may be eligible for public disclosure....This form is governed by Executive Order 00-03, RCW 42.56, and RCW 40.14." CP 69. Without question the document falls within the ambit of chapter 40.16 RCW.

H. Amendment not Untimely, Futile, nor Prejudicial

Respondents' arguments are without merit. As argued to the trial court, the proposed amendment added no new facts, and merely substituted a writ of certiorari to seek the same relief sought in the UDJA and injunctive relief claims. RP2, at 4.

The trial court felt the certiorari claims were new claims that were different, and should not be undertaken when, as the Court believed here, Mr. Kozol had an available remedy of a 42 U.S.C. §1983 action. RP2, at 14-15.

However, Respondents had repeatedly misrepresented to the court that a §1983 action was an available remedy for Mr. Kozol. Clearly this was not the case, and, frankly, the trial court should have known from the case file that it had already entered an order dismissing any and all §1983 claims with prejudice. CP 21-24; CP 27-29.

It was therefore error for the trial court to not allow amendment of certiorari claims, which simply provided an alternate avenue of reviewing the same facts and rights. In contrast, if the trial court was allowing Mr. Kozol to perfect a possible tort claim based upon the same facts, then there was no reason to disallow a certiorari claim based upon the same facts.

What is more, the trial court's ruling that Mr. Kozol could bring a new certiorari action, which "may be an appropriate solution" (RP2, at 15), demonstrates that there was no reason not to grant leave to amend. Amending new claims based upon already pled facts is precisely what CR 15 is purposed for.

For these same reasons, there could be no prejudice to Respondents from the amendment. Despite Respondents' argument that it had been defending the action "for nearly nine months" (Brf. of Rspnt. at 25), the case had actually been developed or litigated very little, with minimal discovery, as Respondents obtained an Order Granting Motion to Stay Discovery Pending Dispositive Motion, entered by the Court on August 16, 2013. Supp. CP at 173. This was subsequent to a previous stay of discovery agreed to by the parties. Supp. CP at 171-172.

Again, Respondents did not argue any prejudice from the proposed amendment. CP 110-117. Such argument should now be deemed waived. Moreover, because prejudice to the opposing party is the primary concern, and because a case scheduling order had not even been entered yet, there simply was no prejudice to Respondents that a continuance could not cure.

Respondents' argument of untimeliness is equally without merit, because undue delay in proposing an amendment may present a basis for denying the motion "only where such delay works undue hardship or prejudice upon the opposing party." Caruso v. Local Union No. 609 of Int'l Bhd. of Teamsters, 100 Wn.2d 343, 349, 670 P.2d 240 (1983). The proposed certiorari claims posed no "undue hardship", because a party is not prejudiced by merely having to meet new claims. Something more is

required. Thomas v. French, 30 Wn.App. 811, 817, 638 P.2d 613 (1981). Here, Respondents have made no credible showing of any actual prejudice.

Likewise, Respondents' argument as to futility of amendment is itself untenable, claiming that substituting certiorari claims for dismissed UDJA claims was futile because "the court determined these claims had no merit and dismissed them with prejudice," and claiming Mr. Kozol "did not have the ability to request a writ of certiorari." Brf. of Rspnt. at 27.

First, let there be no confusion, the trial court never determined that Mr. Kozol's claims had no merit. The merits were never reached. In actuality, Respondents repeatedly misrepresented to the trial court that UDJA review could not be had because Mr. Kozol had an alternate available remedy of a §1983 action. RP2, at 9-11; RP2, at 14-15. In fact, no alternate §1983 remedy existed.

Second, Mr. Kozol is certainly entitled to seek a writ of certiorari. Because there was no PRP remedy, no tort claim, no §1983 remedy, nor any UDJA remedy or injunctive relief, a writ of certiorari was the one remedy that was available to him at the time.

Here, Respondents clearly acted in an arbitrary and capricious and/or illegal manner by denying Appellant's fundamental rights in the hearing (as well as violating

statutory rights by illegally filing a false public record). The right to be free from such action is itself a fundamental right and hence any arbitrary and capricious action is subject to judicial review. Pierce County Sheriff v. Civil Serv. Comm'n, 98 Wn.2d 690, 693-94, 658 P.2d 648 (1983). It is a well established rule of law that agencies must abide by their own rules and policies. Id., at 694. An illegal act, in the context of administrative agency action, is an act which is contrary to statutory authority. Leschi Improvement Council v. Wash. St. Hwy. Comm'n, 84 Wn.2d 271, 279, 525 P.2d 774 (1974)(citation omitted). When an administrative agency fails to adhere to its policy requirements, as required, it acts illegally. Id.

> "An agency' violation of the rules which govern its exercise of discretion is certainly contrary to law, and, just as the right to be free from arbitrary and capricious action, the right to have the agency abide by the rules to which it is subject is also fundamental."

Pierce County, supra, at 694 (citation omitted). "The constitutional writ is always available to a party seeking relief from arbitrary, capricious or illegal acts." Federal Way School Dist. No. 210 v. Vinson, 172 Wn.2d 756, 760, 261 P.3d 145 (2011).

> "The scope of review is limited to whether the hearings officer's actions were arbitrary, capricious, or illegal, thus violating a claimant's fundamental right to be free from such action."

Id., at 769 (citation omitted).

Actions averred in the proposed amendment are expressly disallowed by statute or WAC. Respondents do not usually rubber-stamp infraction appeals by knowingly filing false appeal decisions, nor usually deny fundamental rights to notice and presentation of evidence. Ergo, the actions were arbitrary and capricious.[5]

In the alternative, a statutory writ of certiorari is appropriate. Respondents have

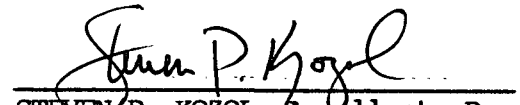
> "acted illegally...[because the actions] (3) ha[ve] so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of revisory jurisdiction by an appellate court.... [creating] erroneous or void proceedings...a proceeding not according to the course of law and [] there is no appeal nor any plain, speedy, and adequate remedy at law."

Seattle v. Holifield, 170 Wn.2d 230, 244-46, 240 P.2d 1162 (2010). Denial of fundamental rights of notice and presentation of evidence was illegal for purposes of chapter 7.16 RCW. Amendment was thus not futile.

III. CONCLUSION

Dismissal should be reversed, and leave to amend granted should Appellant require upon remand.

Respectfully submitted this 10th day of September, 2014.



STEVEN P. KOZOL, Appellant, Pro Per

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[5] If WAC 137-28 is read as only permissive, then the proposed amendment's UDJA claims challenging validity of WAC 137-28 required leave to amend be granted.

DECLARATION OF SERVICE BY MAIL
GR 3.1

I, STEVEN P. KOZOL, declare and say:

That on the 10th day of September, 2014, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. COA 45601-0-II:

Reply Brief of Appellant (Corrected);

;

;

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addressed to the following:

Clerk of the Court	Brian J. Considine, AAG
Washington Court of Appeals	Attorney General's Office
Division II	Corrections Division
950 Broadway, Suite 300	P.O. Box 40116
Tacoma, WA 98402-3694	Olympia, WA 98504

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

DATED THIS 10th day of September, 2014, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Steven P. Kozol

Signature

STEVEN P. KOZOL

Print Name

DOC# 974691 UNIT# H6-A86

STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520