COA Nos. 32596-2-III
32643-8-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STEVEN P. KOZOL,
Appellant,

vs.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,
Respondent.

REPLY BRIEF OF APPELLANT
(COA No. 32643-8-III)

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- ORIGINAL-

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I. INTRODUCTION

This is a case for injunctive relief and violation of the Public Records Act (PRA). Requestor Steven P. Kozol submitted 22 requests for separate original inmate grievance/complaint forms filed in 22 separate instances. The Washington State Department of Corrections confirmed each request, did not request clarification for any request, and only provided Mr. Kozol with a purported copy of the first page of each two-page original grievance. The Department then decided to destroy each of the requested two-page original grievances, even though no authorization was given to destroy these original records before expiration of the six-year records retention requirement.

Mr. Kozol initiated this action by filing a claim as to one record request, no. PDU-15229. Mr. Kozol moved for partial summary judgment as to a violation of the PRA, and the Department cross-moved for summary judgment arguing it did not violate the PRA because the withheld record pages were not "used" and therefore were not responsive to Mr. Kozol's requests. Mr. Kozol then filed an amended motion for partial summary judgment, bringing 21 additional claims of PRA violations as to requests nos. PDU-15230 to PDU-15250, amending the 21 claims into this action under CR 15(b),(c). There was no timely objection to the amendment, and the new claims were tried by expresss or implied consent. Mr. Kozol also moved for a CR 56(f) continuance to obtain countervailing evidence to oppose the Department's summary judgment evidence that the second pages were not "used".

The trial court denied the CR 56(f) continuance and dismissed the action, finding that based upon the sworn declaration evidence the Department did not "use" the second pages of grievances Mr. Kozol had requested. Mr. Kozol filed a timely notice of appeal, and then obtained leave from this Court to introduce new evidence on appeal under RAP 9.11. This evidence proves that the second pages of original grievance forms are substantively "used" by inmates or staff in the grievance process. Accordingly, the Court should reverse the dismissal of this action, and should find that Mr. Kozol is entitled to partial summary judgment on all 22 claims of violation of the PRA.

II. STATEMENT OF THE CASE

Appellant hereby adopts the statement of the case presented in COA No. 32596-2, Appellant's Reply Brief, at 2-3.

III. ARGUMENT

A. The Department's Email Evidence is Inadmissible

In its response briefing, the Department continues to argue and cite to inadmissible email evidence that was already ruled inadmissible by the trial court. This email evidence appearing at Clerk's Papers (CP) 884-935 is cited to numerous times. Brief of Respondent, 13, 14, 24, 25, 31. As explained below, the Court should disregard this evidence in its entirety.

Because the email evidence was not material to any issues in the case, Appellant Kozol moved the trial court to strike the emails as inadmissible under ER 402 or 403, as well as being statutorily irrelevant under RCW 42.56.080 and thus inadmissible. CP 550-56. The trial court ruled that it would not consider the email evidence: "I'm not going to consider it for purposes of the summary judgment motion, cross motions themselves." Verbatim Report of Proceedings (RP) (June 19, 2014), at 11. The trial court also entered an order on July 14, 2014 stating that the evidence was admissible and to be considered "only on the [three] 'strike' issues" pertaining to frivolousness under RCW 4.24.430. CP 596-97. This evidence is therefore inadmissible to any issues raised in this appeal. Where a trial court issues an evidentiary ruling by expressly stating in a written order that the evidence was not considered, instead of "striken", the court makes an evidentiary ruling finding that these portions of the evidence were not admissible and therefore did not consider them on summary judgment. Kenco Enterprises N.W. LLC v. Wiese, 172 Wn.App. 607, 614-15, 291 P.3d 261 (2013).

Respondent Department of Corrections has not appealed the trial court's July 14, 2014 order (CP 596-97), nor has Respondent appealed any ruling made by the trial court below. Similarly, Appellant Kozol has not assigned error to the trial court's July 14, 2014 order, has not assigned error to the trial court's finding of frivolousness under RCW 4.24.430, and has not assigned

error to the court's evidentiary ruling to not consider the inadmissible email evidence in deciding the summary judgment issues. See COA No. 32643-8, Opening Brief of Appellant, 1-3.

Thus, as a matter of law, the trial court's evidentiary ruling and July 14, 2014 order is binding. Where no error is assigned to the court's findings relating to the factors it considered in making a determination, they are verities on appeal. Gormley v. Robertson, 120 Wn.App. 31, 36, 83 P.3d 1042 (Div.3, 2004); Robel v. Roundup Corp., 148 Wn.2d 35, 42, 59 P.3d 611 (2002); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992); State v. McLean, 178 Wn.App. 236, 243, 313 P.3d 1181 (2013).

Here the Department has not challenged the evidentiary ruling on the limited admissibility and remaining exclusion of the email evidence and therefore "may not do so via the back door." State v. Allen, 161 Wn.App. 727, 748, 255 P.3d 787 (2011). In fact, Respondent DOC squarely conceded below that the emails were irrelevant, stating, "I don't think they are relevant anymore based on this Court's rulings." RP at 9.

Despite the binding effect of the court's rulings below, the Department continues to cite to this evidence, now making different arguments that the emails are probative to any amended claims not relating back under CR 15(c), that the emails go to show the claims are time-barred, and show that the records requests were not seeking "identifiable records." Brief of

Respondent, 13, 14, 24, 25, 31. However, the Department was required to file a notice of appeal if it wished to argue that the email evidence was relevant to any summary judgment issues. The one issue the emails were ruled admissible on, the distinctly separate RCW 4.24.430 finding, has not been raised on appeal by Appellant. As such, the email evidence cannot be somehow magically resurrected and now be admissible to all summary judgment issues raised on appeal simply upon the whim of Respondent.

"[W]hen various portions of a judgment are 'separate and distinct,' an appellate court must not review those portions 'from which no appeal [has] been taken.'" Clark County v. Western Wash. Growth Management Hearings Review Board, 177 Wn.2d 136, 144, 298 P.3d 704 (2013) (quoting Cook v. Commellini, 200 Wash. 268, 271, 272, 93 P.2d 441 (1939) ("The portions...not appealed from [become] res judicata, and...legal and binding, and the court [is] without power to set [them] aside."). Requiring an actual challenge prior to undertaking appellate review avoids "the danger of an erroneous decision caused by the failure of the parties...to zealously advocate their position." Id., at 144 (citing Orwick v. City of Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984)). Appellate courts "will not consider matters to which no error has been assigned." Transamerica Ins. Corp. v. United Pac. Ins. Co., 92 Wn.2d 21, 593 P.2d 156 (1979).

The trial court declined to consider the email evidence when determining the issues now raised on appeal, because, under RCW 42.56.080, it is legally immaterial why a requestor requests certain public records, and "agencies may not inquire into the reason for the request." Cornu-Labat v. Hospital Dist. No.2 Grant County, 177 Wn.2d 221, 240, 298 P.3d 741 (2013). The Public Records Act "statute specifically forbids intent [of a requestor]...from being used to determine if records are subject to disclosure." DeLong v. Parmelee, 157 Wn.App. 119, 146, 236 P.3d 939 (2010). See Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 461 n.8, 229 P.3d 735 (2010). Specifically, the Department knows as a matter of law that its strict compliance under the PRA cannot be affected or controlled by a requestor. Livingston v. Cedeno, 164 Wn.2d 46, 53, 186 P.3d 1055 (2008) ("in its capacity as an agency subject to the [PRA], [DOC] must respond to all public disclosure requests without regard to the status or motivation of the requestor.")

Despite all of this, the Department now attempts to circumvent the trial court's unchallenged rulings below by advancing a new position on appeal that the emails show Mr. Kozol's records requests were not for "identifiable records." But under this Court's de novo review it is established that: (1) Mr. Kozol's 22 requests clearly requested by separate sentence, "the original complaint form" (CP 256-77); (2) the Department repeatedly confirmed that each request sought the original complaint/grievance form (CP 282-302, 204-24, 330-71,

384); (3) the Department admitted that it knew each original complaint form is a double-sided, two-page public record, comprised of pages "DOC 05-165 Front" and "DOC 05-165 Back" (CP 501); and (4) the Department never sought clarification of the requests. Under de novo review, "an identifiable record is one for which the requestor has given a reasonable description enabling the government employee to locate the requested record." Beal v. City of Seattle, 150 Wn.App. 865, 872, 209 P.3d 872 (2009) (citing RCW 42.56.020(2)). There is no question Mr. Kozol requested "identifiable records;" the Department simply chose to silently withhold and then unlawfully destroy numerous responsive pages. See Commissioner's Ruling (May 27, 2015), at 4.

Similarly, the Department now mistakenly argues the inadmissible email evidence should nevertheless be considered in determining that Mr. Kozol's motions to amend were properly denied. But again, such argument is untenable, because Mr. Kozol's first motion to amend (CP 14-55) was denied by the trial court on December 16, 2013. CP 95. Mr. Kozol's second motion to amend (CP 174-228) was denied by the trial court on May 12, 2014. CP 237-39. The Department did not submit its email evidence to the court until June 13, 2014 as part of its Omnibus Response. CP 874-973. Because the email evidence was not yet filed and thus could not have been part of the trial court's consideration of the motions to amend, the emails are not part of this Court's

abuse-of-discretion review and are not probative to whether leave to amend should have been granted.[1]

Perhaps more importantly, there still remains the undetermined issue of the Department silently altering this email evidence before filing it with the trial court. Mr. Kozol raised this issue and moved for an evidentiary hearing. CP 581-88. But the trial court declined to partake in any fact finding and denied the motion to vacate. CP 599. In the face of such a highly material evidentiary challenge that has yet to be adequately addressed, the accuracy of the Department's email evidence is highly questionable and should therefore not be considered on appeal. This Court needs to avoid the "danger of an erroneous decision caused by the failure of the parties...to zealously advocate their position," Clark County, 177 Wn.2d at 144, because Appellant Kozol was not given the opportunity to effectively test the Department's evidence.

Because the proffered email evidence is statutorily inadmissible per RCW 42.56.080, and is irrelevant and inadmissible under ER 402 or 403, this Court's de novo review does not consider such evidence when reviewing the order of summary judgment. See Kenco Enterprises, 172 Wn.App. at 615 ("[a] court cannot consider inadmissible evidence when ruling on a summary judgment

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[1] Kozol's claims brought in the May 11, 2014 amended partial summary judgment motion were amended under the self-executing mechanism of CR 15(b), and as such, Kozol's third motion to amend (CP 464-79) was essentially moot, and ergo the emails were not determinative of the trial court's denial of amendment in the third motion; nor did the trial court base its denial of this motion upon the emails.

motion.") Moreover, on appeal this evidence should simply be disregarded by this Court. See Tamosaitis v. Bechtel, 182 Wn.App. 241, 253, 327 P.3d 1309 (Div.3, 2014)(Rather than striking the brief, "instead, we will simply ignore the offending portions of the reply brief."); Becerra v. Expert Janitorial, LLC, 176 Wn.App. 694, 730, 309 P.3d 711 (2013)("This court is aware of what is properly before us and what is not. We have not considered material that is not properly before us in deciding this case.").

B. Mr. Kozol Established Violations of the PRA

The Department continues to argue that there was no violation of the PRA because, according to the Department, the second page of the original grievances "were not responsive to [Kozol's] request for offender grievance records." Brief of Respondent, at 18. The Department also argues that there was no silent withholding of the second pages of the original grievances, Brief of Respondent, at 21-23; that there was no change in the "search terms", Brief, at 23-26; and that the second pages were not responsive regardless of whether they contained any handwriting, Brief, at 27-28. Because the facts and the law do not support Defendant's argument, they all must be rejected.

i. Back Pages of Original Grievances Are Responsive

The Department's argument that the second/back pages of the original requested grievance records are not "identifiable

records" is without merit. It is undisputed that each of Mr. Kozol's 22 separate requests specifically requested by separate sentence, "the original complaint form." CP 256-77. It is undisputed that the Department repeatedly confirmed that each request specifically sought the "original complaint form." CP 282-302, 204-24, 330-71, 384. The Department admitted that it knew each of the original complaint forms requested by Mr. Kozol were comprised of two pages, "DOC 05-165 Front" and "DOC 05-165 Back." CP 501. The Department's motion arguments further acknowledge this fact. CP 411, 442-45. There is no question the second/back pages of the original grievances are responsive to Mr. Kozol's clear requests for the "original grievance form[s]."

ii. "Silent Withholding" of Records

In its response brief, the Department's argument that it did not silently withhold records is premised upon the unsupported statement that the withheld record pages "contain[ed] only boilerplate instructions for filling out the form," and thus were not responsive to Mr. Kozol's requests. Brief of Respondent, at 21. Unfortunately, neither the Court, Mr. Kozol, the media, nor the citizens of Washington State will ever know the true content of these original grievances, as the truth evinced on these record pages have fallen prey to the Department's continued practice of unlawfully destroying records requested under the Public Records Act.

The remainder of the Department's argument is equally misplaced, asserting that the withholding of the 21 record pages was not done "pursposefully," because the second page of the original grievance forms are not considered to be part of the grievance record. Brief of Respondent, at 21-23. But again, Mr. Kozol was not only asking for the grievance records, but also specifically asked for each original complaint/grievance form. The Department's argument is fatally flawed, because as the record shows, the Department verified that each of Mr. Kozol's 22 requests sought the original complaint/grievance form. CP 282-302, 204-24, 330-71, 384. Moreover, the Department admitted that it knew each original complaint contained at least two pages. CP 501. The record is devoid of any showing that the Department claimed a statutory exemption from producing the second page of each original grievance.

The failure to provide explanations in these 22 requests are "silent withholdings," which occurred when the Department "retain[ed] a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld." Progresive Animal Welfare Society v. Univ. of Wash., 125 Wn.2d 243, 250, 884 P.2d 592 (1994)(emphasis added).

The Department's argument seems to advance a new theory of law under the PRA: one that categorically excuses an agency from identifying or producing non-exempt records, and excuses

the agency from claiming an exemption, so long as the agency takes it upon itself to unlawfully modify a clear request for an identifiable record, disregards a portion of the records request, and only produces the portion of the record that best serves the agency's interests. Brief of Respondent, at 21-27.

Because the request for each original complaint/grievance was confirmed by the Department, because no clarification was sought, because no exemptions were claimed, and because the Department unlawfully modified each request, the Department's 22 silent withholdings of the original second pages violated the PRA.

iii. Inadequate Search Terms/Location

In arguing a different search would not have yielded the second page of the filed grievances, the Department again bases its argument upon the improvident position that "neither review of the paper copies of the grievances nor a change in the search terms would have yielded the back page of [sic] grievance form as responsive to [Kozol's] request because the Department reasonably interpreted the request not to include the boilerplate instruction page." Brief of Respondent, at 24. Further, the Department cites to various inadmissible email evidence as foundation for its various and sundry deficiencies in conforming to the strict requirements of the PRA. Id. All such argument is without merit.

The true information on these specific withheld pages will never be known because they were illegally destroyed after Mr. Kozol requested them. The Department's position here is that it simply did not have to abide by the PRA in this case, as the requested records apparently contained content which the DOC was willing to violate the law and destroy records in order to prevent the information from being disclosed.

Further, the Department knew that the second pages of original grievances contained more than just "boilerplate instructions," as inmate and DOC staff frequently use the second/back pages in the agency's grievance process. Appendix A.[2] With its admitted knowledge that the original paper grievances contained at least two pages, its confirmation that each of the 22 requests sought the original complaint/grievance form, and its knowledge that the second pages frequently contained substantive content, the Department of Corrections was required to search the local paper files for the original grievances. Under such a search, the second pages of the original grievances were required to be identified and produced, absent a claimed exemption.

iv. The Second/Back Pages Were Responsive

The Department argues that "the back page of the grievance form was not responsive regardless of whether it contained any handwriting." Brief of Respondent, at 27. While the Department

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[2] Appendix A contains the new evidence Mr. Kozol was permitted to introduce on appeal under RAP 9.11.

has gone to considerable effort to obfuscate the disclosability of these public records by crafting lines of testimony in a sworn declaration to render these second/back pages of original grievances "not responsive," the ultimate determination nevertheless remains the purview of this Court.

Fortunately for the citizens of Washington State who wish to employ the PRA to investigate and hold an agency accountable for its misconduct, this Court's de novo review does not give deference to any agency's interpretation, opinion, or position of whether the document pages were used, and are thus public records. See Amren v. City of Kalama, 131 Wn.2d 25, n.6, 929 P.2d 389 (1997)("The Court, not the agency seeking to avoid disclosure, determines whether the records [should have been disclosed]."")(citing Servais v. Port of Bellingham, 127 Wn.2d 820, 834, 904 P.2d 1124 (1995)); see Hearst Corp. v. Hoppe, 90 Wn.2d 123, 131, 580 P.2d 246 (1978); Brouillet v. Cowles Publ'g Co., 114 Wn.2d 788, 794, 791 P.2d 526 (1990).

Here, not only have the Department's efforts culminated in a sworn declaration that is proved by Appellant Kozol's RAP 9.11 evidence to be factually false in claiming that second/back pages of original grievances are never used by inmates or staff (see COA No. 32643-8, Opening Brief of Appellant, at 43-45), but the Department went on to destroy the very document pages that it claimed only contained "boilerplate instructions." Not only is the Department's argument untenable under the terms of

the Public Records Act, but it fails under the applied principles of spoliation as well.

Spoliation is the intentional destruction of evidence. BLACK'S LAW DICTIONARY (8th ed. 2004), pg. 1437. Washington courts treat spoliation as an evidentiary matter. To remedy spoliation, a court may apply a rebuttal presumption that shifts the burden of proof to the party who destroys or alters important evidence. Marshall v. Bally's Pac West, Inc., 94 Wn.App. 372, 381, 972 P.2d 475 (1999); Henderson v. Tyrell, 80 Wn.App. 592, 604, 910 P.2d 522 (1996). According to the Washington Supreme Court:

> "[W]here relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him."

Pier 67, Inc. v. King County, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977).

In determining whether to apply the rebuttal presumption, a court considers "(1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party." Marshall, 94 Wn.App. at 381. Whether the missing evidence is important or relevant depends on the particular facts and circumstances of the case. Henderson, 80 Wn.App. at 607. In weighing the importance of the evidence, a court considers whether the party was afforded adequate opportunity to examine the evidence. Henderson, 80 Wn.App. at 607.

A party's actions in destroying evidence are improper, constituting spoliation, where the party has a duty to preserve the evidence in the first place. Homeworks Constr., Inc. v. Wells, 133 Wn.App. 892, 900, 138 P.3d 654 (2006). If the destroying party had a duty to preserve evidence, culpability turns on whether the party acted in bad faith or whether there is an innocent explanation for the destruction of the evidence. Henderson, 80 Wn.App. at 609.

Here, DOC Policy 280.525(III)(D) required the DOC to obtain written signature approval before destroying each of the 22 original front and back pages of the grievances requested by Mr. Kozol. CP 400. Yet the Department stated in its Answer to Interrogatory No. 3 that no documents existed pertaining to the destruction of the 22 original grievances. CP 782. The Department's records retention schedule states that "Public records must not be destroyed if they are subject to an existing public records request in accordance with chapter 42.56 RCW," (CP 394), and that all original grievance documents must be retained for six years. CP 395. Under RCW 40.14.060(c) the Department was required to copy the front and back pages of these 22 original grievances before destroying them prior to the six-year retention policy. RCW 40.14.060(c). Even by the Department's argument that it only considered the front pages of the original grievances responsive to Kozol's requests, it still was required to preserve the (double-sided) original grievances under RCW 42.56.100.

These multiple retention requirements establish that the Department destroyed these original records wrongfully, and accordingly spoliation should apply to establish the inference that these record pages did not merely contain "boilerplate instructions." As well established, this is not the Department's first time illegally destroying inmate grievances to hide staff misconduct. CP 402.

C. Mr. Kozol's 21 Claims From Case No. 13-2-00930-8 Were Amended Into This Case Under CR 15(b),(c)

Mr. Kozol amended his 21 claims of silent withholding and 21 claims of unlawful records destruction -- originally brought in Case No. 13-2-00930-8 -- when he brought them in Plaintiff's Amended Motion for Partial Summary Judgment filed on May 11, 2014. CP 240-48. The Department argues that it "did not agree to an amendment of the pleadings to include the 21 additional claims," and that Mr. Kozol "could not somehow magically" bring these claims by incorporating them into the amended motion for partial summary judgment. Brief of Respondent, at 34-35. Fortunately, Mr. Kozol did not need to rely upon "magic", as the amendment mechanisms of CR 15(b),(c) were sufficient.

These 21 claims were amended under CR 15(b) because there was not a timely objection made by the Department, and the untimely objection was required to be stricken. See COA No. 32643-8, Opening Brief of Appellant, 19-21. Because there was no objection, the claims amended under the first part of CR 15(b). While amendment is also obtainable under CR 15(a) upon an

agreement of the parties, Mr. Kozol is not asserting an amendment under CR 15(a), ergo, the Department's argument is misplaced.

Also, the claims were tried by express or implied consent, as both Mr. Kozol and the Department presented evidence on these claims, and the trial court's ruling applied to all 22 claims. Not only did Mr. Kozol present these claims and argue them on summary judgment (CP 240-402), but the Department included the evidence of these 21 other claims when it cross-moved for summary judgment on April 16, 2014. CP 410-15. This included presenting evidence that it was given notice as early as April 12, 2013 that responsive pages had been withheld in all 22 requests. CP 438-39. The Department also presented evidence on these claims that it searched for responsive records in all 22 requests at the same time. CP 441-42, 447-48. Mr. Kozol even squarely raised these claims again at oral arguments (RP 13), yet there was no objection from the Department. Therefore, the claims amended under CR 15(b).

These claims related back under CR 15(c) because they arose out of the same conduct, transaction, or occurrence that was set forth in the original complaint. See COA No. 32643-8, Opening Brief of Appellant, at 8-12.

In response the Department argues that because these 21 claims were originally plead as separate claims, they cannot relate back under CR 15(c) according to Greenhalgh v. Dept. of Corr., 170 Wn.App. 137, 150, 282 P.3d 1175 (2012). Brief of

Respondent, at 29-30. As established in the consolidated briefing, this argument is wholly without merit. See COA No. 32596-2, Reply Brief of Appellant, at 11-12.

The Department's argument further lacks merit because the test for CR 15(c) relation back is whether factually the new claims arose out of the same "conduct, transaction or occurrence." CR 15(c). On appeal the courts review this issue de novo. Perrin v. Stensland, 158 Wn.App. 185, 193, 240 P.3d 1189 (2010), as amended (Nov. 10, 2010) (issue of whether an amendment relates back is reviewed de novo).

Here, when viewed through the lens of liberality required under CR 15, the 21 claims all factually arose out of the same conduct, transaction or occurrence as that pertaining to the 1 claim initially plead in Case No. 12-2-00285-2. Because all 22 requests were submitted at the same time, were requesting the same class of records, were mailed in the same envelope, and were responded to at the same time by the Department issuing sequential tracking numbers (PDU-15229 to PDU-15250), all 22 claims arose out of the same conduct, transaction or occurrence. CR 15(c).

CR 15(c) is to be liberally construed to permit an amendment to relate back to the original pleading if the opposing party will not be disadvantaged. Kiehn v. Nelson's Tire Co., 45 Wn.App. 291, 296, 724 P.2d 434 (1986). The key factor is whether the defendant received adequate notice of the amendment. See Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 172-73, 744 P.2d

1032 (1987), as amended, 750 P.2d 254 (claims related back because defendant had prior notice of claims). As previously briefed, the Department had adequate prior notice of these 21 other claims. See COA No. 32643-8, Opening Brief of Appellant, at 8-9, 21-22.

Moreover, there is no merit to the Department's argument that relation back cannot occur because Mr. Kozol waited to amend the 21 claims. Under the liberal requirements of CR 8, notice pleading does not require parties to state all of the facts supporting their claims in the initial complaint. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 222, 829 P.2d 1099 (1992). Notice pleading contemplates that discovery will provide parties with the opportunity to learn more information about the nature of the complaint; therefore, courts should be forgiving for deficiencies in a complaint before there has been an opportunity to complete discovery. Id., at 222. Here, it is without question that Mr. Kozol did not receive the discovery identifying the 21 illegal record destructions until the Department provided these responses on April 7, 2014. CP 389-92.

Further, under Washington case law there was nothing precluding Mr. Kozol from waiting to amend his 21 claims until the time that he ultimately brought them via CR 15(b),(c) amendment on May 11, 2014. CP 240-48. Inexcusable neglect, which includes "a conscious decision, strategy or tactic" can only prevent relation back of an amendment adding a new party; "[t]he inexcusable neglect rule does not apply to amendments

adding new claims." Stansfield v. Douglas County, 146 Wn.2d 116, 122, 43 P.3d 498 (2002).

While the Department argues that it "did not agree" to these amendments, and that the 21 claims "could not be somehow magically revived through Kozol's amended summary judgment motion," (Brief of Respondent, at 35), the facts show that no timely objection was made, and Kozol's motion to strike the untimely objection should have been granted. It was not through the use of "magic" that these claims were amended. Instead, it was Kozol's CR 41(a) motion for voluntary dismissal contingent upon amendment (CP 753-55), and Kozol's amending the claims into this case on May 11, 2014 (CP 240-48) before dismissal of the 21 claims was erroneously entered in the other case on May 12, 2014 (CP 809-11). Because CR 15 requires liberal application, the 21 claims were amended into this case, and thus, the related CR 41(a) voluntary dismissal in the other case was required.

Because there was no actual prejudice to the Department, and it had adequate prior notice of the 21 claims (it was in fact already aware of the 21 claims from two prior motions to amend, and the claims being litigated in Case No. 13-2-00930-8), Kozol's 21 original silent withholding claims and 21 new unlawful destruction claims were amended under CR 15(b), and related back under CR 15(c) when brought on May 11, 2014. Because the 21 original silent withholding claims (PDU-15230 to PDU-15250) related back to the 1 claim (PDU-15229) under CR 15(c), they

were not time barred. Because the 21 new destruction claims were brought on May 11, 2014 (CP 240-48), and these new violations did not trigger the one-year statute of limitations in RCW 42.56.550(6), they were not time-barred because they were brought within either three years (RCW 4.16.115) or two years (RCW 4.16.130) of the December 2012 and February 2013 destructions. Because the claims were not time-barred it was error to deny leave to amend.

D. CR 56(f) Continuance Should Have Been Granted

The Department argues that Mr. Kozol had more than two years to conduct discovery, and three years from the date he received the records, to obtain discovery needed to litigate his claims, and therefore, no CR 56(f) continuance was necessary. Brief of Respondent, at 36. Unfortunately, the Department misapprehends the nature of Kozol's CR 56(f) motion.

Mr. Kozol moved for a CR 56(f) continuance to obtain evidence only to rebut the Department's argument that the second/back pages of filed grievance forms were never used by inmates or staff as part of the grievance process. CP 493-95. This issue only first became material upon the Department presenting its argument and evidence that the second pages are never used. CP 414, 442. It is absurd for the Department to argue that the preceeding two or three-year period was sufficient time to conduct discovery on this issue when this issue was not yet raised in the case until May 16, 2014. CP 410-15.

Mr. Kozol made a prima facie showing that additional discovery would likely lead to additional evidence that the second pages were/are "used" in the grievance process. As now established by Mr. Kozol's new RAP 9.11 evidence, the second pages are substantively "used". Appendix A. The very materiality of the RAP 9.11 evidence proves that the CR 56(f) motion should have been granted.[3] Accordingly, the Department's argument is baseless.

E. Department's Evidence Insufficient to Support Summary Judgment

As pointed out to the trial court, the lone declaration of Lee Young not only failed to establish that she had personal first-hand knowledge about the processing of these specific 22 greivances in this case, but also the evidence failed to establish that the second pages of these specific 22 original grievance forms were never used. CP 491-93. The only way the Department could have proven this was to produce the original second pages. This was now impossible as the Department had illegally destroyed these original records. Accordingly, the Department's evidence was insufficient to prove that the specific 22 records at issue were never used, and therefore were not responsive to Mr. Kozol's requests. Based upon this deficiency of evidence, it was error for the trial court to grant summary judgment dismissal of Mr. Kozol's claims.

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[3] As the Department concedes elsewhere in its brief, "Once the Department met its burden, the burden was then shifted to Kozol to provide contrary evidence." Brief of Respondent, 37. As such, Mr. Kozol should have been granted the CR 56(f) continuance to obtain rebuttal evidence.

IV. CONCLUSION

Mr. Kozol's 1 original claim in this case was improperly dismissed because the new evidence shows the second/back pages of original grievance forms are "used". Mr. Kozol's 21 claims for silent withholdings and 21 claims for unlawful records destruction from his other case, no. 13-2-00930-8, were amended into this case under CR 15(b), and related back under CR 15(c). These 21 claims also establish the second pages are "used", and the claims should not have been dismissed. Alternatly, the 21 new claims of unlawful records destruction were brought by amendment within the statute of limitations from when the destructions occurred. The Court should find that the Department's evidence does not support summary judgment dismissal, and should reverse the trial court's order dismissing Kozol's claims as time-barred, and failing to establish a violation of the Public Records Act. The Court should also find that the Department's records searches were inadequate under the Public Records Act.

RESPECTFULLY submitted this 11th day of October, 2015.

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DECLARATION OF SERVICE BY MAIL
GR 3.1

I, STEVEN P. KOZOL, declare and say:

That on the 11th day of October, 2015, 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 No. 32643-8-III:

Reply Brief of Appellant;

;

;

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addressed to the following:

Clerk of the Court	Candie M. Dibble, AAG
Washington Court of Appeals	John C. Dittman, AAG
Division III	Attorney General's Office
500 N. Cedar ST.	1116 W. Riverside Ave., #100
Spokane, WA 99201	Spokane, WA 99201

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

DATED THIS 11th day of October, 2015, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Signature

STEVEN P. KOZOL

Print Name

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