

FILED
COURT OF APPEALS

SEP 22 AM 8:16

STAFF: [Signature]

BY: [Signature]

#40286-6-II
THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

JEFFERY MCKEE

Appellant

and

KITSAP COUNTY PROSECUTOR'S OFFICE

Respondent

On Appeal from PIERCE COUNTY SUPERIOR COURT

Pierce County Cause # 09-2-14012-5

APPELLANT'S REPLY BRIEF

Jeffery McKee
PO Box 435
Bremerton, WA 98337
(360)478-2012

Appellant Pro Se

TABLE OF CONTENTS

ARGUMENT... 1-5

CONCLUSION... 6

Table of Authorities

Washington cases

Herron v. Tribune Publ'g Co., 108 Wash.2d 162, 166, 736 P.2d 249 (1987)... 3

Nolan v. Snohomish County, 59 Wn.App. 876... 1

Quality Rocks Prod. Inc v. Thurston County, 126 Wn. App. 250, 108 P.3d 805... 2

Stansfield v. Douglas County, 146 Wn.2d 116... 5

Wilson v. Horsley, 137 Wash.2d 500, 505, 974 P.2d 316 (1999)... 2

Rules

CR 7(b)(1)... 3

CR 15... 3

CR 15(a)... 3,5

CR 15(c)... 4,5

CR 15(d)... 3

CR 19(a)(1)... 2

CR 19(a)(2)... 2

Statutes

RCW 4.28.80... 1

RCW 36.01.020... 1

Argument

Appellant did indeed name Kitsap County as the party defendant in this action.

The Respondent cites RCW 36.01.020, which provides:

RCW 36.01.020 The name of a county, designated by law, is its corporate name, and it must be **known and designated** thereby in all actions and proceedings touching its corporate rights, property, and duties. (emphasis added)

In the instant case, the Appellant named Kitsap County in the “Parties” section of the Complaint. This designation of Kitsap County as a party was known to the County upon service of the Summons and Complaint upon the Kitsap County Auditor, the proper office to accept service for Kitsap County, and only Kitsap County, pursuant to RCW 4.28.80.

The Respondent relies on *Nolan v. Snohomish County 59 Wn.App. 876*. What distinguishes this case from *Nolan* is that *Nolan* determined that the Snohomish County Council was not an indispensable party. The issue was not whether Snohomish County was an indispensable party; the County wanted the County Council to be joined as a party, “because if not named, it can not be compelled to send to the reviewing court the record to be reviewed.” *Nolan, 59 Wn.App. 876*. The Court found that the Council was not an indispensable party; whether Snohomish County was an indispensable party was never an issue. In *Nolan*, the Court also cited

CR 19(a)(1) and (2), the statute stating when a party shall be joined. In the case at hand, Kitsap County did not need to be joined as the County was already designated in the Complaint. The only error, if any, was that the Appellant failed to name Kitsap County in the caption.

In *Quality Rock Prods Inc. v Thurston County*, 126 Wn.App. 250, the Court found , We hold that the trial court erred in dismissing Quality Rock's land use action on the basis that the petition's caption was defective when the petition was properly served and the body of the petition clearly identified Black Hills as a necessary party. Thus, the court should have considered if Quality Rock's motion to amend the caption prejudiced Black Hills. *Wilson* , 137 Wn.2d at 505-06. Black Hills did not argue or explain how the amendment prejudiced its interests. Indeed, Quality Rock properly served Black Hills, it appeared before the court, it was actively engaged in the prior administrative proceedings by twice appealing the hearing examiner's approval of Quality Rock's land use proposals, Quality Rock did not seek any form of relief or damages from the organization, and the petition clearly indicated that Black Hills was a necessary party. Given these circumstances, the court abused its discretion in denying Quality Rock's motion to amend.

The Appellant made a good faith effort to obtain leave of the Court to amend the caption of the Complaint.

CR 7(b)(1) states:

(b) Motions and Other Papers.

(1) How Made. An application to the court for an order shall be by motion which, **unless made during a hearing or trial**, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. (emphasis added)

At the hearing on December 11, 2009; the Appellant asked the Court for leave to change the caption of the Complaint if the Court found that the Complaint filed was inadequate. At the hearing on January 8, 2010; the Appellant again asked the Court for permission to amend the Complaint citing CR15 and case law. The Court should have considered the oral motions because they were made during a hearing. A ruling on a request to amend a complaint under CR 15(a) or to file a supplemental complaint under CR15(d) is reviewed for abuse of discretion. The primary consideration in permitting amendment is prejudice to the opposing party resulting from delay, surprise, jury confusion, or unrelated claims relying on a different factual basis. *Herron v Tribune Publishing*, 108 Wn.2d 162.

The Respondent has never claimed any prejudice whatsoever would result from amending the caption of the Complaint.

The Respondent does address CR 15(c) regarding the relation back of amendments:

CR15(c) Relation Back of Amendments. Whenever 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, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment **(1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. (emphasis added)**

In the case at hand, Kitsap County (1) did receive notice of the institution of the action and (2) knew or should have known that but for a mistake concerning the identity of the proper party , the action would have been brought against the County. Kitsap County was properly and timely served notice of institution of the action and has been most insistent that the action should have been brought against the County. Whether an amendment to a complaint relates back to the date of the original complaint under CR 15(c) is a separate question from whether the

amendment should be allowed under CR 15(a). *Stansfield v Douglas County*, 146 Wn.2d 116. The standard set forth in CR 15(c) for relation back of an amended pleading is less stringent when the amendment adds a claim or defense than when the amendment changes a party. The additional requirements under CR 15(c) for relation back of an amendment changing a party do not apply in deciding whether an amendment that adds only a claim or defense relates back to the date of the original pleading. *Stansfield*, 146 Wn.2d 116. In the case at hand, the Appellant did not attempt to amend the Complaint to add a claim or even add a party; simply to amend the caption.

The Respondent correctly emphasizes that a pro se appellant is held to the same standards as a licensed attorney. However, the courts should liberally construe substantial compliance with the form of a caption. The Appellant made a bona fide effort to name the correct party in the caption of the Complaint and did, in fact, name Kitsap County as a party in the body of the Complaint. The Appellant is aware of numerous cases in which a Kitsap County office or department has been named as defendant in the caption of a complaint without the County objecting. The Appellant successfully prosecuted an action against the Kitsap County Sheriff's Office in 2007. Further, departments of the State of Washington are

named as defendants in the captions of thousands of actions that are defended by the State. This pro se Appellant had every reason to believe that the caption on the Complaint was correct. The Appellant asserts that Kitsap County has claimed this defense to avoid a decision on the merits of the case. If allowed, that would place form over substance. The substance of this case centers on compliance with the strongly worded mandate that is the Public Records Act.

Conclusion

This Court should reverse the dismissal of this case and remand to the trial Court for a decision on the merits.

Dated August 23, 2010

A handwritten signature in black ink, appearing to read 'J. McKee', is written over a horizontal line.

Jeffery McKee, Appellant pro se

PO Box 435
Bremerton, WA 98337
(360) 478-2012

RETURN OF SERVICE

I, KAY GOLDENSTEIN, of MCS GLOBAL LEGAL SERVICES, Process Server Registration License #201002040235, registered in Kitsap County in the State of Washington, personally served the following documents:

Pierce County Superior Court cause # 09-2-14012-5
Court of Appeals, Division II cause # 40286-6-II

Appellant's Reply Brief

upon: Kitsap County Prosecutor's Office
Civil Division
at: 614 Division Street
Port Orchard, WA 98366
on: August 25, 2010

FILED
COURT CLERK
10 AUG 25 AM 8:16
STENOGRAPHER
BY

DECLARATION OF SERVER

The undersigned process server, declares under the penalty of perjury, under the laws of the State of Washington, that I am over the age of eighteen, competent to be a witness and not a party to the above action. I declare that the foregoing return of service is true and correct.

Dated this 25 day of August, 2010.

Kay Goldenstein
Kay Goldenstein

