

80998-4

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BURT , Et al, Plaintiffs/Respondents;

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,
Defendant/Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
WALLA WALLA COUNTY

The Honorable Robert Zagelow
05-2-00075-0

BRIEF OF APPELLANT PARMELEE

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A. ASSIGNMENTS OF ERROR

1. Assignments of Error.

1. The trial court erred in entering an order on March 16, 2005, when it ordered the complaint to be amended to include all 15 plaintiffs.

2. The trial court erred by entering an order on March 16, 2005 granting the permanent injunction without making Mr. Parmelee a party to the case.

3. The trial court erred by entering its letter opinion of May 11, 2006 denying Mr. Parmelee the chance to intervene.

4. The trial court erred by entering its final order on application to intervene and denying reconsideration dated June 7, 2005.

2. Issues Pertaining to Assignments of Error.

1. Should various Plaintiffs be dismissed for violation of the civil rules regarding pleadings?

2. Should various pleadings be stricken because they were filed by a non-party?

3. Should Mr. Parmelee have been permitted to intervene in accordance with CR 24?

3. Was Mr. Parmelee provided sufficient notice of the pending action to comport with due process?

4. Was Mr. Parmelee an indispensable party and should have been joined in accordance with CR 19?

5. If Mr. Parmelee is the prevailing party on this appeal is he entitled to attorney's fees and costs from the Department of Corrections?

B. STATEMENT OF THE CASE

On October 7, 2004, Mr. Parmelee submitted a request under the Public Disclosure Act (now the Public Records Act and so referred herein) to the Public Disclosure Coordinator at the Washington State Penitentiary ("WSP").¹ CP 28-29. In this request, he asked for various documents pertaining to individuals employed by the Washington Department of Corrections ("DOC"). He also submitted a request to the Superintendent of WSP on the same date. CP 30-31.

Ms. Murray responded to Mr. Parmelee on October 13, 2004. CP 33-34. In this letter she stated that the request would take approximately 30 business days to review files. On the same day and with a separate

¹The Public Disclosure Act, RCW 42.17.250 et seq., was recodified in 2006 and retitled as the Public Records Act, RCW 42.56 et seq.

letter Ms. Murray asked for clarification of Mr. Parmelee's request. CP 35-36.

Mr. Parmelee sent an appeal of the denial to Kay Wilson-Kirby, the PRA (then PDA) Administrator for the Department of Corrections on December 3, 2004. CP 284-85.

Megan Murray, the Public Disclosure Coordinator wrote a letter on December 22, 2004 to Mr. Parmelee stating that staff "affected" by the records request will be seeking protection in accordance with RCW 42.17.330. CP 500. This letter stated that the records maintained by DOC would not be disclosed until a decision by Walla Walla Superior Court. Some records would be disclosed. No further information about the case was supplied. A subsequent letter was sent to Mr. Parmelee giving information on permissible document costs and referencing the December 22, 2004 letter as to the rest. CP 268.

On January 5, 2005, Mr. Parmelee sent a letter to Ms. Murray stating monies would be coming. 269. The check was subsequently rejected by the WSP mail room. CP 270-71. Mr. Parmelee appealed the decision. CP 272-283.

On January 26, 2005, eleven plaintiffs filed a complaint for protective order with the Walla Walla County Superior Court against the

Washington Department of Corrections (“DOC”). CP 1-6. The eleven named plaintiffs who signed the complaint were Eric Burt, Gary Edwards, Sherry Hartford, JoAnn Irwin, John Moore, Clifford Pease, David Snell, Harold Snively, Alan Walter, Dustin West, and Paul-David Winters.

Under this statute, state employees could move for an injunction to prevent the release of information under the Public Records Act (then Public D Act). The individual making the request was Allan Parmelee, an individual incarcerated within the Washington Department of Corrections. CP 2. Allan Parmelee was not made a party to this lawsuit.

Filed with the complaint was a Motion for Protective Order, asking for a permanent injunction to be ordered preventing Mr. Parmelee from obtaining any of the documents requested. CP 7-11.

On January 28, 2005, Ms. Kirby sent Mr. Parmelee a letter in response to his appeal. In this letter, there was no mention of the filed lawsuit. CP 286-88.

During the pendency of the motion, Mr. Parmelee was being held in administrative segregation. He wrote many letters protesting his continued detention, interference by staff of his legal rights, and complained about his lack of access to the courts. CP 226-255.

On February 1, 2005, Ms. Murray informed Mr. Parmelee there was a hearing date of February 22, 2005. She did not provide Mr. Parmelee with the actual names of the parties, the cause number, nor did she confirm her earlier statement that it was filed in Walla Walla Superior Court. CP 500. She simply stated in her letter to Mr. Parmelee that she would “notify you of the outcome of the hearing on or before March 1, 2005.” Id.

Mr. Parmelee responded to Ms. Wilson-Kirby’s letter with a request for clarification and two subsequent appeals. CP 289-92. This letter was sent March 1, 2005. A letter was sent by Ms. Wilson-Kirby on March 3, 2005. CP 293. Again, there was no mention of the ongoing lawsuit in Walla Walla County.

After DOC appeared, a memorandum was filed on March 14, 2005. CP 12-19. In this memorandum, DOC argued the protective order should be granted. The DOC also answered the complaint on March 15, 2006 with exhibits attached. CP 20-109. No reply was filed by Plaintiffs.

After hearing from the Plaintiffs and the Defendant, but not Mr. Parmelee, the Court ordered a permanent injunction and issued Findings of Fact, Conclusion of Law and Order. CP 110-114. The order stated as follows:

Plaintiffs' motion to enjoin DOC from disclosing the information requested by Mr. Parmelee on October 7, 2004, or in any subsequent similar requests, is hereby GRANTED. DOC is hereby *permanently enjoined* from disclosing either directly or indirectly, including any officer agent, member, employee, attorney and/or representative of DOC, the requested documents to Mr. Parmelee, or any person DOC believes may be an agent of, in privity with, or acting on behalf of Mr. Parmelee. DOC may respond to any such requests by sending a copy of this Order.

This order was presented by Peter Berney, Assistant Attorney General on behalf of DOC and Alan Walter, titled Pro Se Plaintiffs Representative.

Along with the prior order, the Court signed the stipulated motion to amend the complaint to add four additional plaintiffs. These plaintiffs were Cheri Sterlin, Laura Coleman, Charles Crow and Richard "Jason" Morgan. CP 115-116. The amended complaint, while listing all fifteen plaintiffs, had only four signatures were affixed to the signature block, those of the four new plaintiffs. CP 117-120.

Mr. Parmelee was then sent a letter dated March 25, 2005 by DOC employee Megan Murray, a Public Disclosure Coordinator. CP 193. Along with this letter was a copy of the Court's signed order granting the permanent injunction. In the letter Mr. Parmelee was told that he would not be given the supervisory, personnel and payroll files of the persons set forth in the order.

Having finally received actual notice of the case including the names of the parties, the cause number and the county, Mr. Parmelee filed a Limited Notice of Appearance. CP 123. He also filed a motion to intervene (CP 124-195), a motion to reconsider (CP 196-215) and a declaration (CP 216-310). In this motion, Mr. Parmelee asserted that the first pleading he had seen was the final March 16, 2005 order he received with the March 25th letter. CP 124.

Mr. Walters sent a letter dated April 21, 2005 to the court, stating that the contention was with the agency who held the records, implicitly ignoring Mr. Parmelee. CP 498-500. His letter had two exhibits attached, both letters that were written to Mr. Parmelee by Ms. Murray. Ms. Murray is not one of the supposed plaintiffs nor is she an attorney. She is the public disclosure coordinator at WSP.

The Department of Corrections filed a response, filed May 11, 2005. CP 316-322. The trial court then issued a letter denying the motion to intervene and mooting all other motions. CP 322-323. This letter was dated May 11, 2005. On May 16, 2005, Mr. Parmelee submitted a reply. CP 325-344. There was also a motion to reconsider based upon the May 11th letter. CP 345-356. He also included a copy of his April 1st

declaration. CP 357-364. Along with a copy of the previously filed declaration, he attached a new declaration with exhibits. CP 365-476.

In this new declaration, Mr. Parmelee notifies the trial court that the only pleadings he has received are from the Department of Corrections. CP 365-66. He further complained he did not have copies of any of the basic pleadings including the complaint. CP 366. He further went on to state that although he had been informed that a court action was going to be filed, he was never provided with any specific information. Id.

Among other issues he raised was the difficulty of litigating because of actions by DOC officials. CP 371-73. He included a motion to dismiss in federal court dated January 24, 2005 because he was having difficulty obtaining legal access. CP 374-75. All this happened while Mr. Parmelee was at WSP. He was subsequently transferred to the Monroe Correctional Complex, Washington State Reformatory. CP 377.

Mr. Parmelee submitted further documentation about court access in the time period in question. CP 448-476. He complained continually about problems with access the courts.

The trial court issued a final order denying the intervention and the reconsideration. CP 483-85. Mr. Parmelee then filed a notice of appeal, a amended notice of appeal. CP 486-495.

In this Court, the Commissioner asked for and received briefing on the appealability of Mr. Parmelee's notices of appeal. On July 24, 2006, the Commissioner entered a ruling stating the order being appealed was a final order and that Mr. Parmelee was an aggrieved person in accordance with RAP 3.1 and Breda v. B.P.O. Elks Lake City, 120 Wn. App. 351, 353, 90 P.2d 1079 (2004).

C. SUMMARY OF ARGUMENT

Mr. Parmelee first challenges the validity of the permanent injunction applying to all Plaintiffs who did not sign the first amended complaint. He then shows that he should have been permitted to intervene and subsequently, that he was an indispensable party and should have been joined. He finally argues he is entitled to all costs under the Public Records Act.

D. ARGUMENT

1. The Plaintiffs Violated Various Civil Rules Including CR 11 When Filing Pleadings And Eleven Plaintiffs Must Be Dismissed And All Pleadings Stricken As Regards Certain Plaintiffs If Not Signed.

The original complaint was signed by eleven plaintiffs. However, there is no address provided which is necessary for service. The usual location of an address, in the lower right-hand corner of the pleading, has only an error message. CR 11(a) states that “[a] party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address.”

A fundamental requirement to respond to a complaint is an address. “Fundamental to statutory construction is the doctrine that 'shall' is construed as mandatory language and 'may' is construed as permissive language.” State v. Goins, 151 Wn.2d 728, 749, 92 P.3d 181 (2004). The providing of an address was mandatory.

Contemporaneously to filing the complaint, Plaintiffs filed a memorandum. A Mr. Alan Walters, one of the named Plaintiffs, signed the memorandum as representing all named plaintiffs. This too violates CR 11. He has no legal authority to sign for any party other than himself absent statutory authority. *See* In re Treatment of C.E., 78 Wn.App. 420,

897 P.2d 1275 (1995) (statutory authority given to mental health official to sign legal documents). There is no such statutory authority for Mr. Walters.

As a consequence, only Mr. Walters had standing to ask for an injunction regarding Mr. Parmelee's requested materials, because the other Plaintiffs should have been struck. "If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant." CR 11(a).

Subsequent to filing the complaint, the existing Plaintiffs, four new Plaintiffs and Defendant stipulated to amend the complaint. Once again, Plaintiffs failed to abide by the civil rules when only the four new Plaintiffs signed the amended complaint. Thus, as Mr. Walters was the only individual bringing the original motion and he did not sign the amended complaint, the permanent injunction must be reversed and this case remanded for dismissal. Also as a consequence, Mr. Walters had no standing to present the final order as the "Pro Se Plaintiffs Representative." Besides the obvious point there is no such thing as a "Plaintiffs Representative" at this point, he was not a party to the cause of action.

2. Mr. Parmelee Must Have Been Permitted To Intervene Under CR 24.

Mr. Parmelee asked to intervene in the action between the many named Plaintiffs and DOC because it was his Public Records Act request which was the subject of the request for a protective order by Plaintiffs.

Under CR 24(a), intervention as a matter of right is set forth as follows:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicants interest is adequately represented by existing parties.

Under CR 24(a), one is allowed to intervene as of right in an action after establishing,

To intervene, an intervener must meet a four-factor test:

- (1) timely application for intervention;
- (2) an applicant claims an interest which is the subject of the action;
- (3) the applicant is so situated that the disposition will impair or impede the applicant's ability to protect the interest; and
- (4) the applicant's interest is not adequately protected by the existing parties.

Aguirre v. AT&T Wireless Servs., 109 Wn. App. 80, 86-87, 33 P.3d 1110 (2001); *citing* Westerman v. Cary, 125 Wn.2d 277, 302, 303, 892 P.2d 1067 (1994).

It is clear that Mr. Parmelee's interest in the records is the subject of the action. It is also clear that the order of March 16, 2005, impeded Mr. Parmelee's ability to protect his interest in obtaining the records. It has been shown by the Defendant's response to the Motion for a Protective Order in which DOC did not oppose the motion that Mr. Parmelee's interests were not protected by any of the parties to the action. The issue the trial court ruled on, the timeliness of his motion to intervene, is the critical element on whether or not the trial court appropriately denied his motion.

Where a person seeks to intervene after judgment, the court should allow intervention only upon a strong showing after considering all circumstances, including prior notice, prejudice to the other parties, and reasons for and length of the delay.

Kreidler v. Eikenberry, 111 Wn.2d 828, 832, 766 P.2d 438 (1989); *citing* Martin v. Pickering, 85 Wn.2d 241, 243-44, 533 P.2d 380 (1975). Mr. Parmelee made such a showing.

Mr. Parmelee has shown he received no actual notice of the necessary information he required while incarcerated to properly intervene

and that he did not delay moving to intervene once he received the notice of the court and case number. The December 29th letter from Ms. Murray talked in the future tense. The February 1, 2005, letter from Ms. Murray did not provide Mr. Parmelee with any of the necessary information needed to respond. He was not provided the case caption. He was not provided the case number. He was not informed who the judge was. Other correspondence sent to Mr. Parmelee from Ms. Wilson-Kirby before the March hearing made no mention of the case. The actual trial court was not confirmed.² These are undisputed facts and the intervener's allegations in the pleadings are accepted as true. Westerman, 125 Wn.2d at 303. Mr. Parmelee was not provided with sufficient notice to comport with due process. Wash. Const. art. I, sec. 3

Due process requires that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . ." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950). Illustrative of what is

²The first letter only mentioned that affected staff planned to seek protection of the records and Walla Walla Superior Court was mentioned. This was in the future tense. There was no confirmation in the second letter of the critical details. Interestingly, the Trial Court in its May 11, 2005, letter claimed that the December letter informed Mr. Parmelee that the affected DOC staff members had sought protection. Clearly, this contention was in error.

considered sufficient notice to intervene is presented in cases involving uninsured motorists as tortfeasors, plaintiffs and the plaintiffs' insurance companies. In these cases, the question is whether the plaintiffs' insurance company is bound by the judgment against the tortfeasor. This issue turns on whether or not plaintiffs' insurance company has sufficient notice and opportunity to intervene. See Finney v. Farmers Ins. Co., 21 Wn. App. 601, 586 P.2d 519 (1978), *aff'd*, 92 Wn.2d 748, 600 P.2d 1272 (1979); Fisher v. Allstate Ins. Co., 136 Wn.2d 240, 961 P.2d 350 (1998) (reaffirming Finney).

A classic example of proper notice is where an insurance company is provided a copy of the complaint. See Lenzi v. Redland Insurance Co., 140 Wn.2d 267, 996 P.2d 603 (2000). In Lenzi, the plaintiffs sent Redland a copy of the complaint and summons filed with the court against the tortfeasor defendant. The complaint had a date-received stamp and a court stamped file number. Id. at 271. Redland Insurance did not intervene and the Lenzis obtained a default judgment. The Plaintiffs then demanded Redland pay the judgment. Id. at 272. Rejecting the argument that the Lenzis needed to inform Redland when the complaint had been served, the Court of Appeals held receipt of the complaint and summons sufficient notice. Id. at 275-76. At the court said:

Receipt of such pleadings is sufficient to put an alert and concerned party on notice that further proceedings in which it might have an interest may occur, and that in order to protect its interests, the interested party needs to act to assure receipt of subsequent pleadings.

Id. at 276. Contrast that to the present case where Mr. Parmelee received little and no useful information and what information he did receive was not from one of the parties in the case.

It is standard for courts to permit the intervention of all interested parties when an action has been filed under RCW 42.17.330. *See Tiberino v. Prosecuting Attorney*, 103 Wn. App. 680, 13 P.3d 1104 (2000) (records requestor Cowles Publishing intervened, withdrew and then Spokane Television intervened) ; *Bellevue John Does v. Bellevue School Dist.* 405; 129 Wn. App. 832, 839, 120 P.3d 616 (2003) (records requestor Seattle Times was permitted to intervene); *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990) (Washington Education Association granted right to intervene as party plaintiff); *Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 32, 769 P.2d 283 (1989) (records requestor Cowles Publishing Company, and the City of Spokane were permitted to

intervene). This result is logical consequence of the continued quest for efficient judicial administration.³

Furthermore, if both parties had been in an adversarial position, a preliminary injunction would have put Mr. Parmelee on notice after an order had been issued. CR 65. But there was no adversarial proceeding, hence no preliminary injunction. Defendant's Answer made this clear:

Respondent does not object to a permanent restraining order being entered against prohibiting disclosure of the documents in question to Alan (sic) Parmelee, his agents or other inmates incarcerated by Respondent.

CP 21.

Because Mr. Parmelee did not have sufficient notice, the issue of timeliness clearly falls in Mr. Parmelee's favor. As soon as he had the information required to respond, namely the cause number and caption, he filed the limited notice of appearance and his request to intervene. Thus, Mr. Parmelee had the right to intervene because meets all the requirements of the four factor test.

³Many cases invoking RCW 42.17.330 (now 42.56.540) are filed against the records requestor. See e.g. Soter v. Cowles Publishing Co., No. 23136-4-III, (Mar. 9, 2006); Confederated Tribes v. Johnson, 135 Wn.2d 734, 958 P.2d 260 (1998) (*en Banc*); Tacoma Public Library v. Woessner, 90 Wn. App. 205, 951 P.2d 357 (1998); Everett v. Van Dyke, 18 Wn. App. 704, 571 P.2d 952 (1977).

3. Mr. Parmelee Was An Indispensable Party In Accordance To CR 19.

Mr. Parmelee was also an indispensable party in accordance with CR 19(a). This rule describes in pertinent part an individual like Mr. Parmelee:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may as a practical matter impair or impede his ability to protect that interest . . .

CR 19(a)(2)(A). Our courts have further said:

A party is necessary if the party's absence would prevent the trial court from affording complete relief to existing parties to the action or if the party's absence would either impair that party's interest or subject any existing party to inconsistent or multiple liability.

National Homeowners v. Seattle, 82 Wn. App. 640, 643, 919 P.2d 615 (1996); *quoting* Coastal Bldg. Corp. v. City of Seattle, 65 Wn. App. 1, 5, 828 P.2d 7 (1992) (quotations removed). In other words, indispensable parties are:

[those] [p]ersons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

Lakemoor Comm'ty Club, Inc. v. Swanson, 24 Wn. App. 10, 17, 600 P.2d 1022 (1979); *quoting* Shields v. Barrow, 58 U.S. (17 Howe) 130, 139, 15 L. Ed. 158 (1854). Mr. Parmelee is that necessary party.

Our courts have embraced this examination in the context of the Public Records Act. *See* Lindberg v. Kitsap County, 133 Wn.2d 729, 948 P.2d 805 (1997) (en banc). In Lindberg, the plaintiffs sought engineering drawings in the possession of Kitsap County. These drawings were copyrighted by the firm that produced them. While holding that the federal fair use doctrine permitted the copying of these documents, the Supreme Court went on to say the following:

The indispensable party doctrine is not jurisdictional, but founded on equitable considerations. When a complete determination of a controversy cannot be made without the presence and participation of other parties than those already in a case, it is mandatory that they be joined in the action. When a complete determination can be made without those other parties, it is within the discretion of the court to allow them to be joined. Persons who may be involved in the subject matter of an action are not necessary parties where no recovery is sought against them and they would not be prejudiced by the judgment.

Id. at 744-45; *citing* Cathcart-Maltby-Clearview Community Council v. Snohomish County, 96 Wn.2d 201, 634 P.2d 853 (1981); Williams v. Poulsbo Rural Tel. Ass'n, 87 Wn.2d 636, 555 P.2d 1173 (1976); State ex

rel. Continental Cas. Co. v. Superior Court, 33 Wn.2d 839, 207 P.2d 707 (1949); In re Estate of Wilson, 50 Wn.2d 840, 315 P.2d 287 (1957).

The Commissioner found this also to be true in the July 24, 2006 ruling on appealability. As the Commissioner said: “Mr. Parmelee . . . is an aggrieved person as the whole purpose of the order is to prevent Mr. Parmelee from obtaining the documents he requested . . . “ *Citing* RAP 3.1; Breda v. B.P.O. Elks Lake City, 120 Wn. App. 351, 353, 90 P.3d 1079 (2004).

Mr. Parmelee claimed a critical interest in the proceedings as it was his Public Records Act request which was the subject matter of the filings by Plaintiff. Clearly, the disposition by the trial court which did not mandate joinder totally impeded Mr. Parmelee’s ability to protect that interest. Because Mr. Parmelee was an indispensable party, the only question was whether joinder was feasible. National Homeowners, 82 Wn. App. at 643.

Joinder was clearly feasible. Mr. Parmelee was obviously subject to service of process, being incarcerated during this litigation in the Washington Department of Corrections. Both Plaintiffs and Defendant knew where he was at all times. It would be a simple matter for Mr. Parmelee to be served the necessary papers. It also would not deprive the

trial court of subject matter jurisdiction. For these reasons, joinder was not only feasible but required.

Even if joinder was not feasible, a Court must consider, in equity and good conscience, whether or not the action can proceed without the missing party. Crosby v. Spokane County, 137 Wn.2d 296, 306-307, 971 P.2d 32 (1999) (en banc). CR.19(b) states:

If a person joinable under (1) or (2) of section (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the persons absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the persons absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

It is clear from the facts that the decision was prejudicial to Mr. Parmelee. No measures could protect Mr. Parmelee's interests without him being present, as the hearing was nonadversarial. No party represented Mr. Parmelee's interests. If dismissed, the Plaintiffs could simply refile, naming Mr. Parmelee as an indispensable party, thus they have an adequate remedy.

4. Mr. Parmelee Is Entitled To Attorneys' Fees And Costs Under The Public Records Act.

Under both the old and new codification of the Public Records Act, individual who prevails against the agency is entitled to all costs, including reasonable attorney's fees. RCW 42.56.550(4); The Public Records Act's authorization of attorney fees includes fees on appeal. Progressive Animal Welfare Soc'y v. University of Wash., 114 Wn.2d 677, 690, 790 P.2d 604 (1990).

The Public Records Act is a "strongly worded mandate for broad disclosure of public records." Prison Legal News Inc. v. Dept. of Corrections, 154 Wn.2d 628, 635, 115 P.3d 316 (2004); *citing* Amren v. City of Kalama, 131 Wn.2d 25, 31, 929 P.2d 389 (1997). This scheme also permits an agency to notify those individuals who may be affected by such a request the right to object to disclosure of materials.

Prior case law has held that when an agency is willing to disclose the records and it is the individuals who bring an action to prevent disclosure, and the agency does not actively oppose the requestor, attorney fees are not applicable. *See* Confederated Tribes v. Johnson, 135 Wn.2d 734. A basic rule was then developed and stated as follows:

This provision does not authorize an award of attorney fees in an action brought by a private party, pursuant to RCW 42.17.330, to

prevent disclosure of public records held by an agency where the agency has agreed to release the records but is prevented from doing so by court order. Mr. Johnson prevailed against the Tribes, not against the agency.

Id. at 757. However, this case is distinguishable because of the procedural posture which means that if Mr. Parmelee prevails, he prevails against the agency. The critical element must be whether or not the agency is actively opposing the delivery of records in court.

In a more recent case applying this test, the trial court denied attorney's fees because the agency did not fight disclosure but the plaintiffs did. Bellevue Jone Does v. Bellevue School Dist. 405, 129 Wn. App. at 866 ("The record confirms that the school districts did not oppose the Times' disclosure request in court."). The holding comports with the trial court's ruling when it analyzed Confederated Tribes:

The tribes resisted disclosure; but the agency - the Gambling Commission - did not. The requester of the records was denied an award of attorney fees because he 'prevailed against the Tribes, not against the agency.'

Id. at 864-65; *quoting* Confederated Tribes, 135 Wn.2d at 756-57. The Bellevue court quoted the trial court's ruling which said that "because the government agencies involved, the School Districts, did not oppose the Times' request; the opposition came from the individual." Bellevue, 129 Wn. App at 864-65. Contrast this case with the facts in Confederated

Tribes. There the Gambling Commission did not a position on the various exemptions claimed by the Tribes.

Upon being served the complaint, DOC did not oppose the request. However, upon receiving Mr. Parmelee's initial motions for reconsideration and intervention, DOC filed a brief in opposition. The only purported plaintiff to respond with a short letter opposing intervention was Mr. Walter.⁴ The Department has done all the lifting in this case before this Court to oppose Mr. Parmelee's attempt to intervene. Thus the holding in Confederated Tribes should not apply to the facts of this case because the opposing party is the agency.⁵ Both the purported plaintiffs and the DOC are sitting at the same table, eating out of the same dish. Such a situation goes against the purpose of the PRA as expressed in Confederated Tribes.

⁴At this point in time, Mr. Walters was not an official party to the case. See section D.1, *supra*. Mr. Walters further did not respond to the briefing schedule before the Commissioner on the issue of appealability.

⁵It was DOC who opposed Mr. Parmelee when this Court's Commissioner asked for briefing on whether or not Mr. Parmelee could appeal the trial court's ruling in accordance with RAP 2.2 or 2.3. Thus, the Department of Corrections must pay the appellate costs including fees if Mr. Parmelee were to prevail.

The stated purpose of the attorney fees provision “is to encourage broad disclosure and to deter agencies from improperly denying access to public records.” Confederated Tribes, 135 Wn.2d at 757; *citing* Lindberg v. Kitsap County, 133 Wn.2d at 746. However, the rationale used in Confederated Tribes should not apply to the situation where the agency is taking an active role in the litigation to prevent the disclosure of the requested records. This goes against the express purpose of the Public Records Act. The agency in question must be a neutral bystander. If not, it should be held accountable.

5. Equitable Considerations Also Govern Costs and Attorney’s Fees.

Our courts have also granted costs and attorney’s fees based on equitable considerations. *See* Confederated Tribes v. Johnson, 135 Wn.2d 734. As the Supreme Court has said, “[t]he applicable equitable rule is that attorney fees may be awarded to a party who prevails in dissolving a wrongfully issued injunction or, as here, temporary restraining order. *Id.* at 758; *citing* Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 143, 937 P.2d 154, 943 P.2d 1358 (1997), *cert. denied*, 118 S. Ct. 856 (1998); Seattle Fire Fighters Union, Local 27 v. Hollister, 48 Wn. App. 129, 138, 737 P.2d 1302 (1987).

The rationale for this equitable remedy lies with the issue of damages.

Because the trial on the merits had for its sole purpose a determination of whether the injunction should stand or fall, and was the only procedure then available to the party enjoined to bring about dissolution of the temporary injunction, the case comes within the rule that a reasonable attorney's fee reasonably incurred in procuring the dissolution of an injunction wrongfully issued represents damages.

Cecil v. Dominy, 69 Wn.2d 289, 418 P.2d 233 (1996). This award can include costs and fees at appeal. Seattle Fire Fighters v. Hollister, 48 Wn. App. 129, 138, 737 P.2d 1302 (1987).

The problem with this case is that Mr. Parmelee never had the opportunity to address any issues at a preliminary injunction hearing because there was no opposition to the motion for the protective order. He has had to go to this Court to seek redress to force such a hearing. Mr. Parmelee asks this Court to order the Department of Corrections to pay all costs and attorney's fees if he should prevail on his appeal.

E. CONCLUSION

For the reasons set forth above, appellant Allan Parmelee respectfully asks this Court to reverse the granting of an injunction against the Department of Corrections and remand this case back to superior court for a hearing on the merits with Allan Parmelee as a party, able to defend

his records request. Mr. Parmelee further asks this Court to confirm that Mr. Walters could not represent other Plaintiffs and that all pleadings filed by Mr. Walters after the amended complaint must be stricken. Finally, Mr. Parmelee asks this Court to order the Department of Corrections to pay all costs of this appeal.

DATED this 9th day of October.

Respectfully submitted,


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