IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CITIZENS FOR ACCOUNTABLE GOVERNMENT IN EGLON AND HANSVILLE, Appellant, v. KITSAP COUNTY; JUDITH FORITANO; SID KNUTSON; NANCY RUMMEL; DEBBIE MADEN; CINDY McDERMOTT; GERRY PORTER; LOU FORITANO; REX GALLAHER; JERRY ULSUND; KINLEY DELLER; TIM HOLBROOK; LINDA REDLING; NANCY GARING; TREVOR EVANS; LYNN HIX; SANDI WRIGHT; ALLEN OTTO; PAT FREDRICKS; KEN SHAWCROFT; EMMA JEAN HEMINGWAY; FRED NELSON; MAX POLIN; ROBIN POLIN; HEIDI KASTER; TOM RITLEY; PATRICIA PINKHAM; GARY PAULSON; TONY ATKINSON; JUDY ROUPE; BARBARA McGILL; BECKY ELLISON; CAROLEE FLATEN; WAYNE STILES; PAT MILLER; RAY ROHAY; MIKE CONNOLLY; JEAN CONNOLLY; JIM LAUGHLIN; McKINZIE McDERMOTT; MIKE BRINTON; and KELLY HAGOOD, Respondents.	No. 39041-8-II UNPUBLISHED OPINION

Van Deren, .J. — Citizens for Accountable Government in Eglon and Hansville (CAGEH) appeals the trial court's dismissal of the individual members of the Greater Hansville Area Advisory Council (Council) from CAGEH's lawsuit seeking injunctive and declaratory relief

against the Council members for violating both the Open Public Meetings Act (Act)[1] and the Council's bylaws. Because the record is insufficient to allow us to determine the relationship between Kitsap County (County) and the Council, we cannot resolve whether the Council members are necessary parties to CAGEH's lawsuit. Accordingly, we reverse and remand for further proceedings.[2]

FACTS

CAGEH is a non-profit corporation whose members "own property and/or reside in the north end of Kitsap County." Clerk's Papers (CP) at 5. The County adopted Resolution No. 125-2007 establishing the Council. The resolution states that the Council's mission is "[t]o communicate with and represent the interests of the Greater Hansville Area (GHA) with Kitsap County and other government entities, and other individuals and organizations to prioritize, organize and facilitate enactment of GHA mandated goals in accordance with the GHA

[1] Chapter 42.30 RCW.

[2] CAGEH also appeals the trial court's denial of CAGEH's motion to dismiss affirmative defenses raised by the Council and the County based on Strategic Lawsuits Against Public Participation legislation (the anti-SLAPP statute), RCW 4.24.500 through .520, and misjoinder. Because the record does not show that the trial court ruled on CAGEH's motion, we do not consider this issue. CAGEH also requests attorney fees and costs under the anti-SLAPP statute, which states, "If the agency fails to establish the defense provided for in RCW 4.24.510, the party bringing the action shall be entitled to recover from the agency costs and reasonable attorney's fees incurred in proving the defense inapplicable or invalid." RCW 4.24.520. Because this case is insufficiently developed to allow review and because the trial court did not rule on the motion to dismiss the anti-SLAPP defense, we do not award attorney fees or costs at this time.

community's values."[3] CP at 52. Resolution No. 125-2007 also sets out bylaws that control the Council's operation.

Citizens sued the County and 41 individual members of the Council for injunctive and declaratory relief, claiming that: (1) the County "had no legal authority to constitute" the Council, (2) the County unlawfully delegated to the Council powers to amend its own bylaws and determine its own members and representatives, (3) the Council's voting structure violates the equal protection clause of the federal constitution, (4) the County violates Hansville citizens' free speech rights to directly communicate with the County because the County requires those citizens to communicate through the Council, (5) the County failed to ensure that the Council followed its own bylaws, (6) the Council failed to follow its own bylaws, and (7) the Council violated the Act. CP at 10.

The County and the Council members denied the allegations and asserted that: (1) CAGEH "failed to state a claim," (2) CAGEH "failed to show . . . a justiciable controversy," (3) CAGEH improperly joined the parties, and (4) defendants were immune from suit under the Strategic Lawsuits agains Public Participation legislation (the anti-SLAPP statute). CP at 21. The County and the Council members jointly moved to dismiss the Council members, based on CAGEH's failure to state a claim and the members' immunity from civil liability under the anti-

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[3] Chair of the Council, Judith Foritano, stated that the Council has taken "five formal actions" pursuant to its mission:

> (1) a letter to Kitsap County supporting traffic calming devices; (2) a letter supporting a master planning process with community involvement at Norwegian Point Park; (3) a letter supporting the grant application to obtain funds for the development of Norwegian Point Park; (4) a letter asking for law enforcement assistance due to public misuse of Point No Point park during the summer of 2008; and (5) working on a sub-area land use plan with County staff.

CP at 137.

SLAPP statute, RCW 4.24.500 through .520. The trial court ultimately dismissed all Council members from CAGEH's action under CR 12(b)(6) for failure to state a claim, but it stated no further explanation of the grounds on which it based its dismissal of the individuals or the claims. Subsequently, CAGEH voluntarily dismissed the remaining claims against the County under CR 41(a)(1)(B).

CAGEH appeals the trial court's dismissal of the individual Council members.

ANALYSIS

I. Standard of Review—CR 12(b)(6)

When a trial court dismisses a cause of action under CR 12(b)(6), we review that dismissal de novo.[4] *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007). To prevail, the moving party in a CR 12(b)(6) motion bears the burden to establish "beyond doubt that the claimant can prove no set of facts consistent with the complaint" that would justify recovery. *No New Gas Tax*, 160 Wn.2d at 164. "Such motions should be granted 'sparingly and with care,' and only in the unusual case in which the plaintiff's allegations show on the face of the complaint an insuperable bar to relief." *San Juan County*, 160 Wn.2d at 164 (internal quotation marks omitted) (quoting *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998)). We accept the allegations in the complaint as true. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998).

[4] The County and the Council members argue that, because the arguments underlying the dismissed causes of action "were that the [County and the Council members] were not subject to a declaratory judgment action," we should review the "trial court's refusal to consider a declaratory judgment action for abuse of discretion." Br. of Resp't at 9. But they do not point to any evidence that the trial court considered the merits of the claim in dismissing it. Instead, the trial court explicitly dismissed under CR 12(b)(6) for CAGEH's failure to state a claim.

II. Dismissal of Claims Against the Council Members

CAGEH argues that the trial court erred in dismissing its claim for injunctive and declaratory relief against the Council members for violating the Act because the Council and its actions fall under the scope of the Act, which allows for injunctions against the Council's individual members. The County and the Council members argue that the trial court properly dismissed the individual members and the claim because the Act does not apply to the Council and its actions, and, moreover, the County has "fully indemnified the [Council] volunteers for their actions as [members of the Council]."[5] Br. of Resp't at 19.

CR 12(b)(6) jurisprudence indicates that courts are authorized to grant a CR 12(b)(6) motion if "the defendant has some . . . iron-clad defense as a matter of law." 3A Karl B. Tegland, Washington Practice: Rules Practice CR 12 at 264 (5th ed. 2006). Thus, we analyze the County's and the Council members' argument that the trial court based its dismissal on the grounds that the County, and not the individual Council members, is the "only proper party to the case." Br. of Resp't at 15.

The County and the Council members argue that, even if the Council fell under the ambit of the Act, enjoining the Council members is improper because "the [Council] acts as an agent of

[5] The County and the Council members also argue that CAGEH did not raise this issue before the trial court because it "did not brief, argue, or even mention this allegation" in its response to the County and the Council members' motion to dismiss. Br. of Resp't at 16. But CAGEH's allegation that "the [Council] has violated [the Act]," in its complaint is "a short and plain statement of the claim showing that the pleader is entitled to relief." CP at 12; CR 8(a)(1); *Champagne v. Thurston County*, 163 Wn.2d 69, 84, 178 P.3d 936 (2008). Moreover, in a response to a 12(b)(6) motion, CAGEH need not address the merits of the claim because the court accepts the allegations in the "complaint and any reasonable inferences therein" as true. *Reid*, 136 Wn.2d at 201. Thus, this argument fails.

the County" and thus, "its members . . . do not have to be joined as parties."[6] Br. of Resp't at 31. Their defense is better stated as an argument that the Council's individual members either were "misjoined parties" or were not "necessary" parties.

A. Misjoined Parties

CR 21 controls our analysis of misjoined parties.[7] Assuming that the trial court based its dismissal on misjoinder, we review a trial court's application of CR 21 for abuse of discretion. *Shelby v. Keck*, 85 Wn.2d 911, 918, 541 P.2d 365 (1975). Because CR 21 is "identical to and patterned from the federal rule, it is appropriate that we apply the federal courts' interpretation." *Carle v. Earth Stove, Inc.*, 35 Wn. App. 904, 907, 670 P.2d 1086 (1983).

Misjoinder is not a ground for dismissal and may not be raised by a motion to dismiss. *United States v. E I. du Pont de Nemours & Co.*, 13 F.R.D. 490, 493 (N.D. Ill., 1953); *see also Mehlenbacher v. DeMont*, 103 Wn. App. 240, 245, 11 P.3d 871 (2000). "'[T]he proper motion [to object for misjoinder] is to drop the misjoined party or to sever the misjoined claim[, and such] motion . . . is addressed to the court's discretion and will not be granted if the propriety of joinder is one of the issues to be determined at the trial.'" *E.I. du Pont de Nemours*, 13 F.R.D. at 493 (quoting 3 James Wm. moore et al., Moore's Federal Practice 2094 (2d ed.)); *see also*

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[6] Because the trial court dismissed all claims against the Council members under CR 12(b)(6) for failure to state a claim, without explanation of the grounds on which it based such dismissal, the propriety of any denial of an injunction "is not directly before us." *No New Gas Tax*, 160 Wn.2d at 153.

[7] CR 21 provides:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Mehlenbacher, 103 Wn. App. at 245. Even a "strong showing of misjoinder . . . would not necessarily preclude the imposition of a preliminary injunction."[8] *Canon Computer Sys., Inc. v. Nu-Kote Int'l, Inc.*, 134 F.3d 1085, 1088-89 (Fed. Cir. 1998). Thus, the trial court abused its discretion when it dismissed the Council members and failed to consider an injunction if the Council members were merely misjoined parties.

B. Necessary Parties

A court's discretion to dismiss parties is "circumscribed . . . by Rule 19(a)."[9, 10] *Lenon v. St. Paul Mercury Ins. Co.*, 136 F.3d 1365, 1371 (10th Cir. 1998). Under CR 19, "[a]ppellate courts have generally required a clear determination by the ruling court that a party is both necessary and indispensable before allowing dismissal . . . and have also required an order that

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[8] In *Canon*, the alleged misjoinder of two named inventors in a patent infringement action did not preclude imposition of a preliminary injunction, since any error was easily curable, and the patentee introduced evidence showing the basis for correcting the alleged error. 134 F.3d at 1088-89.

[9] CR 19(a) provides:

> 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 (1) in his absence complete relief cannot be accorded among those already parties, or (2) 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 (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

[10] Because Washington's CR 19 is "identical" to Federal Rule of Civil Procedure 19, we may use federal authority to analyze CR 19(b) issues. *In re the Stay of Proceedings Against Johns-Manville Corp.*, 99 Wn.2d 193, 198, 660 P.2d 271 (1983).

any necessary parties be joined." *Orwick v. Fox*, 65 Wn. App. 71, 80, 828 P.2d 12 (1992). A party is necessary if that "party's absence from the proceedings 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." *Coastal Bldg. Corp. v. City of Seattle*, 65 Wn. App. 1, 5, 828 P.2d 7 (1992).

The identity of the necessary parties to this action rests on the relationship between the County and the Council. The record shows that the relationship between them was formalized by the County's adoption of Resolution No. 125-2007 establishing the Council. Under this resolution, the Council "formally affiliated with the County for [certain enumerated] purposes." CP at 52. And although the County does not pay the Council members for their services, the County defends and indemnifies them against actions arising from the members' business on the County's behalf. The record does not reveal any other description of the County's relationship to the Council.

The County and the Council members argue that a principal-agent relationship existed between them. "Agency is generally a question of fact reserved for a jury unless the facts are undisputed or permit only one conclusion." *Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co.*, 125 Wn. App. 227, 236, 103 P.3d 1256 (2005). Here, even though the County is no longer a defendant in the action, the County—both in its briefs and during oral argument—maintained that the "only proper party" is the County and not the Council members. Br. of Resp't at 15.

Furthermore, the County and the Council members argue that under CR 65(d), any injunction on the County will also bind the Council members. CR 65(d) provides, "Every order granting an injunction . . . is binding only upon the parties to the action, their officers, agents,

servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

If a principal-agent relationship exists between the County and the Council, then enjoining only the Council members may adversely affect the County's interest in controlling its agent, the Council, thus making the County a necessary party. *See B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc.*, 440 F.3d 541, 548 (1st Cir. 2006) (holding that a defendant was necessary "insofar as appellees seek an injunction that affects [defendant]'s interests under [a contract]"). On the other hand, if there is an agency relationship, enjoining only the County, once the County is joined as a party, may provide sufficient relief on CAGEH's claims. *See* CR 65(d); *see also Pujol v. Shearson Am. Express, Inc.*, 877 F.2d 132, 136-37 (1st Cir. 1989) (holding that even though an agent will suffer adverse consequences when his principal is vicariously liable for the agent's conduct, this is not sufficient to make the agent a necessary party).

If the trial court finds no principal-agent relationship, the Council members are necessary parties because no injunction on the County would afford complete relief to CAGEH, whose interest is remedying the Council members' alleged violations of the Act and the Council's bylaws.[11, 12]

III. Remedy

Based on this record, we are unable to determine whether a principal-agent relationship

[11] The Act explicitly provides for injunctive relief against members of a governing body. RCW 42.30.130.

[12] The County and the Council members also speculate that the trial court based its dismissal on the grounds that the County indemnified the Council members under the following laws: RCW 36.01.010, 020; Kitsap County Code Ch. 4.144, Chapter 4.96 RCW, the anti-SLAPP statute, and Kitsap County Resolution 203-2008. We do not review arguments based on speculation.

exists between the County and the Council and who are necessary or permissive parties. Because we "deem as true any assertion consistent with the complaint," we hold that the County and the Council members' improper joinder defense poses no "insuperable bar to relief" on CAGEH's claims. *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995); *No New Gas Tax*, 160 Wn.2d at 164. Until proper parties are ascertained, we are unable to determine whether CAGEH has stated a proper claim against the Council members. Thus, the trial court's dismissal of the Council members for failure to state a claim was erroneous.

We remand to the trier of fact to determine the relationship between the County and the Council and, accordingly, to render a decision about the identity of the necessary parties to this action, such that the trial court could grant complete relief to CAGEH, should it prevail at trial. We do not reach CAGEH's substantive arguments that the Council violated the Act and the Council bylaws.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Bridgewater, J.

Hunt, J.