IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JEFFERY MCKEE, Appellant, v. KITSAP COUNTY PROSECUTOR'S OFFICE Respondent.	No. 40286-6-II UNPUBLISHED OPINION

Penoyar, C.J. — Jeffery McKee appeals an order dismissing his Public Records Act[1] (PRA) claim against the Kitsap County Prosecutor's Office for lack of jurisdiction. The trial court ruled that McKee failed to timely move to amend his pleadings to name Kitsap County instead of the Kitsap County Prosecutor's Office (the KCPO). We affirm because McKee never complied with CR 15(a) and thus the trial court never obtained jurisdiction over an indispensible party.

Facts

On September 30, 2009, McKee filed a summons and complaint in Pierce County Superior Court against the KCPO for alleged violations of the PRA. McKee alleged in his complaint that the KCPO had failed to provide a time estimate within the five-day limit of RCW 42.56.520, had failed to provide a timely response when producing public records, and had failed to provide an adequate legal basis for withholding records. He requested an order requiring the KCPO to produce all records requested, reimbursement of costs and attorney fees, and monetary penalties.

He based his complaint on four records requests. The first, dated September 18, 2006,

[1] Chapter 42.56 RCW.

requested all records pertaining to an inmate assaulting him. The KCPO denied the request on October 2, 2006, claiming a work product exemption. The second, dated January 18, 2007, requested all records in which he was a suspect, victim, or witness. The KCPO initially denied the request in its entirety but eventually provided 376 pages of material in December 2007 and January 2008 and then provided a Washington State Patrol (WSP) crime lab report on July 7, 2009. The third, dated January 6, 2008, requested all records in which the KCPO had claimed the work privilege exemption. On February 21, 2008, the KCPO provided a 37 page list of approximately 900 cases. On July 7, 2009, it provided 618 pages of denials. The fourth request, dated October 31, 2008, requested any materials mentioning the name Sharon Hacket and Jeffrey McKee. The KCPO denied the request in its entirety, claiming work product exemption. On December 7, 2008, McKee protested but as of September 30, 2009, when he filed his summons and complaint, the KCPO had provided no documents to McKee.

On October 22, 2009, Kitsap County (the County) filed a motion to dismiss the complaint under CR 12(b)(6) and for judgment on the pleadings under CR 12(c). The County asserted that (1) McKee had improperly identified a party defendant; (2) the PRA one-year statute of limitations barred McKee's causes of action; and (3) McKee could not make a "redisclosure" claim for previously disclosed records.

McKee's summons and complaint identified the defendant as "Kitsap County Prosecutor's Office." Clerk's Papers (CP) at 1, 3. The trial court found that Kitsap County was the proper defendant, that McKee's complaint was legally insufficient, that he had had ample time to amend his complaint, and that because he had not sought to amend his complaint, it dismissed the complaint. McKee appeals.

analysis

I. Improper Party

McKee first asserts that while the caption of his summons and complaint name the KCPO as a defendant, the body of his complaint, paragraph two, states: "The Defendant, Kitsap County Prosecutor's Office, is a department of Kitsap County, Washington." CP 3. This, he argues, coupled with the fact that he served the Kitsap County Auditor, should be sufficient to assert jurisdiction over the County.

RCW 36.01.010 provides:

> The several counties in this state shall have capacity as bodies corporate, to sue and be sued in the manner prescribed by law; to purchase and hold lands; to make such contracts, and to purchase and hold such personal property, as may be necessary to their corporate or administrative powers, and to do all other necessary acts in relation to all the property of the county.

RCW 36.01.020 requires that the County be the named party in any complaint. It provides: "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." RCW 36.01.020

The question of identifying a corporate entity arose in *Nolan v. Snohomish County*, 59 Wn. App. 876, 883, 802 P.2d 792 (1990), where the court made it clear that one must sue the county, not a county officer or department:

> RCW 36.32.120(6),[2] read together with RCW 36.01.010 and .020, makes clear the legislative intent that in a legal action involving a county, the county itself is the only legal entity capable of suing and being sued. It follows that a county council is not a legal entity separate and apart from the county itself. Jurisdiction over the Snohomish County Council is achieved by suing Snohomish County. No purpose would be served by naming both the County and the County Council in this proceeding. The County argues that they are both indispensable parties, but the law gives no support to such a contention.
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> Nolan gained jurisdiction over the only indispensable party when he sued Snohomish County. The trial court erred in holding that the County Council was an indispensable party.

See also Broyles v. Thurston County, 147 Wn. App. 409, 195 P.3d 985 (2008) (Thurston County, not the prosecuting attorney's office, was liable for its administrative actions).

Thus, McKee's initial claim fails. Statutes and case law make clear that the County was the party that he was required to name as a defendant if he wished to proceed with a case based on the KCPO's actions

II. Failure to Amend

McKee argues that the trial court erred in finding that he failed to move to amend the complaint to name the County as the defendant. He asserts that he requested to do so both at the December 11, 2009 hearing on the County's motion to dismiss and at the January 8, 2010 hearing. At the December 11, 2009 hearing, McKee stated:

> Last of all, Court Rule 17 says, No action shall be dismissed on the ground that it has not prosecuted the name of a real party in interest unless a reasonable time has been allowed after objection for ratification of commencement of the

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[2] RCW 36.32.120(6) sets out the counties' legislative authority:

> The legislative authorities of the several counties shall:
> . . . .
> (6) Have the care of the county property and the management of the county funds and business and in the name of the county prosecute and defend all actions for and against the county, and such other powers as are or may be conferred by law;

> action by or joinder or substitution of the real party in interest. I contend that I did name the proper defendant in naming Kitsap County in paragraph two. However, should the Court disagree with that, I would ask that I be able to change the caption on the Complaint to name the county.

Report of Proceedings (RP) (Dec. 11, 2009) at 15. The trial court denied his request and granted the State's motion to dismiss, explaining:

> Well, they raised this issue a long time ago. I mean, you have had sufficient time to amend your Complaint; so I'm going to dismiss it with prejudice. You didn't name the right party, and you needed to do that. After all, it's the county taxpayers that could be paying any judgments which might, possibly, be awarded; and you, therefore, have to name the legal entity which is Kitsap County.

RP (Dec. 11, 2009) at 23.

At the January 8, 2010 hearing, McKee asked the trial court again if he could amend his complaint:

> I, at this point, would like to, also, ask the Court one more time for permission to amend the Complaint. During oral argument on the 11th, I did ask the Court to amend the Complaint to name Kitsap County as opposed to the Prosecutor's Office, Where—I have some case law here. It says, Where a real defendant is identifiable from the record or has, actually, been personally served, the error in name is not fatal. That's Court Rule 4(h), 17(a), 21.60, and Rules of Appellate Procedure 1.2(a).
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> I oppose the dismissal without having a chance to amend the Complaint pursuant to Court Rule 15. In this case, Kitsap County proper was served—has served the auditor as required by the Court Rules; and one more case law, There are serious questions as to the correctness of dismissing a case because the party was served in a personal instead of a representative capacity, and dismissal should be granted on mere technicality easily remedied by—or should not be granted on mere technicality easily remedied by amendment. That's Court Rule 4(h) and 17(a), again.
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> In this case, Kitsap County proper was served; and the error here is, simply, in the captioning.

RP (Jan. 8, 2010) at 4. The trial court reiterated that it was dismissing the matter because McKee had had adequate time to amend the complaint.

The governing rule is CR 15(a). It provides in part:

> (a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. If a party moves to amend a pleading, a copy of the proposed amended pleading, denominated "proposed" and unsigned, shall be attached to the motion.

CR 15(a).

Because the County responded to McKee's summons and complaint, the second sentence of this rule applies, i.e., McKee needed the court's permission to amend or the permission of the adverse party. While McKee sought the court's permission, he did not follow the procedure set out in the third sentence of this rule, i.e., he needed to file a written motion and have his proposed amended pleading attached to it. McKee never filed a written motion to amend and never offered a proposed amended complaint. His oral motions to amend his existing pleadings were insufficient and not allowed under local rules. *See* PCLR 15(e) ("No interlineations, corrections or deletions shall be made in any paper after it is signed by the judicial officer or filed with the clerk. Any such mark made prior to filing shall be initialed and dated by all persons signing the document.").

We review a trial court's decision denying a motion to amend the pleadings for an abuse of discretion. *Wilson v. Horsley,* 137 Wn.2d 500, 505, 974 P.2d 316 (1999). We will not disturb the trial court's ruling "except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Horsley,* at 505 (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). The

primary consideration the court considers when facing a motion to amend is the prejudice such an amendment would cause the non-moving party (i.e., undue delay, unfair surprise, and jury confusion). *Horsley*, 137 Wn.2d at 505-06 (citing *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 165-66, 736 P.2d 249 (1987)).

McKee had from October 22, 2009, when the County filed its answer and motion to dismiss, until December 11, 2009, when the trial court held a hearing on the motion, to comply with CR 15(a). The County's pleading cited CR 15(a), giving McKee immediate notice of this rule's requirements. Yet he offers no excuse for his lack of diligence in seeking to amend the complaint, opting instead to argue that his complaint was sufficient. This was an unnecessary risk; unsupported by statutory and case law. As a result, his legally insufficient motions to amend his complaint resulted from undue delay and the trial court could rely on this delay as a reason to dismiss his complaint. While a different trial judge may have ruled differently, that is not the question before us; rather, we ask only whether the trial court acted with reason or whether it manifestly abused its discretion. *Horsley,* 137 Wn.2d at 505. We find no manifest abuse of discretion here.

Finally, McKee argues that the trial court erred in dismissing his complaint with prejudice. But a dismissal under CR 12(b)(6) and CR 12(c) is with prejudice because the plaintiff has failed to show any set of facts consistent with the complaint that would support the requested relief. Because McKee named only a party that he could not legally sue, it would serve no purpose to allow him to re-file the complaint. The complaint was simply defective and dismissal with prejudice was appropriate. *See* 3A Karl B. Tegland, Washington Practice: Rules Practice*,* § CR 12 at 266 (discussing paucity of cases addressing issue but noting federal rule that dismissal is

with prejudice unless the trial court's specifies otherwise).

Finally, the County requests attorney fees and costs under RAP 18.1, RAP 14.2, RAP 14.3, RCW 4.84.010, and RCW 4.84.080. As the County is the prevailing party, we award those costs and fees as statutorily allowed.

We affirm.

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.

Penoyar, C.J.

We concur:

Van Deren, J.

Johanson, J.