No. 89462-1

SUPREME COURT
OF THE STATE OF WASHINGTON

ROBERT UTTER and FAITH IRELAND in the name of the STATE OF WASHINGTON

Petitioners,

v.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,

Respondent.

ANSWER TO AMICUS CURIAE MEMORANDUM OF KAREN SAMPSON

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I. ANSWER TO AMICUS MEMORANDUM

The amicus curiae memorandum of Karen Sampson provides no support for granting the cross-petition for review of the Building Industry Association of Washington ("BIAW").

The Court of Appeals did not adopt new legal standards for the award of attorneys fees in citizen actions, as Sampson suggests. Rather, in affirming the trial court's denial of the motion for fees, the Court of Appeals cited well-established Washington case law, which follows from the unambiguous statutory language governing the award of fees in such cases.

Sampson, who resides in Colorado, argues that the Court should adopt a prevailing party standard for awarding fees in citizen actions brought under the Fair Campaign Practices Act ("FCPA"). *Amicus Curiae Memorandum of Karen Sampson* ("Amicus Memo"), p. 2. That is the standard in Colorado, but not in Washington State. The Colorado Constitution provides that "The prevailing party in a private enforcement action shall be entitled to reasonable attorneys fees and costs." Colo. Const. art. XXVIII, § 9(2)(a). *See Sampson v. Buescher*, 625 F.3d 1247, 1251 (10th Cir. 2010).

Washington Citizens struck a different balance when they adopted the citizen initiative that enacted the citizen action enforcement

mechanism. As discussed in the Petition for Review, Washington citizens enacted a statutory scheme which strongly encouraged citizen actions, with a *qui tam* provision and a lengthy statute of limitations. Consistent with these policies, the initiative granted citizens acting as private attorneys general a limited prosecutorial immunity. A citizen could only become liable for the defendant's attorneys fees if the citizen action was brought "without reasonable cause," and even then the imposition of a fee award was discretionary with the trial court. RCW 42.17A.765(4)(b).

The Court of Appeals' published decision merely recited this statutory language and the case law that has interpreted it over the years. Specifically, it stated that fees can only be imposed on a citizen if the case was brought "without reasonable cause," which has been interpreted as being a claim that "cannot be supported by any rational argument on the law or facts." *Utter v. Bldg. Indus. Ass'n. of Wash.*, 176 Wn.App. 646 ¶¶ 49, 50.

It was this attorneys fees provision – the one adopted in Washington, not Colorado – that the Supreme Court deemed sufficient to prevent frivolous and harassing lawsuits and to protect the constitutional rights of those participating in the political process. In *Fritz v. Gordon*, the Supreme Court held:

> In our view, the qui tam provision of initiative section 40(4) poses no problem of constitutional dimension. We note respondents' assertion that they fear the threat of frivolous and unwarranted harassment suits. ***In this connection we can also note that should the suitor fail in his action the trial court, upon finding lack of reasonable cause, may reimburse the defendant for his costs and attorney's fees. In view of the current high costs of legal services, we regard this as no small deterrent against frivolous and harassing suits.*** Additionally, the plaintiff in such cases is required to give the Attorney General a 40-day notice of an alleged violation. The litigant may then proceed *only after the service of a second 10-day notice* results in no action on the part of the Attorney General.
>
> ***We feel that these specified safeguards are ample protection against frivolous and abusive lawsuits.***

83 Wn.2d 275, 314 (1974) (emphasis added).

The published decision recognized that under well-established law the trial court's decision on the fees petition was reviewed on an abuse of discretion standard. *Utter*, 176 Wn.App. 646 ¶¶ 49.

Neither Sampson nor the BIAW can credibly claim that Petitioners' claims were brought without reasonable cause in light of the

Court of Appeals' previous unpublished decision which found for Petitioners and reversed and remanded the trial court's grant of summary judgment to the BIAW. If the Court of Appeals originally found Petitioners' claims to be meritorious, they cannot be deemed frivolous or unsupportable "by any rational argument on the law or facts." Even after granting reconsideration, the Court of Appeals' published decision found for Petitioners on critical contested issues, including the "primary purpose" test. The Court of Appeals withdrew its opinion favoring Petitioners only due to its faulty ruling on the "investigatory preclusion" rule, which, as discussed in the Petition and Reply, was contrary to the FCPA's policy and language, controlling precedent, and common sense.

It is difficult to see how Sampson, a resident of Colorado, is in any position to argue that Washington State should pay over a half million dollars of fees to the BIAW. Her argument that Washington must intervene in a case to have standing to avoid a fee award is absurd. When BIAW decided to pursue a fee award against the State, it had a duty to bring the State into the case. Petitioners' opposition to the BIAW's fee petition pointed out that the BIAW never served the State. As the statute plainly reads, and as the Court of Appeals recognized, any award of attorneys fees against the State under RCW 42.17A.765(5) is

discretionary. *Utter*, 176 Wn.App at 677 (citing *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 165 (2007)). By failing to bring the State of Washington within the Court's jurisdiction, the BIAW abandoned any claim it had against the State. The trial court did not abuse its discretion by refusing to enter a judgment against a party that had never even been served and was therefore not within the court's jurisdiction.

While Sampson claims to have experience with the case before this Court, her situation was vastly different from that of the BIAW. The Tenth Circuit held that Sampson did not have to comply with Colorado's complex campaign reporting laws because her group's political spending was so small — less than $1,000 — and was in the context of a ballot proposition, where the public has a reduced interest in disclosure. *Sampson*, 625 F.3d at 1259-1261. In contrast, the BIAW spent, *and publicly reported spending,* well over $6 million to elect Dino Rossi as governor. The BIAW's spending was in support of a candidate, where the public has the highest right to disclosure, *Sampson,* 625 F.3d 1255, and certainly was not *de minimis* like that of Sampson's organization.

Sampson's memorandum, like the BIAW's cross-petition for review, contains no argument as to why the cross-petition meets the standards for discretionary review under RAP 13.4(b). The Court of Appeals' decision does not conflict with another decision of the Court of

Appeals or the Supreme Court, and therefore does not warrant review under RAP 13.4(b)(1) or (2). This Court in *Fritz* found that the citizen action provision and its attorneys fees provision to be constitutional, and that was before the citizen action provision was significantly weakened through the elimination of the *qui tam* provision and the significant shortening of the statute of limitations. Nor has there been any subsequent history of frivolous or harassing litigation under the FCPA that would warrant court intervention. *See Fritz at 314.* (noting that if the court experience a "significant number of palpably frivolous lawsuits," the court has power to address problem through its rule-making power). Finally, since the published decision merely applies well established law to a unique set of facts, under an abuse of discretion standard, the cross-petition does not involve an issue of substantial public interest that should be determined by the Supreme Court.

II. Conclusion

The Court of Appeals' decision merely applies well-established law in denying an award of attorneys fees and therefore the cross-petition should be denied. Sampson's advocacy for a Colorado-like standard for attorneys fees award should be brought to the State Legislature, not this Court.

Respectfully submitted this 10th day of January, 2014.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on January 10, 2014, I caused Petitioners' Answer to the Amicus Curiae Memorandum of Karen Sampson to be served in the above-captioned matter upon the parties herein in the manner indicated:

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Stated under oath this 10th day of January 2014.

Jessie C Sherwood

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Cc: harrykorrell@dwt.com; Maguire, Robert; knoll lowney; Michael Withey; wmaurer
Subject: Electronic filing in No. 89462-1
Attachments: Opposition to Amicus Brief_Final.pdf

Good afternoon. Please find the attached Petitioners' Answer to Amicus Curiae Memorandum of Karen Sampson for filing in Case no. 89462-1, Utter, et al. v. Builders Association of Washington, on behalf of Knoll Lowney, WSBA 23457 (knoll@igc.org).

Yours very truly,

--
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