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NO. 98776-9

SUPREME COURT OF THE STATE OF WASHINGTON

CHEM-SAFE ENVIRONMENTAL, INC., a Washington corporation;
and ABC HOLDINGS, INC., a Washington corporation,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The Respondent, State of Washington, Department of Ecology (Ecology), hereby submits this response to Sky Allphin's July 13, 2020 Discretionary Review Motion to Modify the Commissioner's Ruling. Ecology respectfully requests that this Court deny review.

II. DECISION BELOW

The Petitioner seeks review of the April 2, 2020 decision of the Commissioner of the Court of Appeals, Division III, ordering Mr. Allphin to obtain counsel to represent the corporations Chem-Safe Environmental, Inc. (CSE) and ABC Holdings, Inc. (ABC), in an appeal before Division III.

III. STATEMENT OF THE ISSUES

A. Should the Washington State Supreme Court accept review under RAP Title 13 when the Commissioner of the Court of Appeals properly denied review of this matter?

B. Does Washington law allow a pro se litigant to represent corporations in matters before Washington courts?

IV. COUNTERSTATEMENT OF THE CASE

The procedural history of this case is helpful to understanding its current posture and the issue before this Court. Accordingly, a brief summary of that history follows.

On January 24, 2014, CSE and ABC commenced this action in Yakima County Superior Court, alleging claims under 42 U.S.C. § 1983 against Kittitas County, former Kittitas County employee James Rivard, Ecology, and Ecology employees Gary Bleeker, Richard Granberg, Norman Peck, and Valerie Bound. In February 2014, this matter was removed to federal district court for resolution of the federal law claims. CSE and ABC thereafter amended their complaint, in which they added the cause of action of tortious interference.

On summary judgment, the federal trial court dismissed CSE and ABC's 42 U.S.C. § 1983 cause of action against the individual Ecology staff on March 10, 2016. Also on March 10, 2016, the federal court remanded CSE and ABC's remaining state law claim of tortious interference against Ecology to the Yakima County Superior Court.

On May 20, 2019, Ecology filed a motion for summary judgment to dismiss CSE's and ABC's lawsuit. On July 17, 2019, the Yakima County Superior Court heard Ecology's motion for summary judgment. Mr. Allphin presented argument why the court should deny Ecology's motion. On that day, the court dismissed CSE's and ABC's claim for tortious interference, but not their lawsuit.

On October 1, 2019, the Court of Appeals, Division III, received a Notice of Appeal filed by Mr. Allphin. In a November 1, 2019 letter, the

Clerk for the Court of Appeals informed Mr. Allphin that it is necessary for him to obtain counsel to represent ABC and CSE in these proceedings. In response to this November 1 letter, Mr. Allphin, on November 12, 2019, filed a Declaration. On November 21, 2019, the Court of Appeals' Clerk again advised Mr. Allphin that he must retain counsel to represent the corporations in these proceedings by December 2, 2019.

On December 2, 2019, Mr. Allphin sent the Clerk a letter with his argument as to why, as a pro se litigant, he should be able to represent ABC and CSE. On March 4, 2020, the Court issued its Order on Mr. Allphin's motion to modify the Clerk's Ruling. In that Order, the Court referred the matter to the Commission to be set for hearing on a Court's motion to dismiss the appeal for failure to retain legal counsel.

On April 2, 2020, after considering briefing by Mr. Allphin and Ecology, the Commissioner issued its ruling in which she denied Mr. Allphin's motion to reverse the Clerk's letter rulings. The Commissioner concluded that Mr. Allphin had "not shown a reason to except this appeal from the rule that requires a licensed attorney to represent corporations." Commissioner's Ruling at 6.

Mr. Allphin filed a motion to modify the Commissioner's Ruling. After considering briefs submitted by Mr. Allphin and Ecology, Division III issued an Order Denying the Motion to Modify the Commissioner's Ruling.

Mr. Allphin now brings this Motion for Discretionary Review before this Court.

V. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

A. Mr. Allphin’s Motion for Review Fails to Satisfy the Criteria for Acceptance of Review under RAP 13.4

In this Court’s July 16, 2020 letter regarding this matter, the Court stated that it is treating Mr. Allphin’s filing as a petition for review. Mr. Allphin’s motion fails to establish why this Court should accept review under one or more of the tests established in RAP 13.4(b) for petitions for review.

RAP 13.4 states:

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). RAP 13.4(c) requires that a petition for review contain “[a] direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b) [of RAP 13.4], with argument.” RAP 13.4(c)(7).

In this case, Mr. Allphin fails to provide with a “direct and concise statement” why review should be accepted under the Rules of Appellate Procedure. Since Mr. Allphin failed to comply with RAP 13.4(c)(7), this Court should deny his motion for discretionary review.

Furthermore, Mr. Allphin’s motion does not meet any of the requirements governing acceptance of discretionary review, as provided in RAP 13.4(b). Mr. Allphin argues issues of fact where the applicable law (as evidenced by the ruling of the Commissioner of Division III Court of Appeals) holds that the question raised is an issue of law. Therefore, this Court should deny Mr. Allphin’s motion for discretionary review.

B. The Commissioner of Division III Court of Appeals Correctly Ruled That Mr. Allphin Could Not Represent Corporations CSE and ABC in the Appeal

The Division III Commissioner’s ruling does not trigger or meet any of the considerations found in RAP 13.4(b), since the Commissioner followed accepted Washington law in properly concluding that Mr. Allphin cannot represent CSE and ABC in an appeal.

In his motion before this Court, Mr. Allphin argues that an assignment of claims, by CSE and ABC to Mr. Allphin, allows him to appear pro se in the appeal before the Court of Appeals, Division III. Discretionary Review Mot. at 15–17. However, Mr. Allphin’s argument ignores the controlling precedent for this issue.

Washington law requires a licensed attorney to represent corporations for claims presented in Washington courts. *Lloyd Enters., Inc. v. Longview Plumbing & Heating Co.*, 91 Wn. App. 697, 701, 958 P.2d 1035 (1998); *Dutch Village Mall v. Pelletti*, 162 Wn. App. 531, 536–37, 256 P.3d 1251 (2011).

In *Lloyd*, a corporation, after a lawsuit had been initiated, assigned its claims to an individual, who then defended the suit in his pro se capacity. 91 Wn. App. at 700–01. In addressing the issue of whether a pro se litigant could represent the corporation, the *Lloyd* court stated, “[b]ecause corporations are artificial entities that can only act through their agents, we agree with the general common law rule . . . that corporations appearing in court proceedings must be represented by an attorney.” *Id.* at 701.

In rejecting Mr. Allphin’s argument that the Assignment of Claims he filed with the superior court allows him to appear as a pro se litigant, the Division III Commissioner correctly noted that the *Lloyd* decision “involved an assignment, yet the court enforced the requirement that the corporations procure counsel to represent them in court.” Commissioner’s Ruling at 4.

In support of his motion that the Commissioner’s ruling should be reversed, Mr. Allphin argues that neither the Yakima County Superior Court nor Ecology objected to him representing ABC and CSE during the

summary judgment hearing. Discretionary Review Mot. at 13–14, 16. As authority for this position, Mr. Allphin cites to *Finn Hill Masonry, Inc. v. Department of Labor and Industries*, 128 Wn. App. 543, 116 P.3d 1033 (2005). Discretionary Review Mot. at 16. However, *Finn Hill* is distinguishable from the present case.

In *Finn Hill*, a pro se litigant represented a corporation in matters before the Board of Industrial Insurance Appeals and an appeal of that Board’s decision to the superior court. 128 Wn. App. at 545. The pro se litigant appealed the superior court ruling to the court of appeals. *Id.* Two days before oral argument before the court of appeals, the Department of Labor and Industries “filed a statement of additional authorities indicating that corporations must be represented by an attorney.” *Id.*

In analyzing whether that pro se litigant could represent the corporation before the court of appeals, the court of appeals noted:

if the Department [of Labor and Industries] had appropriately raised the issue before us, we would probably have struck the brief and allowed Finn Hill time to obtain counsel. But, the Department did not timely raise the matter. It filed no motion to strike or even to prohibit oral argument before us. Additionally, its supplemental authorities were not filed until two days before oral argument, despite the fact the case it relies on was decided in 1998. Even at oral argument, the Department did not move for any prohibitions.

Finn Hill, 128 Wn. App. at 545–46. The *Finn Hill* court then held that because “the Department did not contest lay representation in either the

superior or the appellate court,” it waived any claim or objection to the pro se representation of the corporation. *Id.* at 546.

The procedural history in this case is distinguishable from facts in *Finn Hill*. As recognized by the Commissioner in her ruling, the Clerk in this case required ABC and CSE to obtain counsel “early on,” which allowed those corporations more than sufficient time to retain counsel for this appeal. Commissioner’s Ruling at 6. The Commissioner accurately concluded that neither Ecology nor the Yakima County Superior Court “could waive the court of appeal’s authority to require that the corporations retain counsel to represent them on appeal.” *Id.*

Since *Finn* is inapplicable to this case, the Court of Appeals, Division III, did not err in following the controlling case law as set forth in the *Lloyd* opinion and requiring Mr. Allphin to retain counsel to appear for the corporations CSE and ABC.

VI. CONCLUSION

The Commissioner of the Court of Appeals, Division III, correctly ruled that Washington law precludes Mr. Allphin from representing ABC and CSE. Mr. Allphin’s motion fails to provide any basis that satisfies the

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standards for review in RAP 13.4. Thus, this Court should deny Mr. Allphin's Discretionary Review Motion to Modify the Commissioner's April 2, 2020 ruling.

RESPECTFULLY SUBMITTED this 27th day of August 2020.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 27th day of August 2020, at Olympia, Washington.

s/John A. Level
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ATTORNEY GENERAL'S OFFICE - ECOLOGY DIVISION

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