THE SUPREME COURT OF THE STATE OF WASHINGTON

CHEM-SAFE ENVIRONMENTAL, INC., et al., Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	98776-9 No. 370941 DISCRECTIONARY REVIEW MOTION TO MODIFY COMMISSIONER'S RULING Treated as a petition for review

I. INTRODUCTION

Prior to responding to the Washington State Department of Ecology's ("DOE") motion for summary judgment, Chem Safe Environmental, Inc. and ABC Holdings, Inc., collectively, ("CSE"), the plaintiff in the case on appeal, in recognition of its financial inability to continue to pursue its legal rights assigned and distributed all of its claims in the litigation to its officer, director and a controlling shareholder, Mr. Sky Allphin ("Appellant"). In accepting the assignment, Appellant held harmless CSE from all further costs and liabilities in the litigation and agreed to substitute itself as the plaintiff therein. Appellant did so. The Superior Court accepted Appellant as substitute

party for CSE and allowed Appellant to defend the summary judgment motion on Appellant's own account as the proper albeit substitute party Appellant. The DOE did not object. The Superior Court granted the DOE's motion for summary judgment. Appellant appealed to the Commissioner. Only then did the Commissioner by mischaracterizing CSE as the appellant apparently disregard the substitution and demand that CSE appear by counsel. Appellant responded by directing the attention of the Commissioner to Appellant's substitution by accepted appearance below. The Commissioner then invited briefing from both parties assigning the decision to the commissioner. Thereafter, the Commissioner acting through the commissioner ruled that the assignment of claims and recognized substitution of parties recognized below would be disregarded and Appellant and CSE would be dismissed for failure to retain counsel to represent CSE as a corporate party.

II. IDENTITY OF MOVING PARTY

The moving party is Mr. Sky Allphin ("Appellant") as assignee of CSE's right, title and interest in claims brought by CSE in Chem-Safe Environmental, Inc., et. al v. Kittitas County, et al YAKIMA COUNTY SUPERIOR COURT No 142004451 (the "Litigation") from the summary judgment in favor of defendant DOE (the "Judgment")

which Appellant as assignee of CSE's right, title and interest in the claims brought by CSE has appealed to this Court.

III. RELIEF SOUGHT

Appellant seeks to have the decision of the Commissioner (the "Decision") dated April 2, 2020, denying Appellant the right to bring this Appeal pro se as the owner of all of the remaining claims made by CSE as plaintiff against the DOE as defendant in the Litigation by assignment of claims referenced and partially set forth on page 2 of the Decision (the "Decision") and permission or recognition by this Court of Appellant's right to own and represent himself pro se on the claims in this Appeal.

IV. FACTS AND PROCEDURAL HISTORY

A. This Litigation.

This Litigation was originally filed under 42 USC Sec. 1983 and as a state law tortious interference claim in Yakima County Superior Court on January 24, 2014. The civil rights case was dismissed and the state law tortious interference claim remanded to Superior Court for Yakima County. On the remand, CSE's counsel withdrew. CSE was then served with a summary judgment motion. To permit Mr. Allphin, CSE's controlling shareholder, officer and director, to pursue CSE's claims in

light of CSE's financial inability to do so, CSE assigned and distributed its remaining claims in the action to Appellant. At the time of the assignment and thereafter there were no counterclaims or cross claims against CSE that Appellant could avoid by reference to CSE's corporate status. CSE's power and authority to assign the claims to Appellant and vest Appellant with a cognizable interest therein cannot be at issue. *Zimmerman v. Kyle,* 53 Wn.App. 11, 17, 765 P.2d 905 (1988); *Lloyd Enterprises, Inc. v. Longview Plumbing & Heating, Inc.* 91 Wn.App 697, 702, 958 P.2d 1035 (1998).

Appellant responded pro se on the claims at summary judgment. No objection was raised to Appellant's pro se appearance on the claims or at summary judgment either by the counterparty or sua sponte by the Superior Court. No complaint was raised by counterparty or the Superior Court of prejudice or burden from Appellant's pro se representation on his own claims. The Superior Court acknowledged Appellant's ownership of the claims and pro se representation in its order granting the DOE summary judgment.

In conflict with the Superior Court and without the issue being raised therein, this Court raised objection to Appellant's pro se representation sua sponte, first on the basis of representative representation for the corporation and when that was shown not to be the case, on what appears to be some misguided sense of equitable grounds. The Commissioner recited that it would be an inequity if Appellant could use

the protections of the corporation and not face the burdens of the requirement that a corporation must be represented by separate counsel citing *Lloyd Enterprises* at 703 and *Zimmerman* at 18.

B. Appellant's Objection to Uneven Policing of Candor and Fairness Rules.

To understand this Litigation is to consider Appellant's frustration with the behavior of representatives and counsel of the counterparties first to CSE and then to Appellant. Appellant is dissatisfied with the presentation of the claims by counsel. He believes the facts surrounding those claims demonstrate egregious misbehavior on the part of the DOE and its counsel. Specifically, Appellant offers the following examples affecting this case and companion PRA litigation between Appellant and either the County or the DOE. Appellant is concerned that candor to the courts and fairness to counterparties to defendants in this Litigation is being generally disregarded under the ruse of advocacy. See CR 11, RPC 3.3, 3.4.

On February 4, 2016, Mr. Peck signed a declaration in this litigation, claiming he never reviewed the Sampling and Analysis Plan prepared by Landau Associates, stating, "Under Mr. Allphin's interpretation of the question and my answer on pages 71 and 72 of my deposition, he wrongly holds out my answer as to apply to a review of a Chem-Safe sample plan before the sampling occurred. However, the only

sampling document I reviewed was the July 30, 2013 Landau Associate sampling report, that was made after Landau Associates' June 18 sampling event". In this case, three years later Mr. Peck admitted in his June 18, 2019, declaration, that he did in fact review the Sampling and Analysis Plan and stated: "I have reviewed the Landau Sampling and Analysis Plan with the "sticky note" that Mr. Allphin included with his June 14, 2019 declaration and it appears the plan is one that I reviewed possibly in June 2013. I have no recollection of conducting this review". Mr. Peck thus admitted that he testified falsely in his February 4, 2016 declaration that he did not know of or consult with the County on the sampling plan, probably to hide the fact that the Ecology falsely testified in discovery in the same case that "Norm Peck was identified as the person who was to communicate with Kittitas County about approval or disapproval of Chem-Safe's Sampling and Analysis Plan. The Plan was implemented prior to Ecology conducting review. Ecology never approved any plan implemented by Chem-Safe" and also when the DOE answered, "All communication was verbal", when asked if the Ecology had any documentation related to documents given to Kittitas County regarding the Sampling Plan. The "sticky note" on the Sampling and Analysis Plan that Peck referenced in his June 18, 2019 declaration were notes by James Rivard, confirming that Peck provided handwritten notes to the Sampling and Analysis Plan on June 3, 2013. The Sampling Plan was not approved by the County until after the

meeting on June 4, 2013, a meeting the DOE was required to attend, but Peck's supervisor, Ms. Valerie Bound emailed Mr. Peck on the morning of June 4, 2013, telling him not to attend the meeting. Mr. Jeff Seapulski took notes for Kittitas County Public Health and documented that Mr. Rivard admitted no spill had ever occurred at the Chem-Safe property. In *Kittitas County v. Sky Allphin et al,* 2 WnApp 2d 782, 413P3 22 (2018),the Appeals Court de novo found that the "Sticky Notes" were never in Peck's possession. Peck's admission in his June 18, 2019, declaration proves the opinion by the Appeals Court needs to be reviewed. Mr. Peck got caught lying to the trial court, appeals court and federal court and for Mr. Peck to finally admit six years later that he did in fact review the plan should not be ignored. The issue was not neutral. It grounded in part the Commissioner decision.

The Ecology and Kittitas County continue to release records that are responsive to Appellant's October 17, 2012 PRA Request. Releasing critical documents that should have been released in 2012 that would have proven Kittitas County and Ecology made up the spill. An email from Kittitas County Prosecutor Suzanne Becker to Rivard, on March 23, 2011 that was finally released in 2019, explaining to Mr. Rivard that if he wanted Ecology's help, he would need to turn Chem-Safe in for a spill. Another email from Mr. Rivard stated, "I'll catch up with you on Monday about this, but I think we are going to have to pull the plug on the chemical

disposal company". On January 24, 2011, Kittitas County Prosecutor Becker emailed Kittitas County Commissioner Paul Jewell, and cc'd Kittitas County Prosecutors Neil Caulkins and Geg Zempel. The email attached a "confidential memo", on the memo, Becker wrote, "Transfer of a shipment of dangerous waste from one storage transport vehicle to another transport vehicle, from one container to another container, and any ten-day storage activities may only occur at a transfer facility that is registered with DOE". Kittitas County silently suppressed this document for over seven years to hide the fact that Ms. Becker, who wrote the Notice of Violation for Rivard, shutting down CSE's transfer facility on January 27, 2011 never checked to see if CSE operated a transfer facility as a transporter under WAC 173-303-240(6). CSE was permitted as a transporter with a transfer facility, registered with the DOE. On April 30, 2019, Kittitas County released records showing that Kittitas County Prosecutor Paul Sander falsified an exemption log on December 23, 2013, by removing reference therein to this critical attachment.

Furthermore, Mr. Rivard falsely testified in his declaration in this case on July 9, 2019. When he attempted to clarify a false statement that he made in a November 15, 2012, declaration, where he stated, "Mr. Bradley did not want to pursue Ecology's transfer facility permit due to cost and time so Chem-Safe sought a moderate waste facility permit through the County instead". Mr. Rivard now states in his July 9,

2019, declaration that, "The "transfer facility permit" referenced above was TSD permit, a reference to paragraph 6 of this declaration, where he stated falsely: "Chem-Safe did not want to pursue a TSD permit, so their only option was to seek a MRW permit through the County". This statement is a flat lie. Mr. Rivard knows CSE's transfer facility is not a TSD facility and is not subject to its requirements. Mr. Rivard is now changing his story because an email chain between Ms. Suzanne Becker and Ecology employee Richard Granberg who oversaw CSE as a regulated dangerous waste transporter between February 4-9, 2011, that Ms. Lowe tried to "claw back" confirmed that Chem-Safe was in fact a transfer facility. The email chain confirms that the County and Ecology both knew that Chem-Safe was correctly permitted and as Ms. Becker acknowledged in the email chain, Moderate Risk Waste facilities are not allowed to accept dangerous waste. Furthermore, an email from January 25, 2011 @ 10:16 from Mr. Rivard to Ms. Becker, that was responsive to Appellant's October 17, 2012 PRA Request, suppressed by the County and only finally released in April 2019 stated: "One thought is to leave the permit requirement open so that KCPHD is not locked into a solid waste permit. Say if the facility needs to be a transfer station then that permit is required or if the EPA wants to require something additional then "X" permit is required. That was what I was kind of going for at the end of the 1st page". For Mr. Rivard to now change his story by claiming the transfer permit is actually a TSD facility

should not be accepted by Mr. Level. The Attorney General's office should investigate Mr. Rivard's false statements under oath.

The Ecology and County have used the administrative appeal process to damage CSE, causing economic destruction to the point of shutting down the business in 2018. In the administrative case, rather than delivering the full file, the County delivered a declaration, cherry picking the evidence. The Ecology and County have used the PRA process to block CSE from conducting discovery by hiding and cherry picking the file, blocking documents that CSE had a legal right to review. The County even sued CSE and Mr. Allphin personally to hide the documents that showed both agencies knew that Chem-Safe was a licensed transfer facility. A position they initially denied at the administrative appeal. Causing extensive costs to Chem-Safe and Mr. Allphin personally. While the County and Ecology have been able to use tax dollars to hide behind, CSE and then Mr. Allphin had to fund their own litigation. The Ecology and County have used to tax payers money to outlast CSE and Mr. Allphin. A private citizens pursuit of rights against the governments should not be resolved by attrition. The Ecology and County went as far to falsify that a Field Investigation claiming a spill had occurred at the CSE. The Ecology withheld the falsified report and did not let CSE use this document in earlier court proceedings and only released it in December 2014.

Without relief in this lawsuit the remedy to be removed from the retaliatory listing from Ecology's Washington State Contaminated Sites list is limited.

The following are more examples of egregious behavior in the efforts taken by the Ecology and their attorney's to continue to ignore the sustenance rights involved and win by attrition. Washington State Assistant Attorney General Harold Lee Overton's Amicus Brief to the Washington State Supreme Court on February 10, 2017, claiming that 32 emails between the County and Ecology had never been released to an adversary, therefore protected under the "common interest" privilege. This was *after* Mr. Overton's claim on August 11, 2016 during oral argument in Kittitas County Superior Court that the Ecology had released over half of the 32 emails to CSE no later than the Spring of 2013. Mr. Overton even filed a brief with the Washington State Court of Appeals Division III on May 17, 2017, claiming that the Ecology had provided a CD to CSE on December 23, 2014 with all the records that had been released to CSE prior to February 26, 2013. Including records that had been sealed by Kittitas County Superior Court. Both of these conflicting statements were allowed by the Washington State Supreme Court and Washington State Court of Appeals Division III. Furthermore, Kittitas County Attorney Ken Harper filed a response of Amici Curiae Washington Coalition for Open Government, American Civil Liberties Union of Washington and the Spokesman-Review on March 1, 2017, stating, "But work product protection is lost

only when the materials are disseminated to a litigation adversary, which never occurred here". Mr. Harper knew, or was on notice that his statement was false. Mr. Harper was a party in the Ecology lawsuit and had been informed that the Ecology had released over half of the 32 emails on December 23, 2014.

To this day, neither Mr. Harper nor Mr. Overton have admitted to the Washington State Supreme Court that their briefs contained false statements. How was it possible that Kittitas County prevailed by claiming that the 32 emails had never been disseminated to an adversary and later, the Ecology prevailed by claiming they had released over half of the very same 32 emails in 2013? One of these opinions can't be accurate. These emails weren't both withheld and released.

V. SOURCES OF FACTS SUPPORTING ARGUMENT

The argument herein is based on the Commissioner's Decision and citations to the record therein, on the decision of the trial court below at summary judgment, and on the filings made and correspondence issued by this Court and the Commissioner's Decision.

VI. ARGUMENT

The Commissioner miscasts the facts and law to reach a desired conclusion. This case is not a case raising representation of a party by a non attorney. The claims

remaining in the case are owned by Appellant and Appellant seeks to pursue them for his own account. Hence, *Dutch Village Mall v. Pelletti*, 162 Wn.App. 531, 256 P.3d 1251 (2011) are inapposite. The first question is not identity of derivative and legal ownership. Rather, the first question is whether a natural person who is an assignee of a corporate claim acting on his own behalf may legally pursue it pro se. In other words, does *Wash. State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n*, 91 Wn.2d 48, 56, 586 P.2d 870 (1978) mean what it says that the right pro se is linked to ownership of the claim. *Dutch Village* at 537, 538, and *Lloyd Enterprises* at 702, 703, recite various reasons why pro se appearance on assigned claims may create issues. There is inconvenience to the Court and the opposing party arising from the pro se party's lack of understanding of protocol and the parameters of allowable behavior and positions. There is the hypothetical interest of unspecified third parties in the corporate claim. There is the putative unfairness that the burden of the claim is being brought by an assignee protected against claims by the counterparty through the corporate shield from liability. There is the question of the degree of responsibility for the pleadings.

These concerns are either hypothetical or call to question the right granted to the common law pro se party. If the concern is inconvenience, the factual issue of inconvenience should be addressed. Obviously neither the Superior Court nor the counterparty were greatly inconvenienced at the pleading or hearing level. Neither

objected. Further, the Commissioner that reviews this case de novo as a summary judgment has made nothing but hypothetical statements facts that may give rise to 'inconvenience'. Should this be an issue, the record should be cited as to facts set forth therein that support it.

Reliance on 'inconvenience' begs the question of the significance of the Sixth Amendment to the U. S. Constitution. It promises the right of each person to appear personally or by counsel at least in criminal cases. The right is recognized at common law. In federal courts it is set forth in 28 USC Sec. 1654. The right is twofold, the right to appear with or without counsel. Denying the owner of the claim the right to appear on the basis of some hypothetical notion that there may be missing claim holders or the result may not be fair, calls to question the existence of the right at all.

While not patent, it raises the interesting question whether the right or one or another part thereof can be materially infringed to the extent that the Sixth Amendment applies to 'persons' and entities enjoy personhood under *Citizens United v. FEC*. 558 U.S. 310, 342-4, 351-6, 130 S.Ct. 876 (2010). In light of the This Court's summary dismissal of legal restrictions applicable to corporate persons under the laws creating them, questions could be seen to arise about restrictions imposed by state laws or court rules that abridge those rights. *American Tradition Partnership, Inc. v. Bullock,* 567 U.S. 516, 132 S.Ct. 2490, 2491 (2012).

Likewise standard of behavior is here suspect. There is no factual basis on which to determine whether Appellant has made filings in violation of CR 11. Moreover, CR 11's rules do not excuse parties not represented by attorneys from sanctions. They directly apply to pro se representation. See second and fifth sentence, CR 11(a) 'signature of a party' or 'a party who is not represented by an attorney shall sign'. The sanction in the last sentence of CR 11(a) applies to the person executing the pleading without regard to status. Finally, there is no analog to CR 11(a) in the RAPs governing appeals and petitions for review. Clearly CR 11 takes into account pro se appearances and holds pro se appearants accountable.

Prejudice to unidentified stakeholders is even less persuasive as an excuse to deny the right of the assignee who is a natural person to appear pro se. The reason is that the stakeholder issue arises in virtually every assignee case. Someone could have a claim against the assignor that is prejudiced. Yet, the Commissioner would reserve the limitation for entity assignors only. What is the basis for treating one differently than the other? Moreover, as the Commissioner notes, the assignment in this case burdened the assignee Appellant with the duty to defend and hold harmless against any such stakeholder or third party claims. How then are such claimants adversely affected by the assignment?

The real issue is narrower than the nature and extent of the right of appearing pro se in a corporate context. Here, Appellant appears for himself pro se as the owner by assignment of the claims. CSE does not appear and does not claim any interest in the claims. Neither are there intervenors claiming that they are third parties whose rights are abridged by the assignment. Nor are there third party claims that are avoided by the assignment, a fact completely distinguishing *Lloyd Enterprises* at 699, 700. No third party claims or counterclaims are avoided by the assignment. There is no question that the assignment to Appellant is bona fide. If not, the issue should be remanded for further fact finding.

The second issue is controlling. Is the right to object lost if not exercised by the counterparty or by the trial court before a decision on the merits? Given the fact that the basis for objecting to the assignee as owner of the claim and the natural person with the right to appear pro se is largely based on inconvenience or hypothetical prejudice, it would seem clear that the doctrine of waiver should be applicable. Here the fact and nature of the assignment with hold harmless was made known to the Superior Court and counterparty before the hearing. Neither the Superior Court nor the counterparty objected. The counterparty did not appeal or request appellate review of the issue. Nor did the counterparty raise the pro se representation issue to the Commissioner. *Finn Hill Masonry, Inc. v. Dep't of Lab & Ind.*, 128 Wn.App. 543, 545, P3d 1033 (2005).

Here, the issue was never raised by the DOE either before the Superior Court or on appeal. Further, when the Commissioner raised the issue it responded to Appellant appearing as a representative of CSE and not for his own account a response inconsistent with the facts. The factual issues surrounding the motive for and third party interests in the subject matter of the assignment as well as the effect of the hold harmless in responding to the latter were only raised in the final briefing. The assignment preceded the Superior Court's handling of the matter as well as its determination by recognition that the assignment was bona fide.

To the extent the Commissioner sub silentio relies on *Jones v. Niagra Frontier Trans. Auth.,* 722 F2d 20, 22, (2d Cir. 1983), it is based on 28 USC Sec. 1654 and is applicable only by analogy in Washington. To the extent there is reliance on RCW 2.48.180 restricting the practice of law to licensed attorneys, reference is made to the pro se exception recognized in *Wash. State Bar*, and explicated in *Pappas v. Phillip Morris*, 915 F. 3d 889, 892, 893 (2d Cir. 2019) holding the statute does not bar sole beneficiary or sole administrator representation of an estate. See also *Guest v. Hansen*, 603 F3d 15, 20 (2d Cir. 2010).

VII. CONCLUSION

The Commissioner offers no substantive record facts to support its sua sponte denial of recognition of the assignment of CSE's claims to Appellant after recognizing

the right of CSE to do so or Appellant's right to appear pro se as a natural person owning those claims, a right recognized in *Wash. State Bar*, id, cited by the Commissioner. It offers no basis for reversing the Superior Court's determination of the bona fides of the assignment by recognition thereof. It recites to no substantive prejudice unique to this case. Yet it wishes to impose counsel and the cost thereof on Appellant a natural person and assignee of the claims, as a condition to litigating his damage claim against the DOE. Appellant asks this Court to review and reverse the Decision of the Commissioner denying Appellant his right to represent himself pro se in the appeal of the summary judgment of the trial court in favor of the DOE in this Litigation.

DATED this 13th day of July, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on this day I served a true copy of this document on the following, properly addressed as follows:

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