

NO. 65212-5-1

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

PUGET SOUND SECURITY PATROL, INC.,
Appellant,

v.

STATE OF WASHINGTON,
Respondent.

APPELLANT'S AMENDED REPLY BRIEF

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TABLE OF CONTENTS

A. Restatement of the Issue	1
B. Washington law permits a sole stockholder to represent his own corporation.	2
C. Whether <i>Willapa Trading</i> Created an Exception for a Sole Stockholder	2
D. Limitations and Policy of the <i>Willapa Trading</i> Sole-Stockholder Exception	4
E. Mr. Kirby ought to be able to represent his company <i>pro se</i> in this administrative setting.	7
F. The case title may be amended by this court if deemed necessary.....	8
G. The department is not entitled to attorney’s fees under RAP 18.9.	8
H. Conclusion	10

TABLE OF AUTHORITIES

Cases

<i>Advocates for Responsible Development v. Western Wash. Growth Management</i> , ___ Wn.2d ___ (No. 84501-8, Nov. 18, 2010).....	10
<i>Advocates for Responsible Development</i> , 155 Wn. App. 429, 230 P.3d 608 (2010)	3, 5, 6, 9
<i>In re Guardianship of Lamb</i> , 154 Wn. App. 536, 228 P.3d 32 (2009).....	1
<i>Russell v. Catholic Charities</i> , 70 Wn.2d 451, 423 P.2d 640 (1967).....	6
<i>Skinner v. Holgate</i> , 141 Wn. App. 840, 173 P.3d 300 (2007).....	10
<i>State v. Madsen</i> , 168 Wn.2d 496 (2010).....	6
<i>Willapa Trading Co. v Muscanto, Inc.</i> 45 Wn. App. 779, 727 P2d 687 (1986). 3, 4	

Statutes

RCW 2.28.010	6
RCW 2.28.060	6
RCW 34.05.410	7

Regulations

WAC 10-08-020.....	7
WAC 263-12-020(3).....	7

Court Rules

CR 10	8
CR 15	8
CR 8	8

RAP 7.3..... 8

RAP 18.9..... 8, 9

Treatise

Jay M. Zitter, 8 A.L.R.5th 653 (1992)..... 3, 4

Out of State Cases

Marbury v. Madison,

5 U.S. (1 Cranch) 137 (1803).....3

Matter of Holliday's Tax Services, Inc.,

417 F.Supp. 182, 184 (E.D.N.Y. 1976)6, 7

Natural Resources Defense Council v. Southwest Marine, Inc.,

28 F.Supp.2d 584 (S.D.Cal. 1998).....3

Vermont Agency of Nat. Res. v. Upper Valley Reg'l Landfill Corp.,

621 A.2d 225, 159 Vt. 454, 458 (1992).....9

A. Restatement of the Issue

This is an appeal pursuant to the Administrative Procedures Act. The superior court was asked to overturn the department's action, and was acting in an appellate capacity. Before attending to the merits, the Employment Securities Department argued, "I think everything would go forward ... more smoothly if there were lawyers on both sides," VRP 17, and it moved to require Puget Sound Security to retain an attorney. CP 327-331. When it moved, the department did not know about the *Willapa Trading* exception. VRP 13-14.

Jeff Kirby appeared at the hearing to represent his company. VRP 3. Mr. Kirby is the sole owner of Puget Sound Security. The superior court was aware that he was the sole owner, and the court knew of the *Willapa Trading* case. VRP 14. However, the superior court stated its understanding of the holding on the record as if no corporation could appear *pro se* VRP 23-24 (stating, "a case cannot proceed in court unless the corporation retains counsel" and that the court was "bound by the clear law").

The superior court ordered Puget Sound Security to appear through a lawyer or suffer dismissal. CP 531-532. Puget Sound Security declined, so the cases were dismissed. CP 546-547. The standard of review is *de novo* because the appeal turns on an issue of law, the lower court based its decision on an erroneous view of the law, and it applied an incorrect legal standard. *See e.g., In re Guardianship of Lamb*, 154 Wn. App. 536, 544, 228 P.3d 32 (2009) (citations omitted).

Puget Sound Security Patrol asks this court to reverse and remand the cases, allowing its sole owner the benefit of self-representation, which has been afforded such sole shareholders for almost 25 years in Washington. The *Willapa Trading* exception should be preserved, as it reflects the fact that a sole owner representing his company does not represent anyone but himself. Washington prohibits the practice of law without a license, but preserves the individual's right to represent his own interests. Jeff Kirby is Puget Sound Security and wants to represent himself.

B. Washington law permits a sole stockholder to represent his own corporation.

Washington law recognizes a sole stockholder exception to the general rule prohibiting a non-lawyer from appearing in court to represent a corporation. *Willapa Trading*, 45 Wn. App. 779, 787, 727 P.2d 687 (1986). This case has been unchallenged law since 1986. The department takes a contrary position.

C. Whether *Willapa Trading* Created an Exception for a Sole Stockholder

The department argues that *Willapa Trading* did not create an exception. It argues the section of the opinion articulating the exception was not essential to the holding. This court should reject the argument and reaffirm the *Willapa Trading* sole-stockholder exception.

The sound approach to interpreting a judicial opinion is to read the decision of the case along with the reasons supporting the decision, rather than to look for all logical arguments to disregard them. As courts and commentators have noted, “Even the great legal principle of judicial review espoused in *Marbury v.*

Madison, 5 U.S. (1 Cranch) 137 (1803), can be seen as dicta,” because “*Marbury*’s holding is a narrow one—that the Court lacked jurisdiction.” See e.g., *Natural Resources Defense Council v. Southwest Marine, Inc.*, 28 F.Supp.2d 584 (S.D.Cal. 1998).

Appellate and trial courts have recognized and applied the holding of *Willapa Trading*, so that its holding is established precedent worthy of the protection afforded by *stare decisis*. The recognized holding of the *Willapa Trading* case concerns the sole stockholder exception. In that case, the court said, “In acting for [the corporation], [the sole-shareholder] was, in fact, acting on his own behalf.” *Id.* at 787. “No financial interests other than [the sole-shareholder] were involved,” because he appeared for “his wholly-owned corporation.” *Id.* As recent as this year, the court repeated the understanding of the holding,

The *Advocates* court articulated the holding of *Willapa Trading*, “[A] non-lawyer could appear on behalf of himself and a corporation of which he was the president, director, and sole stockholder,” because “the litigant ‘was, in fact, acting on his own behalf’ and thus his personal interests were virtually indistinguishable from those of his corporation.” *Id.* at 483-484.

(Opening Brief at pg. 7) (citing *Advocates for Responsible Development*, 155 Wn. App.479, 230 P.3d 608 (2010)). The treatise cited by the department summarizes the case almost identically. See Jay M. Zitter, 8 A.L.R.5th 653 (1992).¹ While

¹ The ALR summarizes the case as follows: “While recognizing that it was somewhat unusual, the court in *Willapa Trading Co. v. Muscanto, Inc.* 45 Wash. App. 779, 727 P2d 687 (1986), held that there was no abuse of discretion in permitting the president, director, and sole shareholder of a corporation to appear on his own behalf and on behalf of the corporation in a shipping dispute. The court said that the president, in acting for the corporation, was in fact acting on his own behalf, as no financial interests other than his own were involved. Furthermore, the court noted that the president had sought permission to appear as

the court discussed invited error, that was an alternate and subordinate reason for the decision. *Willapa Trading*, 45 Wn. App. at 787; *see also* 8 A.L.R. 653, §14[a]. The *Willapa Trading* court created an exception allowing a corporation to act *pro se* through its sole stockholder.

D. Limitations and Policy of the *Willapa Trading* Sole-Stockholder Exception

The department argues that the *Willapa Trading* exception does not apply to Mr. Kirby because he was not also the president and a director. This argument betrays a misunderstanding of corporate law, agency principal relationships, and the policy behind the *Willapa Trading* exception. In explaining why the *Willapa Trading* exception applies to the cases at bar, we discuss the public policy for the rule and its limitations.

First, duties of directors and officers do not necessarily coincide with legal representation in court. Directors act as part of a board, not individually. And specific duties of officers are defined by the corporation. If a corporation wanted to give ultimate power to one officer and call that officer a vice president, the law would not prohibit such a delegation. And such a delegation might be to an at will employee. On the contrary, a sole owner has concentrated and undivided interests.

such, and that if his appearance for the corporation was error, it was invited error, which the president could not use to gain relief on appeal.” 8 A.L.R. 653, §14[a].

Second, directors and officers serve the corporation and its stockholders; they are agents of the principal. Mr. Kirby,² for the purposes of representing interests in court, is the principal and not an agent.

Third, as the *Advocates* court recognized and as argued above, the rule articulated in *Willapa Trading* focuses on unified financial interests. *See Advocates, supra*. It is sufficient to meet the rule if the person representing the corporation is its sole stockholder (shareholder, or member).

The law recognizes that an individual may represent himself or herself *pro se*.³ The department offers no public policy reason supporting its position that corporations should not enjoy the same privilege, as long as the dangers of unlicensed practice of law are addressed.

In the sole-stockholder circumstance, the dangers of unlicensed representation are absent.⁴ As an example of a limitation of the sole stockholder exception, the *Advocates* court distinguished *Willapa Trading* and did not allow a non-lawyer to represent a non-profit association. *Advocates*, 155 Wn. App. at 484. Limiting the representation to instances where there is but one stockholder in a for-profit corporation is a reasonable limitation to guard against the dangers of the unlicensed practice of law.

² Mr. Kirby is also an officer of the corporation. *See e.g.* (Resp. Brief at pg. 2 fn. 3 (department citing facts outside the record)).

³ “Lawyers are the only persons in whom ignorance of the law is not punished.” Jeremy Bentham (1748-1832).

⁴ The sole stockholder is essentially representing himself. Therefore, it is not representation of some other person or entity. The department says the rule is “more firmly grounded in” RCW 2.48.170 (prohibiting unlicensed practice), GR 24 (defining practice of law in relation to “another”), APR 1(b) (prohibiting unlicensed practice).

Another limitation to the rule is the court's inherent power to exercise reasonable control over the proceedings, including restrictions on a *pro se* litigant's right to proceed without counsel. *See* RCW §§ 2.28.010, 2.28.060 (concerning powers of courts and judicial officers to enforce order in proceedings); *see also State v. Madsen*, 168 Wn.2d 496, 509 n.4 (2010) ("After *pro se* status is granted, the court retains power to impose sanctions for improper courtroom behavior," and may also appoint standby counsel or "even terminate *pro se* status if a defendant is sufficiently disruptive or if delay becomes the chief motive."); *Russell v. Catholic Charities*, 70 Wn.2d 451, 453, 423 P.2d 640 (1967) (assessing the competence of a party arguing *pro se* and then appointing a guardian to manage litigation); *Matter of Holliday's Tax Services, Inc.*, 417 F.Supp. 182, 184 (E.D.N.Y. 1976) (relying on court's inherent power to supervise proper administration of justice by allowing corporation to appear *pro se*).

In summary, the general rule is that corporations must appear by counsel. The exception to that rule is that (for profit) corporations may appear *pro se* through their sole-stockholder. The trial court has discretion to impose reasonable restrictions or limitations on the right to appear *pro se* on individuals and corporations in order to exercise control over and maintain order in the proceedings.

The sole-stockholder exception recognizes the high cost of litigation on small businesses. In a report by the Small Business Administration, legal costs for litigation ranged from \$3,000 to \$150,000.⁵ Small business owners felt they had

⁵ Small Business Research Summary, October 2005; (reviewing Klemm Analysis Group, Impact of Litigation on Small Business) <http://www.sba.gov/advo/research/rs265.pdf>.

to “recoup” these losses by such measures as cutting operating expenses, because raising prices would put them at a competitive disadvantage. “Small business owners indicated they would go to great lengths to stay out of court, which was their major motivation for settlement,” and that the main reason settlement failed was that the opposing party refused to meet and negotiate, preferring to go to court.” *Id.*

E. Mr. Kirby ought to be able to represent his company *pro se* in this administrative setting.

Under *Willapa Trading*, the right to represent a corporation in court extends to all for-profit corporations. In the alternative, this court should reverse the trial court on the ground that Mr. Kirby may represent the corporation in administrative appeals. As explained in the opening brief, (pgs. 11-12), the superior court was entertaining an appeal pursuant to the Administrative Procedures Act. *See* Chapter 34.05 RCW. APA appeals make up less than eight-tenths of a percent of superior court cases, and permitting the representation is consistent with statutory and equitable considerations.

The APA permits non-lawyer representation. RCW 34.05.410(1). Regulations extend that permission. *See* WAC 263-12-020(3); WAC 10-08-020(3).

Equitable considerations support the representation. If Puget Sound Security did not pay its obligations to the Washington State Employment Security Department, the state would take the position that it could pursue Mr. Kirby personally. *See* (Opening Brief pg. 13). In this context, Mr. Kirby’s interests are

perfectly aligned with that of Puget Sound Security, and the court should permit him to represent the company in this administrative appeal.

F. The case title may be amended by this court if deemed necessary.

This appeal concerns two decisions from the Employment Security Department. Puget Sound Security is the relevant employer. There is no dispute as to who the proper parties are with respect to the caption in the pleadings. Although there may be pleadings at the trial court referring to a different party name, the court should treat Puget Sound Security as the plaintiff/petitioner consistent with CR 10(a)(1)(concerning the title of the action), CR 15(authorizing amended pleadings), and CR 8(f)(construing all pleadings as to do substantial justice), or order a change to the pleadings pursuant to RAP 7.3 if deemed “necessary or appropriate to secure the fair and orderly review of [the] case.” This issue is not dispositive.

G. The department is not entitled to attorney’s fees under RAP 18.9.

The department asks this court for an award of attorney’s fees under RAP 18.9. The department argues that relying on *Willapa Trading* is so devoid of merit as to be frivolous. (Resp. Brief pg. 19-20). It cites *Advocates*, which stated, “[A] non-lawyer could appear on behalf of himself and a corporation of which he was the president, director, and sole stockholder,” because “the litigant ‘was, in fact, acting on his own behalf’ and thus his personal interests were virtually indistinguishable from those of his corporation.” *Advocates for Responsible Development*, 155 Wn. App. at 483-484. That court distinguished *Willapa Trading* by the fact that a non-profit association is different from a for-profit

corporation, and held that the non-lawyer could not appear for the non-profit association. The intermediate court went on to sanction the non-lawyer for trying to advance the argument that he could represent the association. *Id.* at 489. In other words, *Advocates* stands for the proposition that failure to distinguish between a for-profit corporation and a non-profit association in terms of non-lawyer representation is sanctionable. The *Advocates* decision supports Puget Sound Security on this point.

This court resolves any doubts under RAP 18.9(a) in the appealing party's favor. *See Skinner v. Holgate*, 141 Wn. App. 840, 858, 173 P.3d 300 (2007). Additionally, the Supreme Court reversed the intermediate appellate court. The Supreme Court cited a case in which a non-lawyer represented an environmental organization, so that the position was not meritless. *Advocates for Responsible Development v. Western Wash. Growth Management*, __ Wn.2d __ (No. 84501-8, Nov. 18, 2010) (citing *Vermont Agency of Nat. Res. v. Upper Valley Reg'l Landfill Corp.*, 621 A.2d 225, 159 Vt. 454, 458 (1992)).

In other words, the department relies primarily on the *Advocates* case to argue that Puget Sound Security's position lacks merit, yet the *Advocates* case actually supports Puget Sound Security. Additionally, the Supreme Court took review of the case and reversed the appellate court solely on the issue of attorney's fees, and that reversal also supports Puget Sound Security. There is no basis in law for the department's continuing request for attorney's fees in this case.

H. Conclusion

Jeff Kirby is Puget Sound Security for the purposes of self-representation in court. If he is comfortable representing himself in court without an attorney, and if the court does not have case-specific reasons to deny him, this court should permit it. The court should err on the side of allowing access to justice and assuming the competence of entrepreneurs. Puget Sound Security wants to have its day in court and argue the merits of its case, and Mr. Kirby would like the opportunity to do it himself.

Respectfully submitted this 15th day of December, 2010

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Declaration of Service

I caused a copy of the foregoing Appellant's Reply Brief to be served on the following in the manner indicated below:

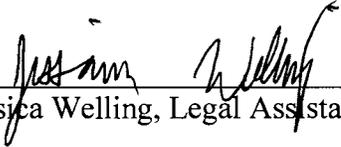
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on today's date.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my belief.

SIGNED this 15th day of December, 2010, at Seattle, Washington.



Jessica Welling, Legal Assistant

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