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COURT OF APPEALS
DISTRICT II

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STATE OF WASHINGTON
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NO. 28375-1-II

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

WASHINGTON EDUCATION ASSOCIATION,

Appellant,

v.

GARY DAVENPORT, MARTHA LOFGREN, WALT PIERSON,
SUSANNAH SIMPSON and TRACY WOLCOT,

Respondents, individually, and on behalf
of all other nonmembers similarly situated.

BRIEF OF *AMICUS CURIAE*
WASHINGTON FEDERATION OF STATE EMPLOYEES

Edward Earl Younglove III
WSBA#5873

Joaquin M. Hernandez
WSBA#31619
Attorneys for the Washington
Federation of State Employees

PARR & YOUNGLOVE, P.L.L.C.
1800 Cooper Point Rd SW, #16
PO Box 7846
Olympia, WA 98507-7846
(360) 357-7791

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I. STATEMENT OF THE CASE

The Washington Federation of State Employees ("WFSE"), *amicus curiae*, agrees with the Statement of the Case articulated by the Washington Education Association ("WEA") in its Brief and Reply Brief.¹

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The WFSE is affiliated with the American Federation of State, County and Municipal Employees ("AFSCME") as AFSCME Council 28. The WFSE is a labor organization that represents employees of the State of Washington. Like the WEA, the WFSE represents public employees. Over 20,000 state employees are members of the WFSE, making it the largest state employee union in the state of Washington. The WFSE expects exponential growth in membership because of recent civil service reform.²

The WFSE evaluates and supports candidates for public office within Washington, including

¹ See Appellant's Brief, 2-5; Appellant's Reply Brief, 1-2.

² See RCW Ch. 41.80, Ch. 354 Laws 2002.

candidates for the Legislature and for statewide office. Additionally, the WFSE supports legislative bills, referendums and initiatives in the interests of its members. Since the Legislature funds state employees' salaries and benefits and sets state employees' terms and conditions of employment,³ the WFSE has a particular interest in the Legislature (and state political processes). Accordingly, WFSE expends funds to advance the interests of the union and its members through lobbying expenses and campaign contributions.

Since the passage of Initiative 134, the WFSE has cooperated and interacted with the Public Disclosure Commission ("PDC") to assure compliance with the Public Disclosure Act ("PDA" or "Act"). The WFSE continues to consult with the PDC and to apprise it of WFSE's structure and internal organization.

The WFSE and its counsel consult with the PDC to obtain guidance and counsel regarding the

³ See RCW 41.06; see also Ortblad v. State, 88 Wn.2d 380, 561 P.2d 201 (1977) (Ortblad II); Ortblad v. State, 85

various mechanisms the union has in place to participate in the political process. The union applies the PDC's guidance when administering union business and affairs with regard to its political participation and agenda.

This case presents a vital interest to the WFSE and its members. Similar to the WEA, the WFSE has nonunion member agency fee payers who, pursuant to agency shop provisions in collective bargaining agreements authorized by statute, pay an "agency fee" to the union in an amount equal to union member dues.⁴ Likewise, on a yearly basis, the WFSE complies with the constitutionally mandated "Hudson" process to assure that such fee payers have the opportunity to object to the WFSE's use of a portion of their agency fee for political expenditures.

Wn.2d 109, 530 P.2d 635 (1975).

⁴ See RCW 41.06.150; Association of Capitol Powerhouse Engineers v. Division of Bldg. and Grounds, 89 Wn.2d 177, 570 P.2d 1042 (1977).

This process was never questioned until recently.⁵ The PDC alleged that the WEA failed to follow RCW 42.17.760 of the PDA.⁶ As a result of the recent litigation, certain WEA agency fee payers brought a private cause of action against the WEA for violation of the PDA. In this case, the fact that the trial court permitted an individual to bring a private cause of action under the PDA means that the WFSE would face similar duties and liabilities that the WEA faces in light of the trial court's ruling.

Similarly, if the trial court's ruling stands, the WFSE faces liabilities from private individuals for any infraction it may commit under the PDA. The WFSE faces additional legal expenditures to defend private causes of action under the PDA in addition to any expenditures it incurs to comply with the PDA. Accordingly like the WEA, the WFSE has a vital interest in

⁵ See Washington Educ. Assoc. v. State ex. rel. Wash. State Pub. Disclosure Comm., No. 28264-0-II (2002).

⁶ See id.

assuring that the PDA creates no express or implied private cause of action.

III. ARGUMENT

This Court recently decided the Act provides no implied private right of action. See Crisman v. Pierce County Fire Protection Dist. No. 21, ___ Wn.App. ___, 60 P.3d 652 (2002). An individual thus cannot bring a private cause of action under RCW 42.17.760. The same analysis and rationale reasoned in Crisman applies to this case.

The statute neither expresses nor implies a private right of action. Instead, the Act provides express remedies through RCW 42.17.400 and RCW 42.17.390, making it illogical to imply a private right of action. As Crisman recognized and both parties agree, courts find an implied private right of action when elements articulated in Bennett v. Hardy, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990), are met. See Crisman, 60 P.3d at 655. A statute creates an implied private right of action when (1) the plaintiff is within

the class for whose "especial" benefit the statute was enacted, (2) the legislative intent, explicitly or implicitly, supports creating or denying a remedy, and (3) whether implying a remedy is consistent with the underlying purpose of the legislation. Id.

As explained below, the PDA's legislative purpose and intent does not support creating a private right of action because certain remedies are expressed in the Act, which implies new remedies and private causes of actions are unavailable. Implying a private right of action is also inconsistent with the Act's central purpose--to protect the public from unfair campaign practices and provide the public with disclosure of campaign activities. See Crisman, 60 P.3d at 655.

In this case, neither the legislative intent nor the voter's intent supports finding an implied private right of action when the Bennett elements are considered. The Act was enacted for the public as a whole, not for Davenport's

"especial" benefit. Procedures and remedies are expressed in the Act for public benefit, which implies the legislature and voters did not intend creating an implied private remedy. Considering these factors, an implied private right of action is inconsistent with the Act's underlying purpose.

A. This Court recently held that the Act does not create an implied private cause of action, thus precluding Davenport from bringing this action.

This Court recently declined to extend an implied private right of action to citizens under the Act.⁷ See Crisman, 60 P.3d at 655-56 (note added). After examining the Act's intent, the Court declined to extend an implied private cause of action based on two factors. The same two factors examined in Crisman apply to this case.

In Crisman, this Court was requested to determine whether a statute within the Act permitted an individual to bring a private

⁷ The Division II Crisman opinion was published on December 31, 2002, after the parties submitted their appellate briefs.

action. The statute at issue precluded a public official or his/her employee from using any public facility for campaign purposes. See RCW 42.17.130.⁸ The plaintiff had brought a private action against the county fire district and its executive director. The plaintiff, who lost an election to the defendant executive director, alleged the defendants coerced district employees into campaigning for the incumbent executive director.

After recognizing the elements outlined in Bennett, this Court examined several facets of the Act that barred an implied private right of action. First, this Court noted that a citizen action must be brought "in the name of the state[.]" Id. at 655 (citing RCW 42.17.400(1)). Second, the Court recognized that RCW 42.17.390 expressed various enforcement procedures and

⁸ "No elective official nor any employee of his office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion

provided both legal and equitable remedies. Id. Crisman argued that RCW 42.17.390 expressly permitted a court to impose civil remedies and sanctions "in addition to any other remedies provided by law," which implied a private right of action. Id. (emphasis in original and citation omitted). However, this Court disagreed and asserted that the remedies in RCW 42.17.390 suggested that the legislature intended no implied private right of action. Id. at 656. To the contrary, RCW 42.17.390 gave the attorney general, county prosecutor, or citizen enforcer considerable latitude in seeking the appropriate relief. Id.

This Court thus found no implied private right of action under the Act. Id. This Court examined the Act's policy favoring the public as a whole. Id. at 655. The same public policy applies in this case. Similar to Crisman, this Court should find the mechanisms and remedies in

of or opposition to any ballot proposition. . . ." RCW 42.17.130.

place under the Act preclude Davenport from bringing a private cause of action.

B. The Act expressly creates a remedy for the public upon following certain procedures, thereby implicitly denying a private right of action.

As outlined in Bennett, legislative intent may deny or create a remedy. To this end, the Court should examine the intent behind Initiative 134 to find any implicit intent of a private remedy. See State ex rel. Evergreen Freedom Foundation v. Washington Educ. Ass'n., 140 Wn.2d 615, 630, 999 P.2d 602 (2000) ("The basic rules of statutory construction applicable to legislative enactment also apply to initiatives").⁹ The electorate's intent in initiatives is ascertained from the language of the initiative itself, as well as from statements contained in the official Voters Pamphlet. Id.

⁹ In State ex rel. Evergreen Freedom Foundation, the Evergreen Freedom Foundation sought the same damages it is seeking under this action. It claimed that the WEA was an "employer" under RCW 42.17.680, and it was therefore restricted in using payroll deductions for political expenditures. The Court found that the WEA was not an "employer" under the statute and was not liable. 140 Wn.2d at 640.

at 636-37. Initiatives are not construed like other legislation because reviewing courts "focus on the language of the initiative 'as the average informed lay voter would read it.'" . . . "Id. at 637 (citation omitted). The court may consider arguments made for and against the initiative in the Voters Pamphlet. Id.

The Initiative's intent is clear and is expressed in RCW 42.17.610¹⁰ and .620.¹¹ See

¹⁰ RCW 42.17.610 provides:

The people of the state of Washington find and declare that:

(1) The financial strength of certain individuals or organizations should not permit them to exercise a disproportionate or controlling influence on the election of candidates.

(2) Rapidly increasing political campaign costs have led many candidates to raise larger percentages of money from special interests with a specific financial stake in matters before state government. This has caused the public perception that decisions of elected officials are being improperly influenced by monetary contributions.

(3) Candidates are raising less money in small contributions from individuals and more money from special interests. This has created the public perception that individuals have an insignificant role to play in the political process.

¹¹ RCW 42.17.620 provides:

By limiting campaign contributions, the people intend to:

Evergreen Freedom Foundation, 140 Wn.2d at 637. Essentially, Initiative 134 sought to limit campaign contributions to ensure public trust in government, which an informed lay voter would view the Initiative as trying to accomplish. See RCW 42.17.620(3); see also Cowles Pub. Co. v. Pierce County Prosecutor's Office, 111 Wn.App. 502, 510, 45 P.3d 620 (2002) (the basic purpose and policy of chapter 42.17 RCW is to allow public scrutiny of government, rather than to promote public scrutiny of particular individuals who are unrelated to any governmental operation).

Both Initiative 134 and the Act expressly create remedies. However, neither provides remedies for private individuals like Davenport. The voters and legislature intended citizens to enforce the Act through RCW 42.17.400, not in a

(1) Ensure that individuals and interest groups have fair and equal opportunity to influence elective and governmental processes;

(2) Reduce the influence of large organizational contributors; and

(3) Restore public trust in governmental institutions and the electoral process.

private cause of action. Initiative 134 expressly provided certain penalties codified under the Act's "civil remedies" statute. See RCW 42.17.390. By implication, the Initiative intended no private remedies.

The Act currently permits a court to impose civil remedies provided by law. Davenport's argument that the Act implies a private remedy is difficult to reconcile with the remedy provisions expressed in RCW 42.17.390. The Act created a new penalty for violating a provision irrelevant to this action. It never amended nor created civil remedies in addition to those outlined in RCW 42.17.390 and never altered the procedural safeguards in RCW 42.17.400.

Davenport seeks a private remedy where the Act expresses and limits the remedies available to individuals bringing a citizen action. Such was the case with the plaintiff in Crisman. RCW 42.17.390 expressly provides for "any other remedies provided by law." This Court determined that RCW 42.17.390 basically gives the attorney

general, county prosecutor, or citizen enforcer considerable latitude in seeking the appropriate relief. Crisman, 60 P.3d at 656. The statute in no manner suggests a private remedy under an implied private cause of action. See id.

This leaves the next question, which is whether Davenport and future plaintiffs may disregard the procedures and remedies prescribed in RCW 42.17.400(4) and .390, which would render the Act's underlying purpose and statutory act meaningless.

C. Permitting a private right of action renders the Act's statutory scheme superfluous and ignores the underlying purpose of the Act because defendants would be left unprotected from frivolous lawsuits.

Davenport's interpretation that violations of RCW 42.17.760 create an individual "private" right of action ignores the underlying purpose of the Act. Although Davenport restricts and narrows his reasoning to RCW 42.17.760, he ignores the safeguards and procedures prescribed in RCW 42.17.400(4) and .390. Statutes should be

construed so that no part of the statutory scheme is rendered superfluous. Sim v. Washington State Parks and Recreation Comm., 90 Wn.2d 378, 383, 583 P.2d 1193 (1978); see also Nisqually Delta Ass'n v. City of DuPont, 95 Wn.2d 563, 568, 627 P.2d 956 (1981) ("whenever possible, courts should avoid a statutory construction which nullifies, voids, or renders meaningless or superfluous any section or words"). All provisions must be harmonized. State v. Thomas, 121 Wn.2d 504, 511, 851 P.2d 673 (1993). The Washington Supreme Court stated that RCW 42.17.400(4) provides defendants procedural safeguards to protect defendants from frivolous actions. See Fritz v. Gorton, 83 Wn.2d 275, 314, 517 P.2d 911 (1974). Davenport requests this Court to make an exception. In other words, he seeks an exception that renders the enforcement provision in RCW 42.17.400(4) and civil remedies provision in RCW 42.17.390 superfluous.

RCW 42.17.400 establishes a detailed scheme for enforcing the Act, which includes RCW

42.17.760. The 1975 amendments to the Act created additional procedures to safeguard defendants against unfounded lawsuits by having citizens give additional notice requirement to the attorney general and county prosecutors. See Laws 1975 1st ex. sess. c 294 § 40.

By definition, Davenport, as a member of the public, benefits from the Act. However, the Act was not enacted for his special benefit. The Act was instead passed for the public's benefit by curtailing certain activities and providing for certain disclosures. Accordingly, it regulates how a citizen must bring an action under the Act. See RCW 42.17.400(4).

Davenport's private cause of action would provide an opportunity for lobbyists, politicians, campaign organizers, companies, or a single voter to bring a private cause of action without having the PDC investigate and perhaps ultimately prosecute defendants for violations of the Act. This Court already realized the perils of ignoring the procedural requirements in

RCW 42.17.400 and thus found it necessary to follow the procedures. Crisman, 60 P.3d at 655.

Other jurisdictions have found that their respective fair campaign practice acts do not imply a private right of action. While not controlling, decisions from other jurisdictions provide insight as to why laws like Washington's Act do not imply a private right of action.

The Supreme Court of Kansas dismissed a private cause of action alleging violations of their Campaign Finance Act.¹² The Court in Nichols v. Kansas Political Action Comm., 11 P.3d 1134 (Kan. 2000), analyzed whether a private right of action existed by employing a similar test found in Bennett. Specifically, the Kansas court determined whether the statute was designed to protect a specific group of people rather than to protect the general public. Id. at 1143. The Court also reviewed legislative history in order to determine whether a private right of action

was intended. Id. (recognizing Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975)). The Kansas court found that their act does not imply a private right of action. Id. at 1145. Other jurisdictions have reached similar conclusions. See, e.g., Goff v. Ehrlich, 776 So.2d 1011 (Fla. App. 2001); Common Sense Alliance v. Davidson, 995 P.2d 748 (Colo. 2000); Forster v. Delton Sch. Dist., 440 N.W.2d 421 (Mich. App. 1988); Champ v. Poelker, 755 S.W.2d 383 (Mo. App. 1988). This Court should follow Crisman and similarly conclude that Washington's Act does not allow a private cause of action to individuals.

IV. CONCLUSION

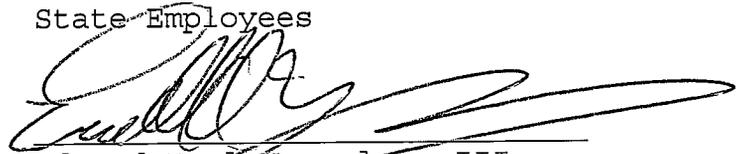
This Court earlier found that the PDA provides no express or implied private right of action in Crisman. Davenport's arguments would make other sections of the Act superfluous if this Court finds that an implied private right of action exists. This is not to say a citizen

¹² The Kansas Campaign Finance Act does not contain the detailed safeguards RCW 42.17.400(4) imposes. See Kan.

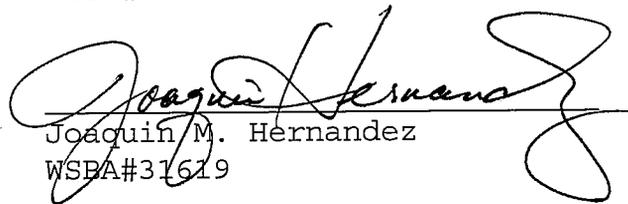
cannot bring an action under the Act. However, the citizen must follow the procedures outlined in RCW 42.17.400. Then he or she would avail himself or herself to the expressed remedies prescribed in RCW 42.17.390. This Court should find no implied private right of action exists under the PDA, and reverse the trial court's ruling and therefore dismiss Davenport's private action.

DATED this 7th day of February, 2003.

PARR & YOUNGLOVE, P.L.L.C.
Attorneys for *Amicus Curiae*
Washington Federation of
State Employees



Edward Earl Younglove III
WSBA#5873



Joaquin M. Hernandez
WSBA#31619

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WALT PIERSON, SUSANNAH SIMPSON,)
AND TRACY WOLCOT,)
Respondents, individually,)
and on behalf of all other)
nonmembers similarly)
situated.)

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
COUNTY OF THURSTON) ss.

I, Carla C. Flynn, being over the age of eighteen, a resident of the State of Washington, and not a party to this action, certify that I am the assistant to the Attorney for the Appellant herein. On the 7th day of February, 2003, I did send by US mail a copy of the Motion of the Washington Federation Of State Employees To Be Granted Amicus Curiae Status and Brief of Amicus Curiae Washington Federation of State Employees to the Respondents by mailing the same to:

Harriet Kay Strasberg
Attorney At Law
3136 Maringo Road SE
Olympia, WA 98501

Aimee Iverson
Washington Education
Association
PO Box 9100
Federal Way, WA 98063

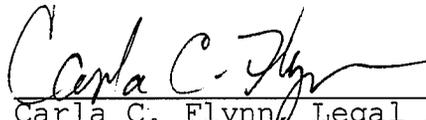
AFFIDAVIT OF MAILING

PARR & YOUNGLOVE, P.L.L.C.
ATTORNEYS AT LAW
WESTHILLS II OFFICE PARK
1800 COOPER POINT RD SW, BLDG 16
PO BOX 7846
OLYMPIA, WASHINGTON 98507-7846
FACSIMILE (360) 754-9268
office@parrandyounglove.com
(360) 357-7791

1 On the 7th day of February 2003, I did also send by ABC
2 Legal Services copies of the above named documents to:

3 Steven t. O'Ban and
4 Nathaniel L. Taylor
5 Attorneys At Law
6 Two Union Square
7 601 Union Street, Suite 4900
8 Seattle, WA 98101

9 Judith Lonnquist
10 Attorney At Law
11 1218 Third Avenue
12 Suite 1500
13 Seattle, WA 98101

14 
15 _____
16 Carla C. Flynn Legal Assistant

17 SUBSCRIBED AND SWORN to before me this 7th day of February, 2003.



18 
19 _____ (PRINT NAME)
20 Jentri Linn
21 NOTARY PUBLIC in and for the State
22 of Washington, residing at Tumwater
23 Commission expires: 8-22-06

24
25
26
AFFIDAVIT OF MAILING

PARR & YOUNGLOVE, P.L.L.C.
ATTORNEYS AT LAW
WESTHILLS II OFFICE PARK
1800 COOPER POINT RD SW, BLDG 16
PO BOX 7846
OLYMPIA, WASHINGTON 98507-7846
FACSIMILE (360) 754-9268
office@parrandyounglove.com
(360) 357-7791