Supreme Court No. 93227-1
Court of Appeals No. 46640-6

SUPREME COURT
OF THE STATE OF WASHINGTON

ARTHUR WEST, a Citizen of Washington State,

Petitioner,

v.

WASHINGTON NORML, et al.,

Respondents.

RESPONDENT NORML'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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Respondent is Washington NORML, *et alia*, ("NORML").

II. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals Division II decision conflict with the Supreme Court's Decision in *Utter*?
2. Is dismissal of Petitioner's claim for failure to provide an attorney a significant question of state law?
3. Is there a conflict between the Division I and Division II Courts of Appeals regarding citizens' actions under the Fair Campaign Practices Act?
4. Is the requirement of retaining counsel an issue of significant public concern?

III. STATEMENT OF THE CASE

Petitioner has sought to bring a statutorily proscribed *pro se* suit in "the name of the state." Petitioner lost at both the Superior Court and appellate court levels. Petitioner's claims are barred and Petitioner's request for further review lacks legal basis.

In December 2012, Petitioner filed a citizen suit, *pro se*, in Thurston County Superior Court ostensibly authorized by the Washington state Fair Campaign Practices Act ("FCPA"), RCW 42.17.460. Pet. Ex. A 1-8. In its Motion to Dismiss, Respondent challenged Petitioner's action on the grounds that Petitioner failed to bring his claims in the name of the state, as required by the FCPA, and failed to retain licensed legal counsel. The Superior Court granted

Respondent's Motion to Dismiss for the foregoing reasons, but also held that the action would not be dismissed if Petitioner retained counsel within two weeks of the date of the order. *Id.* Petitioner failed to do so. After more than a year, the Superior Court dismissed Petitioner's action on August 22, 2014.

Petitioner appealed to the Washington State Court of Appeals Division II, arguing the trial court dismissed his action in error because the FCPA authorizes actions by "persons" and "individuals." The statute's plain meaning, along with all relevant Washington state jurisprudence, precludes Petitioner's assertion that the FCPA authorizes *pro se* "citizen suits." The Court of Appeals affirmed the lower court's decision. *Id.*

IV. DISCRETIONARY REVIEW SHOULD BE DENIED

1. The Court of Appeals Division II decision is consistent with *Utter.*

Washington jurisprudence and the text of the FCPA bar Petitioner's *pro se* suit and support the lower court rulings. The FCPA authorizes citizens to *initiate* actions *in the name of the state* once certain procedural requirements are satisfied. RCW 42.17A.765(4). Petitioner's argument that this necessarily authorizes his *pro se* action hinges on an incorrect reading of the Court of Appeals decision in *Utter*, which Petitioner cites as the controlling authority on this issue. *Utter v. Building Industry Ass'n of Washington*, 182 Wash.2d 398, 341 P.3d 953 (Wash., 2015). The court's holding in *Utter* does not support *pro se* prosecution under the FCPA.

Petitioner's Petition for Discretionary Review reduces *Utter*'s holding to the following: "[The FCPA is] obviously based on the notion that government

may be wrong, and then it is up to citizens to expose the violation." Petitioner's Br. 5. From this, Petitioner concludes that the statute necessarily authorizes citizen actions to be brought *pro se* to effectuate its purpose. *Utter*, however, merely states that the FCPA was intended to enable a citizen to *initiate* an action; it nowhere states that citzens may *personally prosecute* such an action without counsel.

a. There is a strong presumption against a broad reading of the pro se *exception.*

Washington prohibits the unauthorized practice of law as a gross misdemeanor. *Dutch Village Mall v. Pelletti*, 162 Wn. App. 531, 535, 256 P.3d 1251 (2011). See also RCW 2.48.170, RCW 2.48.180(3)(a). The *pro se* exception to this general rule applies "only if the layperson is acting *solely on his own behalf* with respect to his own legal rights and obligations." *Cottringer v. Dep't of Emp't Sec.*, 162 Wn. App. 782, 787, 257 P.3d 667 (2011) (quoting *Wash. State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n*, 91 Wn.2d 48, 56, 586 P.2d 870 (1978) (emphasis original)).

There is no public policy favoring *pro se* litigation for its own sake. On the contrary, the Washington legislature (along with the state legislatures of the 49 other states) has criminalized the practice of law without a license with very few exceptions. Petitioner fails to identify any case law or legislative enactment, from this jurisdiction or elsewhere, endorsing private citizens acting *pro se* on another's behalf – let alone on behalf of an entire class of plaintiffs.

b. Washington and Ninth Circuit case law preclude Petitioner's interpretation of the FCPA.

Washington law proscribes ostensibly "*pro se*" representation in situations similar to Petitioner's, even if the *pro se* litigant has a legitimate interest in the lawsuit. For example, Washington law provides that an individual shareholder cannot litigate *pro se* in the name of his or her corporation. *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 155 Wn. App. at 484-85 (2010). Even the sole owner, member, and officer of a corporation cannot pursue litigation *pro se* on behalf of the corporation. *Dutch Vill. Mall v. Pelleti*, 162 Wn. App. at 534, 539 (2011).

In *Stoner v. Santa Clara County* the Ninth Circuit held that the plaintiff could not bring a *qui tam* action *pro se* on behalf of the federal government based on a "citizen suit" provision in a (non-FCPA) statute. *Stoner v. Santa Clara County Office of Education*, 502 F.3d 1116, 1128 (9th Cir. 2007). The Ninth Circuit forbade plaintiff to bring the action *pro se* even though the statute granted a citizen the right to "conduct the action," because the relevant statue required the suit be brought in the name of the state. *Id.* at 1131. This case distinguishes between a citizen's right to initiate a suit and the right to prosecute it *pro se*.

c. The FCPA does not abrogate established limits to pro se *litigation.*

Nothing in the FCPA abrogates the settled limits to *pro se* actions. The statute requires a citizen action be brought *in the name of the state.* RCW 42.17A.765(4). This authorizes a citizen to act *pro civilis* (in the name of the people) rather than *pro se* (in the name of his or herself), as Petitioner is attempting to do in the instant case. One who initiates a citizen action has no

unique personal interest in the outcome of the case since any judgment resulting from a citizen action under the FCPA "escheats to the state." RCW 4.17A.765(4)(b). Petitioner offers no rationale nor legislative history to justify departing from this standard analysis.

2. Dismissal of Appellant's claims does not merit Supreme Court review.

a. Appellant's argument does not warrant review in this Court.

Petitioner's argument that his action was improperly dismissed under CR 41(b) does not meet the standard of review set forth in RAP 13.4(b). Petitioner fails to identify any material conflict in state law or a compelling public interest to justify this court reviewing the orders dismissing his action. The Supreme Court is a court of law and "not a court of error correction." See Justice Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91, 92 (Spring 2006). That is especially true here where dismissal was without prejudice and Petitioner is free to re-file his action in the Superior Court so long as he retains counsel. CR 41(a)(B)(2). The Washington State Supreme Court is not the forum to litigate matters that do not present an important question of law. Nor is the alleged inconvenience of Petitioner re-filing his action in Superior Court *with* counsel an issue of public concern that merits review.

b. The Superior Court's dismissal of Appellant's action was appropriate.

The Superior Court's dismissal of Petitioner's action was both appropriate and within its discretion. Dismissal is appropriate for failure "to comply with ... any order of the court." CR 41(b)(1). Petitioner's argument engages only the first

part of the rule. Nowhere in Petitioner's Petition for Discretionary Review does Petitioner account for his failure to comply with the Superior Court's order granting dismissal. The Superior Court's July 22, 2013 order granting Respondent's Motion to Dismiss gave Petitioner two weeks to engage counsel and avoid dismissal. Petitioner failed to retain counsel within that period of time and yet his action was not dismissed until August 2014 – more than a year later.

Petitioner misapplies the Washington State Supreme Court decision in *Wallace v. Evans*, which stands for the modest proposition that mere inaction is insufficient to warrant dismissal. *Wallace v. Evans*, 131 Wn.2d 572, 577-578, 934 P.2d 662 (1997). Petitioner disregards *Wallace*'s holding that CR 41(b)(1) "refers to unacceptable litigation practices other than mere inaction." *Id.* at 573. Petitioner's failure to retain counsel was an "unacceptable litigation practice" and not "mere inaction" because it directly contravened the Superior Court's order.

Petitioner further asserts that dismissal was inappropriate because the law was unsettled as to the requirement he retain counsel. The law is and was well settled and the Superior Court acted in accordance with those settled principles and the plain meaning of the FCPA.

3. There is no conflict between the Court of Appeals decision and *West v. Washington State Association of District and Municipal Court Judges.*

There is no conflict between the Court of Appeals Division II's decision below and *West v. Washington State Association of District and Municipal Court Judges* (DMCJ). *West v. Washington State Association of District and Municipal Court Judges*, __ Wn.App. __, Ct. of Appeals Div. I, No. 72337-5-I (Nov. 2, 2015). In the West case, Petitioner brought an action against the Washington State

Association of District and Municipal Court Judges under the FCPA.[1] As in this case, Petitioner failed to comply with procedural requirements under the statute. The statute includes several procedural requirements that must be met before a citizen action can be commenced. They include, as relevant:

> (a) This citizen action may be brought only if:
> (i) The attorney general and the prosecuting attorney have failed to commence an action hereunder within forty-five days after the notice;
> (ii) The person has thereafter further notified the attorney general and prosecuting attorney that the person will commence a citizen's action within ten days upon their failure to do so;
> (iii) The attorney general and the prosecuting attorney have in fact failed to bring such action within ten days of receipt of said second notice; and
> (iv) The citizen's action is filed within two years after the date when the alleged violation occurred.
>
> RCW 42.17A1.765(4)(a).

The court in *DMCJ* found that Petitioner did not meet the notice requirement in RCW 42.17A.765(4)(a), which must be satisfied as a prerequisite to any citizen suit. The Attorney General's prerogative to prosecute preempts enforcement by a citizen action. *West v. Washington State Association of District and Municipal Court Judges*, __ Wn.App. __, Ct. of Appeals Div. I, No. 72337-5-I (Nov. 2, 2015). Because the Court of Appeals in *DMCJ* did not reach the issue of whether Petitioner could have proceeded *pro se* had he met the other procedural requirements, its holding is not in conflict with – nor even relevant to – the issues under consideration in this case.

[1] Petitioner is well known to Washington courts as a serial *pro se* litigant.

4. Petitioner's action does not implicate a public concern worthy of review.

Petitioner's action does not implicate a substantial public concern. On the contrary, the relief he seeks is counter to public policy. Petitioner claims that, without the right to bring a citizen action *pro se*, citizens' voices will go unheard and the FCPA will fail to meet its purpose. There is no recognized public interest in the proliferation of *pro se* actions. As the *Utter* court held, the right granted to citizens in the FCPA is to initiate, not personally prosecute. Indeed, public policy generally discourages parties from litigating without the counsel of a licensed attorney.

A citizen's ability to seek redress under the FCPA with assistance of counsel undercuts Petitioner's claim that his suit implicates a public concern worthy of review. There are resources available to litigants that have difficulty finding an attorney at the outset of an action. Furthermore, Petitioner's alleged inability to secure counsel does not constitute a matter of public concern warranting review because it does not impact the FCPA's effectiveness generally. See *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (court found "substantial public interest" where sentencing action would have invited unnecessary litigation, caused general confusion, and chilled further action). In contrast, Petitioner's inability to proceed *pro se* does not preclude or implicate any other citizen's ability to bring the same action with counsel, as contemplated by the statute. It bears noting that Petitioner has been represented by counsel since the dismissal.

V. CONCLUSION

Petitioner's arguments for Supreme Court review do not merit consideration because his case does not implicate a substantial public interest nor is there any conflict in state law. Accordingly, Petitioner's request for additional review in the Supreme Court should be rejected.

DATED this 6th of September, 2016

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be served in the manner noted below, a copy of the document to which this certificate is attached, as on the following counsel of record:

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___ Via Mail
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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 this 6th day of September, 2016.

Katherine LaPorte, Paralegal

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Dear Clerk of the Court,

Please see the attached Respondent's Answer to Petition for Discretionary Review for filing in Arthur West v. NORML, et al., Case No. 93227-1.

The Attorney for the Respondent's information is below:

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