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NO. 82615-3
(Ct. App. No. 28375-1-II)

SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON EDUCATION ASSOCIATION,

Petitioner/Appellant

v.

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

Respondents

**WEA'S REPLY TO RESPONDENTS' ANSWER
TO WEA'S PETITION TO REVIEW**

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I. INTRODUCTION

In Davenport's Answer to WEA's Petition for Review, Davenport asks this Court, if it accepts review, to reverse the Court of Appeals by finding that there is a private right of action under Chapter 42.17 RCW. Appellant WEA requests that this Court accept review and thereafter, affirm Division Two's holding that there is no implied private right of action under Chapter 42.17 RCW. In so doing, this Court should acknowledge the apparent conflict between Division Two's holding in *Crisman* and *Davenport* that there is no implied private right of action under Chapter 42.17 RCW, while simultaneously granting the Davenport plaintiffs the private right to sue for restitution.

Davenport Plaintiffs claim in their Answer to WEA's Petition that they filed a complaint pursuant to RCW 42.17.400(4), thereby acknowledging that there is a legal requirement to do so prior to filing a private action.¹ They argue that they should be able to pursue a private action because the Attorney General did not seek a remedy of restitution (Answer, at 19).

¹ It is true that the lawyer who later represented Davenport herein filed a letter on August 11, 2000 stating that it represented Evergreen Freedom Foundation (EFF) and public school employees. However, that lawyer did not state that he was representing Davenport and neither Davenport nor any of the other named plaintiffs are identified in, or identified in that letter, as required by RCW 42.17.400.

Division Two did not address the RCW 42.17.400(4) prerequisites but held that, like *Crisman*, there is no private statutory right of action to sue for damages and that such an action is precluded by the statutory scheme and the voters' intent. Division Two seemed to hold that irrespective of RCW 42.17.400, there is no implied statutory private right of action under Chapter 42.17 RCW. Then, inconsistent with that analysis, it *sua sponte* recognized an implied common law right of action for restitution.

II. ARGUMENT

A. THE COURT OF APPEALS CORRECTLY DETERMINED THAT DAVENPORT PLAINTIFFS DO NOT HAVE A PRIVATE RIGHT OF ACTION

1. Davenport Plaintiffs Cannot Pursue a Private Action Because the PDC Pursued an Enforcement Action.

In its Answer, Davenport plaintiffs argue that they can now pursue a private right of action because the Attorney General did not pursue the remedy that they wanted the Attorney General to pursue.² See Answer, pp. 17-19. Significantly, the Davenport plaintiffs did not file a motion to intervene in the PDC enforcement action. If they had, they could have

² RCW 42.17.390 and RCW 42.17.400 give the Attorney General wide latitude to pursue any remedy at law and empower the trial court to award any remedy it deemed appropriate, with or without a request from the Attorney General. Nonetheless, the court's determination that there was no consideration given to a remedy for individuals rests solely upon a press release allegedly issued by the Attorney General's Office – a slender reed upon which to base such determination. See: *Davenport v. WEA*, 147 Wn. App. 704, 712, 197 P.3d 686 (Div. II, 2008).

asked the court to award restitution. As the trial court correctly observed in its Letter Opinion in the *PDC* case,³ “[n]o fee payer sought to intervene”.⁴ Had Davenport intervened, pursuant to CR 24, its issues could have been heard by the trial court.⁵ Davenport plaintiffs should not now be rewarded with the opportunity to go to court long after the fact when they sat silent while the trial court grappled with the very facts that would be at issue in their case.

Notwithstanding an interested party’s right to intervene, it is the PDC that has the exclusive authority and responsibility to enforce the provisions of the campaign finance provisions contained in Chapter 42.17 RCW. RCW 42.17.360 (5) and (7). The only exception to this general rule is the *qui tam* provision contained in RCW 42.17.400(4). RCW 42.17.400(4) provides that a citizen can file a citizen action in court only if a citizen’s complaint is filed consistent with the statutory prerequisites and the attorney general fails “to commence an action” within specified

³ *State ex rel. PDC v. WEA*, 117 Wn. App. 625, 71 P.3d 244 (Div. II, 2003), *aff’d*, 156 Wn.2d 543, 130 P.3d 352 (2006), *rev. sub nom. Davenport et al., v. WEA, et al.*, 551 U.S. 177, 127 S. Ct. 2372 (2007).

⁴ See Answer, App. A-15.

⁵ Generally, an intervenor is treated as an original party to an action. 3A LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE CR 24 cmts. at 612 (4th ed. 1992).

timelines.⁶ Specifically, RCW 42.17.400(4) provides, in pertinent part, as follows:

Any person who has notified the attorney general and the prosecuting attorney in the county in which the violation occurred in writing that there is reason to believe that some provision of this chapter is being or has been violated may himself bring in the name of the state any of the actions (hereinafter referred to as a citizen's action) authorized under this chapter. **This citizen action may be brought only if the attorney general and the prosecuting attorney have failed to commence an action hereunder within forty-five days after such notice and such person has thereafter further notified the attorney general and prosecuting attorney that said person will commence a citizen's action within ten days upon their failure so to do, and the attorney general and the prosecuting attorney have in fact failed to bring such action within ten days of receipt of said second notice (emphasis added).**

RCW 42.17.400(4) provides that a citizen cannot pursue an action in superior court unless the citizen has filed a complaint pursuant to RCW 42.17.400(4) and the Attorney General has not filed a lawsuit after the appropriate time has passed and the required notices have been given. Thus, the entity that lodged the 2000 complaint with the PDC, EFF, would have had standing to file the lawsuit in Superior Court only if the Attorney General had failed to act on its complaint. However, since the Attorney General pursued an action against the WEA based on the citizen's

⁶ The Washington Supreme Court upheld the constitutionality of RCW 42.17.400(4) in *Fritz v. Gorton*, 83 Wn.2d 275, 311-314, 517 P.2d 911 (1973).

complaint, neither EFF nor individuals that it purported to represent had standing to pursue an action to enforce RCW 42.17.760.

RCW 42.17.400(4) gives the Attorney General prosecutorial discretion. The statute does not say that the citizen can pursue a complaint if the Attorney General does not pursue a remedy to the citizen's liking. To the contrary, the statute only requires the Attorney General to file an action but grants complete prosecutorial discretion to the Attorney General.

In *State ex rel. Evergreen Freedom Foundation v. Washington Education Association*, 111 Wn. App. 586, 49 P.3d 894 (2002), Division Two addressed RCW 42.17.400(4) and refused to allow EFF to amend its complaint to assert an additional claim against WEA, a claim that was being prosecuted in an administrative action by the PDC.

Pursuant to RCW 42.17.400(4), EFF had filed a complaint with the Attorney General alleging a violation of the campaign finance statutes based on a particular transaction. The Attorney General responded by filing administrative charges against WEA based on that specific transaction. On these facts, Division Two held that EFF was precluded from bringing a citizen's action under RCW 42.17.400(4) on the additional claim, affirming the trial court's denial of EFF's motion to amend its complaint. In so doing, this Court held that where, as here, the

State has acted on a citizen's claim, the citizen thereafter has no right to independently pursue such claim in court.

Division Two applied the priority of action doctrine and precluded EFF from filing an identical claim to that filed by the PDC. EFF argued that there was no identity in relief sought because the PDC prosecuted the case in an administrative enforcement action where \$2,500 was the maximum fine rather than referring it to the Attorney General which could levy fines far in excess of that amount. The court recognized that if the PDC believed the matter would not be remedied by the penalty available to it, it could have referred the matter to the Attorney General for a lawsuit in Superior Court where all the court could impose any civil remedy, including injunctive relief. RCW 42.17.390; RCW 42.17.395(4) and (5).

Just as the court did not allow EFF to independently pursue a claim in *EFF, supra*, because it was already being prosecuted by the PDC, Davenport must not be allowed to pursue an independent cause of action, whether for damages or for restitution, particularly, where as here, Davenport had the right nine years ago to intervene in the *PDC* case in order to seek broader remedies and had not pursued that opportunity. The Attorney General had full authority to seek a broad range of civil sanctions but limited the relief sought to civil penalties and injunctive relief. The Attorney General properly exercised its prosecutorial discretion.

As a result, although this Court should accept review of WEA's petition, it should deny Davenport's request that it review the Court of Appeals decision that Davenport *et al.* have a private right of action because, as a matter of law, Respondents have no right under RCW 42.17.400(4) to enforce RCW 42.17.760.

2. Division Two Correctly Determined That There Is No Private Statutory Right Of Action, Independent of RCW 42.17.400.

Division Two held that there is no implied statutory right of action to pursue a claim under RCW 42.17.760. In doing so, the court did not consider whether the prerequisites under RCW 42.17.400 were met. Rather, it appears that the court was analyzing whether the Davenport plaintiffs could sue on their own, for private damages or restitution, and not in the name of the State.

Division Two appears to have held that while Davenport plaintiffs cannot pursue a private right of action directly in their own name because they are precluded by RCW 42.17.400, they can nonetheless pursue a private action for restitution. But, that specific action for damages is what, in *Crisman v. Pierce County*, 115 Wn.App. 16, 60 P.3d 652 (2002), Division Two held was precluded by RCW 42.17.400 and the wide latitude granted to the Attorney General in the statutory scheme. Division Two determined that Crisman could not pursue a tort claim under Chapter

42.17 RCW and while Crisman had filed a complaint with the PDC, he had not filed a complaint pursuant to RCW 42.17.400(4).

In *Crisman*, the Court of Appeals decidedly held that the statutory scheme precluded a private right of action for damages outside the process envisioned by RCW 42.17.400. Therein the court stated:

[T]he various remedies RCW 42.17.390 authorize suggest that the legislature intended not to create private causes of action to enforce the code, but to give the attorney general, county prosecutor, or citizen enforcer considerable latitude in seeking the appropriate relief. We conclude that chapter 42.17 RCW does not imply a private cause of action.

This statutory scheme precludes a citizen from seeking a right of action without exhausting the procedures explicitly stated in RCW 42.17.400. The *Davenport* Court acknowledged and agreed with the *Crisman* holding, yet inconsistently allowed an end-run around it by permitting a private cause of action for restitution.

In *State v. Conte*, 159 Wn.2d 797, 154 P.3d 194 (2007), this Court held that the State could pursue criminal sanctions for campaign finance violations pursuant to the provisions of RCW 40.16.030, despite the exclusive language of RCW 42.17.400. RCW 40.16.030 makes it a crime to knowingly procure or offer any false or forged instrument to be filed, registered, or recorded in any public office. This Court harmonized the provisions of RCW 40.16.030 and RCW 42.17.400 and 42.17.390,

determining that RCW 42.17.390 and .400 while authorizing broad civil relief, do not impose or authorize any criminal sanctions. *Id.*

This Court thus distinguished the private tort action sought by the plaintiffs in *Crisman* from the criminal prosecution sought by the State in *Conte*. In specifically addressing the language of RCW 42.17.390, this Court stated [*Id.* at 809-810]:

Crisman does not support the defendants' argument. There, the plaintiff claimed that the phrase "in addition to any other remedies provided by law" permitted recovery through a private tort action. The court rejected the claim, finding that chapter 42.17 RCW does not show legislative intent to create an implied private tort cause of action. In the present case, in contrast, the question is whether an existing criminal statute can be utilized in addition to civil remedies. *Crisman* is not analogous.

Thus, the *Conte* court implicitly held that 42.17.400 and 42.17.390 precluded any private civil action that is not brought pursuant to RCW 42.17.400 while it did not preclude a criminal prosecution brought under RCW 40.16.030 or some other criminal statute. The *Davenport* decision of the Court below thus conflicts with this Court's decision in *Conte*, and is additional justification for granting review herein.

Davenport reads too much into *Nelson v. McClatchy* 131 Wn.2d 523; 936 P.2d 1123 (1997). As Division Two clearly pointed out,⁷ in *Nelson, supra*, this Court assumed, without analysis, that Section 8 of I-

⁷ *Davenport, supra* at 6.

134 implied a private cause of action. The *Nelson* opinion simply is not clear as to whether Nelson was bringing a *private* or a *public* statutory cause of action, under RCW 42.17.400. Second, the *Nelson* court did not hold that Section 8 implied a private statutory cause of action. And third, the *Nelson* court most certainly did *not* decide that any *other* section of I-134, including but not limited to Section 16,⁸ also implied a private statutory cause of action.

The main issue in *Nelson* was whether RCW 42.17.680 infringed on the newspaper's freedom of the press. This Court held that it did. Consequently, Davenport's reliance on *Nelson v. McClatchy* to support the existence of a private cause of action here is misplaced, and the Court should deny Davenport's request for review based thereon.

B. INITIATIVE 134 ADOPTED THE PUBLIC CAUSE OF ACTION THAT EXISTED IN CHAPTER 42.17 RCW AND IN SO DOING, PROTECTS THE PUBLIC.

Initiative 134 did not change the enforcement procedure or remedies allowed. It incorporated the enforcement procedure of RCW 42.17.400. The absence of an express private right of action indicates that the voters did not intend to create one. Rather, the voters intended to incorporate the enforcement procedures of 42.17.400 and the remedies of RCW 42.17.390.

⁸ Codified as §760.

The *Davenport* court correctly acknowledged the statutory intent of Initiative 134 to have only a public cause of action and not a private one:

We buttress this implication by contrasting the 1992 voters' expression of a *public* statutory cause of action with their omission of a *private* one. Since 1972, chapter 42.17 RCW has expressed a public statutory cause of action under which either the AG or the prosecuting attorney (or, if they both decline to act, a private citizen) can bring a civil action When the 1992 voters directed in Section 33 of I-134 that Section 16 be codified as part of chapter 42.17 RCW, they manifested their intent that Section 16 be the basis of a *public* statutory cause of action--while simultaneously *omitting* to express an intent that Section 16 be the basis for a *private* statutory cause of action. Hence, to apply the maxim *expressio unius est exclusio alterius* (to express one thing is to exclude another) is again to conclude that the 1992 voters implied the *absence*, not the presence, of intent that Section 16 be the basis for a *private* statutory cause of action.

Davenport, supra at 719. Thus, this court should affirm that there is no private cause of action under RCW 42.17.760 and that there is no basis for Davenport's request that this Court consider the claim of a private right of action properly dismissed by the Court of Appeals (Answer, pp. 17-19).

C. THE COURT OF APPEALS PROPERLY DISMISSED DAVENPORT'S CONVERSION CLAIM.

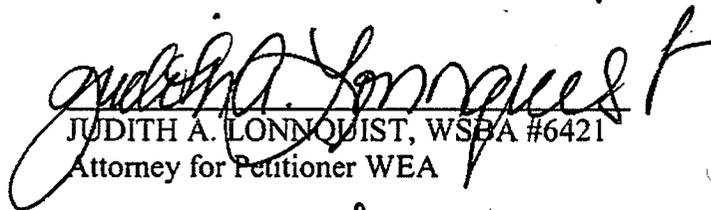
Davenport does not seriously argue that the Court of Appeals failed to correctly analyze plaintiffs' conversion claim. See Answer, pp. 19-20. The Court of Appeals properly held that the facts as alleged by

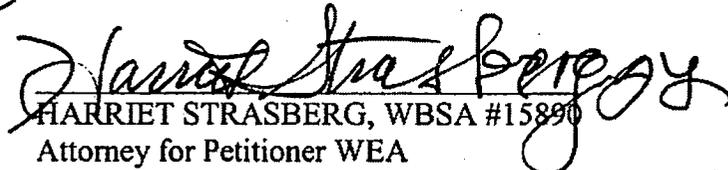
plaintiffs are insufficient to make such a claim. Assuming this Court accepts review, there is no reason for this Court to review the Court of Appeals' analysis of this claim.

III. CONCLUSION

For the foregoing reasons, WEA respectfully requests that this Court accept review of the decision of the Court of Appeals as set forth in its Petition, but deny Davenport's request to review other issues decided by the Court of Appeals.

Dated this 26th day of February, 2009.


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