

X

FILED
JUN 21 2010
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

No. 84501-8

SUPREME COURT
OF THE STATE OF WASHINGTON

CLERK
2010 JUN 21 AM 8:15
DR. JAMES R. CARPENTER
SUPERIOR COURT
STATE OF WASHINGTON

JOHN E. DIEHL,
and ADVOCATES FOR RESPONSIBLE DEVELOPMENT,

Petitioners,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD, MASON COUNTY, and SHAW FAMILY LLC,

Respondents.

REPLY TO SHAW FAMILY LLC'S ANSWER
TO PETITION FOR REVIEW

John E. Diehl, pro se
679 Pointes Dr. W.
Shelton WA 98584
360-426-3709

TABLE OF CONTENTS

1. Can an individual both represent a group to which he belongs and also act in an individual capacity? 1

2. Did the superior court determine that Diehl could not represent ARD after "seven court appearances involving five substantive hearings"? 4

3. Could ARD afford to hire an attorney? 6

4. Should this court impose RAP 18.9(a) sanctions for the appeal filed in this case? 7

Conclusion 13

Declaration of Service 14

TABLE OF AUTHORITIES

Table of Cases

Biggs v. Vail, 119 Wn.2d 129, P.2d 350 (1992) 13

Clark v. Washington, 366 F.2d 678 (9th Cir. 1966) 10

Collins v. Hoke, 705 F.2d 959 (8th Cir. 1983) 8

Community College v. Personnel Board, 107 Wn.2d 427, 730 P.2d 653 (1986) 13

Ex Rel. Schwab v. State Bar Ass'n, 80 Wn.2d 266, 493 P.2d 1237 (1972) 10

Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363 (1914) .. 8

In re Ballou, 48 Wn.2d 539, 295 P.2d 316 (1956) 10

In re Bruen, 102 Wash. 472, 172 P. 1152 (1918) 10

In re Simmons, 59 Wn.2d 689, 369 P.2d 947 (1962) 10

Millers Cas. Ins. Co. v. Briggs, 100 Wn.2d 9, 665 P.2d 887 (1983) 13

Olson v. City of Bellevue, 93 Wn. App. 154, 968 P.2d 894 (1998), *review denied*, 137 Wn.2d 1034 (1999) 12

Perkins v. CTX Mortgage Co., 137 Wn.2d 93, 969 P.2d 93 (1999) .. 9, 11

Skinner v. Holgate, 141 Wn. App. 840 (2007) 12

Streater v. White, 26 Wn. App. 430, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980) 13

Vermont Agency of Natural Resources v. Upper Valley Regional Landfill Corp., 159 Vt. 454, 621 A.2d 225 (1992) 8, 12

Statutes

RCW 2.48.170 10

RCW 36.70A.280 2

Rules and Regulations

GR 24 8, 10, 11

RAP 18.9(a) 7, 12, 13

RPC 3.3 6

WAC 242-02-110 8

Other Authorities

Concerned Citizens of Ferry County and David Robinson v. Ferry County, EWGMHB No. 01-01-0019, Amended Motion Order, April 16, 2002. . . 2

Friends of the Law v. King County, CPSGMHB No. 94-3-0003, Order on Dispositive Motions, April 22, 1994 3

Harvard View Estates, v. Spokane County, EWGMHB Case No. 02-1-0005, Order on Motions, May 31, 2002 3

Hensley et al. v. Snohomish County, Order on Remand and Reconsideration, CPSGMHB 01-3-0004c, December 19, 2002 3

In an answer to our petition for review, captioned "SHAW FAMILY LLC REPLY BRIEF," Shaw Family LLC ("Shaw") seeks review of issues not raised in the petition for review. This reply addresses these new issues of law and fact.

1. Can an individual both represent a group to which he belongs and also act in an individual capacity?

When the Western Washington Growth Management Hearings Board ("Board") ruled that Diehl lacked individual standing because he had expressly stated that his comments to the Mason County Board of Commissioners were on behalf of his group, Advocates for Responsible Development ("ARD"), it appeared that the Board had made a logical error, for it does not follow from the fact that Diehl participated on behalf of his group that he was not also participating as an individual. But counsel for Shaw has now asserted, for the first time in this case, that one cannot participate both as a representative of a group and as an individual: "When one acts in a representative capacity, as Mr. Diehl elected to do, one is not acting as an individual." Shaw Family LLC Reply Brief at 4. If this view is accepted, then the context of Diehl's participation and his numerous comments in which he associated his own views with those of the group he represented as its president are irrelevant, for he could not participate on

behalf of both himself and his group regardless of how he expressed himself.

In effect, Shaw now proposes to correct an apparent logical error by supplying an unstated premise. The previously missing premise is that no one can participate on behalf of both his organization and himself. What appears to be an erroneous argument by the Court of Appeals is construed by Shaw as a kind of enthymeme, and the argument becomes logically valid, i.e., if the premises are true, then the conclusion is true.

But is it true that one cannot participate on behalf of both one's organization and oneself? Not surprisingly, Shaw cites neither statutory authority nor case law in support of its assertion. Certainly, the statute imposes no such restriction on participatory standing. It says only that standing is achieved by participating "orally or in writing" before the county (or city) on the matter for which review is sought by the hearings board. RCW 36.70A.280(2)(b). It would be inconsistent with the entire concept of encouraging citizen participation in GMA planning to engraft onto the statute a restriction not stated therein. As the Eastern Growth Management Hearings Board has recognized, "[T]he spirit of GMA is to encourage citizens to participate, not limit participation through a technical interpretation of standing requirements." *Concerned Citizens of Ferry County and David*

Robinson v. Ferry County, EWGMHB No. 01-01-0019, Amended Motion Order, April 16, 2002.¹

Shaw points out (at 5), that the decision of the Central Puget Sound Growth Management Hearings Board cited in our petition for review (at 9, fn. 5) represents dicta.² A more recent case, though not addressing issues of standing as comprehensively, considered the merits of a challenge to standing essentially identical to Shaw's. In *Hensley et al. v. Snohomish County*, Order on Remand and Reconsideration, CPSGMHB 01-3-0004c [Maltby UGA Remand], December 19, 2002, the Central Puget Sound Board considered a motion to dismiss based on the claim that Corinne Hensley, a member and president of the Little Bear Creek Protective Association (LBCPA), in submitting written testimony to the county on behalf of her

¹ In another case involving a standing issue, the Eastern Board explained that the reason for the requirement for participation orally or in writing "is to allow the County to know the Petitioner's objections and be able to respond to them if they feel it is appropriate. It was clear to the County what the objections of the Petitioner were and he participated actively in the hearings prior to the adoption of the CP and CFP. For us to now find that the Petitioner did not have standing after such participation would be a hyper technical reading of the statute." *Harvard View Estates, v. Spokane County*, EWGMHB Case No. 02-1-0005, Order on Motions, May 31, 2002, at 2. Similarly, Diehl's active participation is undeniable.

² *Friends of the Law v. King County*, CPSGMHB No. 94-3-0003, Order on Dispositive Motions, April 22, 1994, in which this board held that a woman who signed in at a county hearing as representing a group also had standing to appear before the board as an individual.

group was only participating on behalf of her group, not on Ms. Hensley's own behalf. The Board concluded:

... Ms. Hensley, an *individual*, and member and officer of LBCPA, shared in the views of LBCPA. The signed and written testimony was sufficient, under the standing requirements of the GMA [RCW36.70A.280(2)], to establish standing not only for LBCPA, but also for herself. Ms. Hensley clearly participated in writing before the County ... on the matter for which review was requested [the Maltby UGA expansion].

Op. cit. at 5. Similarly, Diehl clearly participated in writing before the County, not only for ARD, but also as an *individual*, and member and officer of ARD.

2. Did the superior court determine that Diehl could not represent ARD after "seven court appearances involving five substantive hearings"?

Although this factual question is of dubious relevance, counsel for Shaw is evidently trying to prejudice the court by implying that Diehl made improper use of the court. Shaw makes its claim (at 1), without mentioning that the superior court's determination that Diehl could not represent ARD did not even occur in the present case. Instead, it was made by a judge who did not hear the present case, as the result of a motion by Shaw in a separate appeal of the same decision of the Board. Ironically, Shaw strongly opposed a motion by ARD and Diehl to consolidate Shaw's appeal of the Board's

adverse decision against it with the appeal by ARD and Diehl of other parts of the Board's decision. Having kept the cases separate, despite the fact that Diehl's standing was an issue in both cases, Shaw proceeded in its own appeal to move to "preclude" Diehl from representing ARD. This motion was heard first by a court commissioner, then, on a motion for revision, by a visiting judge from Lewis County. After Judge Lawler granted the motion, the issue was not revisited before the superior court. The other court appearances to which counsel for Shaw possibly refers dealt with motions by Diehl to allow him to appear either as an intervenor, or as an individual member of his unincorporated association (ARD), or to be named as an indispensable party. All of these matters were considered in Shaw's appeal, not in the appeal of ARD and Diehl now before this court. The question of whether Diehl might properly continue to represent ARD only entered the present case when the Court of Appeals, despite having denied Diehl's motion for consolidation of the two appeals from the superior court, held that it must "decide whether ARD is properly before us." Opinion at 1, fn. 1.

So, counsel for Shaw has greatly exaggerated the number of occasions when the superior court considered the question of whether Diehl might continue to represent ARD. Counsel has conflated two cases, and has

confused the issue of whether Diehl might represent ARD with other issues as to whether he might, individually, appear pro se as an individual member of ARD or to intervene.³ While one can only speculate about the reason counsel would engage in such exaggeration, it is noteworthy that counsel, in submitting a claim for \$7,542.00 in attorney's fees (based on the Court of Appeals' award of RAP 18.9(a) sanctions against ARD and Diehl), acknowledged that he has an arrangement with his client that will result in him being paid more than three times as much if he prevails than if he does not. See "Shaw Family LLC Attorney's Fees Declaration" (sic) at 1. Plainly, counsel has a significant financial incentive to rely on a relaxed interpretation of his obligations under RPC 3.3, "Candor toward the Tribunal."

3. Could ARD afford to hire an attorney?

For the first time, Shaw makes an issue of the question of whether ARD could afford to hire professional representation. With either unusual forgetfulness or a lack of candor toward this court, counsel for Shaw claims that "there is not one fact presented in any proceeding in this matter which

³ Shaw's "Exhibit B" is concerned exclusively with arguments before the superior court in its own appeal, not the appeal of ARD and Diehl, the adjudication of which by the Court of Appeals is the subject of the present petition for review.

even begins to establish that [ARD could not afford professional counsel]." Shaw Family LLC Reply Brief at 8. Actually, Diehl, as president of ARD, submitted a declaration under penalty of perjury, April 8, 2008, to superior court (in Shaw's appeal) in support of his motion to allow him to appear pro se as a member of ARD or to intervene, stating that ARD had collected some funds for its work, "but has never had enough to hire an attorney to represent it." (Diehl also noted that his efforts to secure pro bono representation were unsuccessful.) Given that Shaw has not challenged this declaration until now, we object to the attempt to raise this issue at this late date. If this court chooses to consider this issue, we would ask permission to supplement the record with Diehl's declaration in the Shaw appeal pertinent to whether ARD could afford an attorney, and with statements from ARD's account at the Community Credit Union, showing that ARD never had funds that would have allowed it to hire professional representation.

4. Should this court impose RAP 18.9(a) sanctions for the appeal filed in this case?

Shaw asks not only that RAP 18.9(a) sanctions imposed by the Court of Appeals be affirmed, but also that additional RAP 18.9(a) sanctions be imposed on appellants. Shaw Family LLC Reply Brief at 11. Shaw argues that sanctions are appropriate because it was "illegal and inappropriate for

[Diehl] to file any pleadings on behalf of ARD." This begs the question of whether an unincorporated association that was allowed lay representation by GR 24 and WAC 242-02-110 before an administrative tribunal might continue to be allowed such representation, if it cannot afford professional representation, when the matter before the administrative tribunal is appealed to superior court.

Shaw claims that no case has been cited that "even begins to suggest [Diehl] could represent ARD." Admittedly, there is no controlling case, given that this question of the interpretation of GR 24 has not previously been before this court or any appellate court of this state except the court of appeals in this case. However, Shaw ignores both *Vermont Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 159 Vt. 454, 458, 621 A.2d 225, 228 (1992) and a series of federal cases, including *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard"), *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965) (The right to be heard "must be tailored to the capacities and circumstances of those who are to be heard"), and *Collins v. Hoke*, 705 F.2d 959, 963 (8th Cir.1983) ("Representation by counsel was meant to enhance

an applicant's right to be heard; not to be a bar to that right").

The most pertinent case within Washington, as argued in our petition for review, is *Perkins v. CTX Mortgage Co.*, 137 Wn.2d 93, 102-105, 969 P.2d 93 (1999), which sets forth a test requiring courts to balance "the competing public interests of (1) protecting the public from the harm of the lay exercise of legal discretion and (2) promoting convenience and low cost."⁴ We have argued that application of this test should lead a court to conclude that lay representation should be allowed in the circumstances of this case, where a party could not afford professional representation, but where competent lay representation had caused it partly to prevail before the Board, and where the GMA goal of encouraging citizen participation should be weighed in considering whether the public interest is better served by allowing a party before the administrative tribunal to be heard on appeal through lay representation, given that it could not afford professional representation, or whether the public interest is better served by denying such a party the ability to be represented in court.

⁴ Shaw belittles the significance of the balancing test in *Perkins*, pointing out (at 9) that the test in that case was applied to different circumstances than in the present case; however, the point of a test is to have a standard that may be repeatedly applied, and not to be simply an ad hoc means of disposing of a given case.

Shaw, following in the path of the superior court and the Court of Appeals, ignores the question of whether GR 24 creates an exception to the general rule prohibiting lay representation. Shaw, like the Court of Appeals, relies on RCW 2.48.170, which prohibits lay practice of law, and case law that has dealt with other kinds of lay representation than is involved in this case. Yet, through the separation of powers doctrine, GR 24 trumps RCW 2.48.170. Only the courts may determine what constitutes the authorized and unauthorized practice of law. It is not a legislative prerogative to determine who may practice law under what circumstances. Only the Supreme Court has the power to suspend or enjoin one from the practice of law or to take other disciplinary action. *Ex Rel. Schwab v. State Bar Ass'n*, 80 Wn.2d 266, 493 P.2d 1237 (1972), citing *In re Bruen*, 102 Wash. 472, 172 P. 1152 (1918); *In re Ballou*, 48 Wn.2d 539, 295 P.2d 316 (1956); *In re Simmons*, 59 Wn.2d 689, 369 P.2d 947 (1962); and also *Clark v. Washington*, 366 F.2d 678 (9th Cir. 1966).

If GR 24 did not trump RCW 2.48.170, then lay representation before administrative tribunals would be prohibited, for there can be little doubt that the kinds of advocacy and interpretation of law involved in bringing a case before a hearings board involves the practice of law as ordinarily understood.

But no one disputes that the Supreme Court acted within its authority to allow lay representation when allowed under the rules of administrative tribunals. Yet, GR 24 is ambiguous as to whether, having within its discretion allowed lay representation when allowed under the rules of administrative tribunals, this court intended to cut short such representation when a matter is appealed from an administrative tribunal to the courts.

Even though a denial of lay representation on appeal when it is allowed before an administrative tribunal raises a due process issue, we recognize that the right to appeal is not absolute or unqualified. Certainly there are circumstances when financial considerations limit the exercise of legal rights. For example, while those charged with crimes are entitled to professional representation even if indigent, they are not provided with such representation on appeal, except in capital cases. But it is artificial and illogical to allow a group to rely on lay representation before an administrative tribunal, but then to forbid such representation if the matter is appealed to superior court, even though the arguments before the court would be essentially the same as those made before the administrative tribunal. So, this merges the question of due process into the *Perkins* balancing test: Is the public interest better served by denying an impecunious

group their day in court, after initially allowing them to be heard before an administrative tribunal, or do the advantages of allowing them to be heard through continuing lay representation outweigh the disadvantages? We suggest that the advantages, as analyzed by the Vermont Supreme Court (and less specifically by the federal courts in cases cited), greatly outweigh the disadvantages.

Even if this court determines that lay representation under such limited circumstances should be denied, the question is at least debatable. After all, the Vermont Supreme Court not only found the issue debatable, but upheld the right of a group to rely on lay representation in court proceedings.

However, even if one were to suppose that the question of lay representation in court is frivolous, the argument for RAP 18.9(a) sanctions fails, for RAP 18.9(a) allows sanctions for filing a frivolous appeal, but not for including a frivolous issue in an appeal, so long as there is a debatable issue in the appeal. An appeal is frivolous when **no** debatable issues are presented upon which reasonable minds may differ. *Olson v. City of Bellevue*, 93 Wn. App. 154, 165, 968 P.2d 894 (1998), *review denied*, 137 Wn.2d 1034 (1999), cited in *Skinner v. Holgate*, 141 Wn. App. 840, ¶54 (2007). In other words, for purposes of RAP 18.9(a), raising a debatable issue

precludes categorization of the appeal as frivolous. See *Community College v. Personnel Board*, 107 Wn.2d 427, 730 P.2d 653 (1986). When an action is not wholly frivolous, the defendant is not entitled to an attorney fee award in the Court of Appeals under RAP 18.9(a). *Biggs v. Vail*, 119 Wn.2d 129, P.2d 350 (1992).⁵ Since even the Court of Appeals acknowledged that the issue of Diehl's standing was debatable, RAP 18.9(a) sanctions are not applicable.⁶

Conclusion

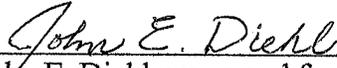
The new issues presented by Shaw may provide additional reason for this court to accept review, but supply no reason for this court to affirm the Court of Appeals or to impose the additional sanctions Shaw requests. Even if Diehl were deemed to lack individual standing, the RAP 18.9(a) sanctions imposed by the Court of Appeals should be reversed, based, if not on the merits of the argument that lay representation should be allowed, at least because the issue of Diehl's standing presented a debatable issue. But this

⁵ The court found that there were clearly debatable issues on appeal, and concluded that the appeal thus was not frivolous, citing *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983); *Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187, review denied, 94 Wn.2d 1014 (1980).

⁶ Moreover, it should be recalled that the issue of lay representation was not even an issue in this case until the Court of Appeals made it an issue by its ruling for which we now seek review.

court should also reverse the Court of Appeals on the issue of Diehl's individual standing, or alternatively, on the issue of whether Diehl might represent his organization in an appeal of the Board decision, remanding to the superior court the issues of GMA compliance originally brought by Diehl and ARD to the Board.

Dated: June 19, 2010


John E. Diehl pro se and for ARD
679 Pointes Dr. W.
Shelton WA 98584
360-426-3709

Declaration of Service

I, John E. Diehl, under penalty of perjury under the laws of the State of Washington, declare that on this day, I mailed, postage prepaid, and/or faxed the above Petition for Review to the offices of Monty Cobb, Deputy Prosecuting Attorney, P.O. Box 639, Shelton WA 98584; Stephen Whitehouse, attorney for Shaw Family LLC, at 601 W. Railroad Ave., Suite 300, Shelton WA 98584; and Jerald R. Anderson, Attorney General's Office, P.O. Box 40110, Olympia 98504-0110.

Dated: June 19, 2010

