

FILED
Court of Appeals
Division II
State of Washington
2/15/2019 3:32 PM
NO. 52726-0-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SEIU 775,
Petitioner

v.

FREEDOM FOUNDATION,
Respondent

**PETITIONER SEIU 775's REPLY IN SUPPORT OF MOTION FOR
DISCRETIONARY REVIEW**

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I. The Trial Court’s Ruling was Obvious or Probable Error.

A. The Foundation Misconstrues the Standard for Determining the Degree of the Trial Court’s Error.

The Foundation contends that SEIU 775 must cite decisions which expressly state the holding SEIU 775 advocates and which declare any contrary conclusion “obviously” or “probably” wrong. Ans., 9, 12. This standard moves the goal posts to an impossible distance. The “obviousness” or “probability” of the trial court’s error is inferred from the strength of the arguments the non-prevailing party presents. Were the Foundation correct, a party seeking discretionary review could never show sufficient trial court error unless a published opinion has applied the exact same law to the exact same fact pattern.

In point of fact, appellate courts often accept discretionary review by identifying “obvious” or “probable” errors on novel issues and facts. For instance, in *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 652 P.2d 948 (1982), the Supreme Court held that the trial court “committed obvious or probable error” in denying an employer’s third party motion to dismiss a manufacturer’s claim for contribution in a products liability suit, even though the trial court’s decision involved ruling on a “novel legal question.” *Id.* at 882-83. Further, the Court of Appeals has found probable error based on a facial reading of statutory language, without the

assistance of case law. In a decision strikingly analogous to the case at bar, an appellate court found that a superior court committed obvious error when it denied the State's motion for summary judgment, in which it was urged that the plaintiffs' claim was deficient because only their attorney verified the complaint. *Shannon v. State*, 110 Wn. App. 366, 368-69, 40 P.3d 1200 (2002). The court then reviewed the relevant statute's language and, relying solely on the rule against surplusage, held that a provision allowing attorney verification in exceptional circumstances implied that, under normal circumstances, plaintiffs must self-verify tort claims against the State. *Id.* at 370; *see also Dep't of Revenue v. Nat'l Indem. Co.*, 45 Wn. App. 59, 61-62 & n.1, 723 P.2d 1187 (1986) (accepting discretionary review because trial court committed probable error when it stayed a tax liability action for a claim against a single bond, when the relevant statute contemplated such stays only when multiple claims were involved).

B. The Foundation's Efforts to Justify the Trial Court's Error Fail.

The trial court's denial of SEIU 775's motion to dismiss turned on its finding that the statutory provision at issue was a "notice statute" which did not trigger any "affirmative obligation" for the citizen to act in accordance with the notice's terms. Mot., 12, n.7. This finding was clear error because it ignored the rule against surplusage and common law waiver principles.

The Foundation first contends that SEIU 775's reliance on the rule against surplusage evinces "erroneous logic." Ans., 10. Curiously, the Foundation does not explain how SEIU 775's application of the rule was illogical. It simply follows this epithet with a tangential aside about subsection (iv) to former RCW 42.17A.765(4)(a). But it offers no rebuttal to the scenario SEIU 775 offered to illustrate the problem with the trial court's interpretation. As even the trial court acknowledges, subsection (ii) requires a citizen to notify the public officials that he will file suit within ten days of the officials' failure to act. *See App.* at 120-21 (stating that "the statute specifically refer[s] to the citizen having [this] obligation..."). Under the trial court's construction, a citizen, having sent notices containing this promise, may pursue his claim regardless of whether he follows through on it. Mot., 13. Or, to put it another way, Citizen A, who makes and breaks this promise, is equally entitled to file a lawsuit as Citizen B, who makes the promise and fulfills it. The question, then, is what is the purpose of the promise to file suit *within ten days* if no adverse consequence follows from renegeing on it?

By invoking subsection (iv), the Foundation perhaps suggests that the promise-breaker is still subject to a limitation period. That is true, but it is also true of the promise-keeping citizen and thus only creates a rule of general applicability that governs even if the phrase "within ten days" is

expunged from subsection (ii). So it cannot explain the independent significance of the critical term.

The only way to avoid rendering the phrase “within ten days” meaningless is to ascribe the provision with its intuitive connotation – as a directive to citizen plaintiffs both to issue notices containing a promise of a future affirmative act *and* to actually engage in that affirmative act.

Notably, the Foundation offers no response to the rule that the issuer of a statutorily required notice is bound to act in accordance with the notice’s terms or else waives any rights flowing therefrom. Mot., 13-14 (and cases cited therein). The Foundation’s silence on this point further demonstrates how untenable the trial court’s reasoning is.

Nor does case law assist the Foundation. It makes the sweeping assertion that no court has ever adopted SEIU 775’s reading of the FCPA. Ans., 12. In fact, in a separate citizen action filed by the Foundation, a different Thurston County Superior Court judge did just that. Exactly one week ago, The Hon. Judge Erik Price dismissed the Foundation’s complaint against SEIU PEAFF on the sole ground that it failed to file suit within ten days of the public officials’ declining to initiate their own enforcement actions. *See* Supp. App. at 1-2. Judge Price’s thoughtful analysis endorsed the rule against surplusage argument discussed *supra*, which is persuasive evidence that the court below was wrong, or at the

very least, that appellate guidance is urgently needed.

The Foundation also claims that SEIU 775 “conveniently ignore[s]” a relevant decision, *State ex rel. Evergreen Freedom Found. v. Nat’l Educ. Ass’n (“EFF II”)*, 119 Wn. App. 445, 81 P.3d 911 (2003). But this decision says nothing relevant about the present issue. *EFF II* clarified the Court’s “inartful” use of the word “tolling” in *EFF I*, 111 Wn. App. 586, 49 P.3d 894 (2002), which it feared might be construed to imply that the AG’s mere referral of a complaint to the PDC precludes a citizen suit. App. at 16. But the tolling issue was unnecessary to the Court’s conclusion that the trial court properly denied the plaintiff’s motion to amend its complaint. *EFF II*, 119 Wn. at 451-52. Thus, *EFF II* withdrew that portion of *EFF I. Id.* Since the decision discussed only whether the court should have introduced a tolling period to the public officer’s ten-day window, it sheds no light on whether a citizen has a ten-day window to file suit.¹

Other *dicta* from *EFF I* is modestly relevant, but the Foundation misconstrues the pertinent language. The Foundation admits *EFF I* says a citizen must notify the officers that he “will commence a citizens action within 10 days of the second notice if neither...acts.” Ans., 11 (quoting

¹ The Foundation also quotes the opinion’s reference to “intent.” Ans., 12. But the “intent” at issue was not the provision as a whole but specifically the meaning of the phrase “commencement of an action” in subsection (iii). *EFF II*, 119 Wn. App. at 453. The Court stressed that it takes an official actually filing an enforcement action, as opposed to referring a complaint to the PDC, to preclude a citizen suit. App. at 106.

EFF I, 111 Wn. App. at 604). The Foundation argues that this quote supports its theory because it discusses the requirement in terms of notice. While that is true, SEIU 775 already explained why the notice language necessarily incorporates an affirmative act requirement. *See supra* at 3-4. What is significant about *EFF I* is what the Foundation studiously ignores – its express tie of a ten-day period to the citizen’s action. This confirms subsection (ii)’s plain language and disproves the Foundation’s claim that the notice’s content is somehow subject to “dispute.” Ans., 16.

The Foundation then attempts to inject ambiguity to the content of the second notice where none exists. It contends that SEIU 775 applies the last antecedent rule “mechanically” to connect subsection (ii)’s ten-day reference to the citizen. Ans. at 16-17. But the Foundation creates a false choice between examining the plain meaning and consulting grammatical rules. The two are inseparable. Words strung together can be given meaning only through universally accepted structural rules. Second, the last antecedent rule is not inflexible. As explained in the Motion, qualifying words apply to the last antecedent “unless a contrary intent appears in the statute.” Mot., 8. In that circumstance, a word may actually modify an *earlier* term in the sentence. That is why there is no difficulty in associating the word “their” with the officers rather than the citizen. But the Foundation’s reading does not seek to have the phrase “within ten

days” modify an earlier term. Instead, it attempts to move the phrase to the *end* of the sentence, so that it follows the officers’ “failure to do so.” SEIU 775 “mechanically” resists this construction because it is not possible for a prepositional phrase to modify any term but a subject. Here, the “citizen” is unquestionably the subject of subsection (ii) and is introduced before the prepositional phrase appears.

Separately, the Foundation argues that, under SEIU 775’s interpretation, a citizen cannot know when his ten days begin to run because it is impossible to determine the date the officers actually receive the second notice. This concern is easily disposed of. Washington’s civil court rules provide a default three-day interval after which service is presumed to have occurred. Wash. Super. Ct. Civ. R. 5(b)(2)(A). This default rule governs the actors’ respective windows, to the extent the citizen lacks actual knowledge of the receipt date.²

The Foundation also references the 2018 amendments to the FCPA but adduces from them the wrong inference. Current subsection (3) still requires the citizen to notify the public officers “that he or she will commence a citizen’s action *within ten days* if the commission does not take action or, if applicable, the attorney general does not commence an

² Moreover, if this supposed uncertainty was truly problematic, it would impair the statute regardless of the existence of a citizen’s ten-day window. It would mean a citizen seeking to file suit immediately upon the conclusion of the officer’s admitted ten-day window could not identify his earliest opportunity to do so.

action.” RCW 42.17A.775(3) (emphasis added). The only change in the provision is subsection (2)’s institution of new time windows for the public officers to act – the termination of which triggers the start of the citizen’s window. *See* RCW 42.17A.775(2)(a)-(b). This does not, however, alter the time limit for the citizen to act. That the legislature, in the course of significantly revising the FCPA’s citizen action provision, did not disturb the placement of the “within ten days” phrasing, demonstrates that the 10-day post-administrative exhaustion window was and continues to be an integral feature of the statute.

II. SEIU 775 Satisfies the “Effects” Prong.

A. Further Proceedings Would be Useless.

The Foundation attempts to distinguish the cases SEIU 775 cites without success. It first claims that SEIU 775 mischaracterizes *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985) by discussing the “uselessness” of proceeding in trial court on the merits when the case involves important issues with “wide implications” that need not otherwise be reached. *Ans.*, 7. But that is what *Hartley* stands for. The Court acknowledged it was “interpreting a new statute with wide implications for governmental liability.” *Id.* at 773. After reviewing *Glass*, the Court found that “the questions of law raised as to interpretation of the HTOA” – i.e., the issues deemed to have wide implications – “are appropriate for review.” *Id.* at

774. *In the very next sentence*, the Court continued, “A useless lawsuit would be prevented by a decision in favor of dismissing the State and County as defendants.” *Id.* Although the FCPA is not a new statute, the issues that are primed to proceed in the trial court include difficult constitutional and statutory questions that could easily be avoided were this Court to accept review. *See Mot.*, 17.

The Foundation’s discussion of *Douchette v. Beth Sch. Distr. No. 403*, 117 Wn.2d 805, 818 P.2d 1362 (1991) is also off-base. *Douchette* supports SEIU 775 because, as is urged here, the Court accepted review of a procedural question – whether a limitations period was equitably tolled – the answer to which foreclosed further “useless” litigation of the merits. *Id.* at 808-09. The Foundation argues *Douchette* is inapposite because the plaintiff there admitted that her claims were subject to a limitations period, whereas here the Foundation does not. *Ans.*, 8. But this merely assumes the Foundation’s desired conclusion. The disputed legal *issue* in both cases is still whether the plaintiff’s claim is procedurally barred. *See also Shannon*, 110 Wn. App. 366 (also finding further proceedings “useless” in light of trial court’s “obvious error” on procedural question).

B. The Trial Court Decision Limits SEIU 775’ Freedom to Act.

The Foundation also argues that SEIU 775 has not identified any reason to alleviate a citizen action defendant’s legal uncertainty, which

last up to two years. Ans., 8, 14. It notes that “[i]t is common that potential defendants have lawsuits, or even criminal indictments, looming over their heads for periods of time much longer than two years.” *Id.* at 8. This statement ignores the critical distinction between run-of-the-mill lawsuits and citizen actions under the FCPA – the latter are authorized only upon the public officials’ decisions *not* to pursue enforcement actions. *See former RCW 42.17A.765(4)(a)(iii)*; App at 1-12. Since the AG already found the Foundation’s claims unmeritorious, the prospect of intrusive discovery and threats to SEIU 775’s First Amendment speech are more prejudicial here than they would be in a typical lawsuit.

RESPECTFULLY SUBMITTED this 15th day of February, 2019.

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2019, I caused the foregoing REPLY IN SUPPORT OF MOTION FOR DISCRETIONARY REVIEW to be filed via the Appellate Court E-filing System, which will transmit a true and correct copy to the following:

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v.

FREEDOM FOUNDATION,
Respondent

**PETITIONER SEIU 775's SUPPLEMENTAL APPENDIX IN
SUPPORT OF MOTION FOR DISCRETIONARY REVIEW**

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APPENDIX PAGE NUMBER	DESCRIPTION
1-2	Order Granting Defendant SEIU PEAFF's Motion to Dismiss Claims Against It Pursuant to CR 12(b)(6) (filed February 8, 2019)

RESPECTFULLY SUBMITTED this 15th day of February, 2019.

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2019, I caused the foregoing PETITIONER SEIU 775's SUPPLEMENTAL APPENDIX IN SUPPORT OF MOTION FOR DISCRETIONARY REVIEW to be filed via the Appellate Court E-filing System, which will transmit a true and correct copy to the following:

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Dmitri Iglitzin, WSBA No. 17673

1 EXPEDITE
2 No Hearing Set
3 Hearing is set
4 Date: February 8, 2019
Time: 9:00 a.m.
Judge/Calendar: Price

FILED

FEB 08 2019

Superior Court
Linda Myhre Enlow
Thurston County Clerk

6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
7 FOR THURSTON COUNTY

8 FREEDOM FOUNDATION, a Washington
9 nonprofit organization, in the name of the State
of Washington,

10 Plaintiff,

11 v.

12 SERVICE EMPLOYEES INTERNATIONAL
13 UNION POLITICAL EDUCATION AND
ACTION FUND, a political committee,

14 Defendant.

No. 18-2-01731-34

~~PROPOSED~~ ORDER
GRANTING DEFENDANT SEIU
PEAF'S MOTION TO DISMISS
CLAIMS AGAINST IT
PURSUANT TO CR 12(B)(6)

Clerk's Action Required

15 This matter came before the Court on Defendant Service Employees International Union
16 Political Education and Action Fund's motion to dismiss all claims against it pursuant to CR
17 12(b)(1) and (6). The Court heard the oral argument of counsel on February 8, 2019, and also
18 considered the following when reaching its decision:

19 1. Defendant SEIU PEAFF's Motion to Dismiss Claims Against It Pursuant to CR
20 12(b)(6);

21 2. Plaintiff's Amended Response, & Declaration of James Abromsky in Support *CA*

22 3. Defendant's Reply, and Declaration in Support of Reply by Dmitri Iglitzin *DL*

23 4. _____ and consistent with the Court's oral ruling *(CA)*

24 Being fully advised, the Court hereby rules as follows:

25 1. Defendant's motion to dismiss is GRANTED;

26 2. All claims against Defendant are hereby DISMISSED with prejudice.

ORDER GRANTING MOTION TO DISMISS - 1
CASE NO. 18-2-01731-34

APP. 1

LAW OFFICES OF
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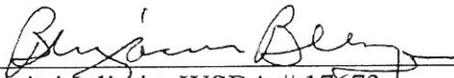
1
2 IN THE ALTERNATIVE:

- 3 1. Defendant's motion to dismiss is GRANTED in part. (EP)
4 2. Claim III and Request for Relief number 2 are hereby DISMISSED with prejudice.

5
6 It is so ORDERED this 8th day of February, 2019.

7
8 
9 The Honorable Erik D. Price
10 Thurston County Superior Court Judge

11 Presented by:

12 
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ORDER GRANTING MOTION TO DISMISS - 2
CASE NO. 18-2-01731-34

SCHWERIN CAMPBELL BARNARD IGLITZIN & LAVITT

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Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52726-0
Appellate Court Case Title: Freedom Foundation, Respondent v. SEIU 775, Petitioner
Superior Court Case Number: 18-2-00454-1

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