

65212-5

65212-5

FILED
COURT OF APPEALS
2010 OCT 10 PM 2:00

NO. 65212-5-1

COURT OF APPEALS FOR DIVISION I

STATE OF WASHINGTON

PUGET SOUND SECURITY PATROL, INC.,
Appellant,

v.

STATE OF WASHINGTON,
Respondent.

APPELLANT'S OPENING BRIEF

ROCKE | LAW GROUP, PLLC
Aaron V. Rocke
WSBA #31525
1424 Fourth Avenue, Suite505
Seattle, Washington 98101
(206)652-8670

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
I. Introduction	1
II. Assignment of Error	2
III. Issues Pertaining to Assignment of Error	2
IV. Statement of the Case	2
V. Argument.....	4
A. The standard of review is <i>de novo</i>	4
B. Corporations must generally appear through an attorney.....	5
C. Washington recognizes an exception for “solely-owned companies.”. 6	
1. Washington’s Sole Stockholder Exception.....	6
2. Grounds used to prevent <i>pro se</i> representation do not apply.....	8
3. Other Jurisdictions Permit the Practice.....	10
D. Mr. Kirby is an “authorized representative” of his own company.	11
1. Corporations may appear <i>pro se</i> in APA cases.....	11
2. The ability to pierce the corporation weighs in favor of permitting <i>pro se</i> representation in sole-stockholder cases.	13
VI. Conclusion.....	13

TABLE OF AUTHORITIES

Cases

*Advocates for Responsible Development v. Western Washington Growth
Management Hearings Board,*
155 Wn. App. 479, 484, 230 P.3d 608 (2010)..... 7

Biomed Comm, Inc. v. Department of Health, Board of Pharmacy,
146 Wn. App. 929, 193 P.3d 1093 (2008)..... 5

Griffith v. City of Bellevue,
130 Wn.2d 189, 194, 922 P.2d 83 (1996)..... 9

In re Guardianship of Lamb,
154 Wn. App. 536, 54, 228 P.3d 32 (2009)..... 4

In re Stranger Creek,
77 Wn.2d 649, 653, 466 P.2d 508 (1970)..... 8

State ex rel. State Fin. Comm. v. Martin,
62 Wn.2d 645, 665-66, 384 P.2d 833 (1963)..... 8

Willapa Trading Co. v. Muscanto, Inc.,
45 Wn. App. 779, 727 P.2d 687 (1986)..... 1, 7

Statutes & Regulations

RCW 34.05.428 2

RCW 50.24.230 13

RCW 82.32.145 13

WAC 485-20-217(8)..... 13

Non-Washington Cases

Chamberlin & Churchill v Mammoth Mining Co.,
20 Mo. 96 (1854) 11

Division of Alcoholic Beverage Control v Bruce Zane, Inc.,
239 A.2d 28, 99 NJ Super. 196, (1968) 12

Idaho State Bar Ass’n v. Idaho Public Util. Commis.,
637 P.2d 1168, 1172, 102 Idaho 672 (1981)..... 9

In the Matter of Holliday’s Tax Services, Inc.,
417 F. Supp. 182 (E.D.N.Y. 1976) 10

Margaret Maunder Assoc. Inc. v. A-Copy, Inc.,
499 A.2d 1172, 1174, 40 Conn.Supp. 361 (1985) 6, 11

S.E.C. v. Sloan,
436 U.S. 103, 98 S.Ct. 1702, 56 L.Ed.2d 148 (1978)..... 10

State Bar of Michigan v. Galloway,
369 N.W.2d 839, 422 Mich. 188 (1985)..... 12

US v. Reeves,
431 F.2d 1187 (9th Cir. 1970) 11

Vermont Agency of Nat. Resources v. Upper Valley,
621 A.2d 225, 159 Vt. 454 (1992)..... 6, 10

Willheim v. Murchison,
206 F. Supp. 733, 736 (S.D.N.Y.1962)..... 11

I. Introduction

Puget Sound Security Patrol, Inc. fired two security officers for sleeping on the job. The former security officers filed for unemployment. When the Employment Securities Department awarded unemployment benefits, Puget Sound Security appealed the decisions to superior court through the Administrative Procedures Act. The superior court consolidated the two matters. Because Puget Sound Security's sole stockholder, Jeff Kirby, appeared for the employer without a lawyer, the Attorney General's Office moved for dismissal.

Washington generally requires corporations to be represented by a lawyer. Mr. Kirby is not licensed to practice law. However, as the sole shareholder of Puget Sound Security, Mr. Kirby fits an exception.

In *Willapa Trading Co. v. Muscanto, Inc.*, 45 Wn. App. 779, 727 P.2d 687 (1986), this court allowed the "president, director, and sole stockholder" of a corporation to represent his company "*pro se*." The court reasoned that, "[i]n acting for [the company], [the sole stockholder] was, in fact, acting on his own behalf." *Id.* at 787.

Jeff Kirby, the sole stockholder of Puget Sound Security, is indistinguishable from the party in *Willapa Trading*; he represents no interests other than his own. The superior court erred when it misapplied the *Willapa Trading* exception and erroneously dismissed the APA appeals. Puget Sound Security asks this court to reverse and remand the cases so they can be decided on their merits.

II. Assignment of Error

The superior court erred in dismissing Puget Sound Security's Employment Security Department appeals by failing to recognize an exception which allows Mr. Kirby to represent his own company.

III. Issues Pertaining to Assignment of Error

1. Should the superior court have permitted Jeff Kirby, the sole owner of Puget Sound Security, to represent his company, given that Washington law recognizes an exception to the common law rule prohibiting corporate self-representation by sole shareholders?
2. Is Mr. Kirby "a duly authorized representative" that can represent his corporation in an Administrative Procedures Act appeal pursuant to RCW 34.05.428 (1)?

IV. Statement of the Case

Jeff Kirby is the sole owner of Puget Sound Security. He founded the security firm in 1981. He started with one client, Newport Shores. He has grown the business into a full-service security company with 25 patrol units and 250 security officers. This local business is a corporation duly registered with the Secretary of State. CP 524-525.

Mr. Kirby's security firm is part of the larger security industry. There are approximately one million security guards (including airport screeners) employed in the United States – compared to 650,000 U.S. police officers.¹ Nearly half are

¹ <http://www.fas.org/sgp/crs/RL32670.pdf>

employed directly by the institutions they serve. *Id.* The rest work for security firms such as Mr. Kirby's. *Id.*

Security firms supplement law enforcement and relieve people from anxiety over lost or damaged property and physical threats to people. Because security requires vigilance, staying awake is a minimum expectation of the job. There are serious consequences when security officers fall asleep on the job.

For example, CBS News obtained video footage of security officers sleeping while guarding Peach Bottom Nuclear Plant in Pennsylvania.² CBS reported that the same security firm, Wackenhut, guarded 29 nuclear plants. The firm was fired from Peach Bottom Nuclear Plant and nine other nuclear plants within months of that broadcast,³ and it recently changed its name.⁴ Providing active protection and inspiring a sense of security in its customers are important functions of a professional security firm.

Puget Sound Security fired two of its security officers for sleeping on the job. The terminations were part of the firm's last step in progressive discipline. The former employees filed for unemployment. When the Employment Securities Department awarded unemployment benefits, Puget Sound Security appealed the decisions through the Administrative Procedures Act. CP 1-4. The two cases were consolidated. CP 378-379.

Before weighing the merits, the department moved to require Puget Sound Security to retain licensed counsel. CP 327-331. The attorney for the department

²<http://www.cbsnews.com/stories/2007/11/02/eveningnews/main3447744.shtml>.

³ <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/03/AR2008010304442.html?sub=AR>

⁴ <http://en.wikipedia.org/wiki/Wackenhut>

did not know about the *Willapa Trading* exception. VRP 13-14. The department argued, “I think everything would go forward ... more smoothly if there were lawyers on both sides.” VRP 17.

Jeff Kirby appeared at the hearing to represent his company. VRP 3. The superior court was aware that Mr. Kirby was the sole owner, and it knew of the *Willapa Trading* case. VRP 14. However, the superior court stated its understanding of the holding on the record, and it took a narrow view of its applicability. VRP 17 (stating rule as if no corporation could appear *pro se*), 23-24 (stating *Willapa Trading* holding as if issue was raised and time given to obtain counsel then “a case cannot proceed in court unless the corporation retains counsel” and “bound by the clear law”).

The superior court ordered Puget Sound Security to appear through a lawyer or suffer dismissal. CP 531-532. Puget Sound Security declined, so the cases were dismissed. CP 546-547. The superior court’s orders were appealed. CP 533-534; 548-549.

V. Argument

A. The standard of review is *de novo*.

The standard of review is *de novo*. The *de novo* standard of review applies when the appeal turns on an issue of law or when it concerns statutory construction. See e.g., *In re Guardianship of Lamb*, 154 Wn. App. 536, 54, 228 P.3d 32 (2009) (citations omitted). The *de novo* standard also applies when the lower court bases its decision on an erroneous view of the law, or when it applies an incorrect legal standard. *Id.* Each reason applies to our case.

In our case, the superior court erroneously thought it had no authority to permit owner Jeff Kirby to represent his own security firm, Puget Sound Security, in the administrative action. Its decision turned on a pure legal issue, and it applied an erroneous view of the law, or it used the wrong standard. This court reviews the matter *de novo*.

B. Corporations must generally appear through an attorney.

The general rule in Washington requires corporations and other organizations who are parties in civil actions to be represented by a licensed attorney. *See e.g., Biomed Comm, Inc. v. Department of Health, Board of Pharmacy*, 146 Wn. App. 929, 193 P.3d 1093 (2008). Mr. Kirby's arguments have not been squarely presented in any case that has followed the general rule.

Public policy does not support strict adherence to the general rule. The Washington Administrative Office for the Courts commissioned a statewide study patterned after a nationwide study. Only twenty-seven percent of Washingtonians said it is affordable to bring a case to court.⁵ This is several percentage points below the national average. The survey asked how certain factors contribute to the cost of going to court.⁶ Some of the factors included: court fees, the slow pace, complexity of the law, the amount of personal time required, and the cost of having a lawyer. The factor which the highest percentage of people (84%) felt made our state's legal process unaffordable was attorney fees. Washingtonians are concerned about the cost of legal counsel.

⁵<http://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.displayContent&heFile=content/publicViewsCourt/fairness>

⁶<http://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.displayContent&heFile=content/publicViewsCourt/attitudeCosts>

It has been said that *pro se* litigants place an additional workload on judicial and clerical resources because of their limited familiarity with legal issues and the court environment.⁷ However, evidence suggests that self-represented litigants do not require additional court time in comparison to litigants with attorneys.

In a 2001 study, the Washington Administrative Office of the Courts found that when both parties were self-represented, “fewer hearings occurred, fewer continuances were granted, and a shorter time period occurred from filing to resolution.”⁸

Additionally, reducing impact on court resources has never been the stated policy behind requiring corporations to appear through a licensed attorney. The policy for requiring corporations to appear through counsel has been articulated as for the protection of the public. *See Vermont Agency of Nat. Resources v. Upper Valley*, 621 A.2d 225, 159 Vt. 454 (1992) (citing *Margaret Maunder Assoc. Inc. v. A-Copy, Inc.*, 499 A.2d 1172, 1174, 40 Conn.Supp. 361 (1985)). The rule is not created to confer a special advantage on or grant a monopoly to lawyers. *Id.* Puget Sound Security is not a publically- traded company, and has only one owner. The policy for requiring a lawyer does not apply in this case.

C. Washington recognizes an exception for “solely-owned companies.”

1. Washington’s Sole Stockholder Exception

Washington authority affirming the general rule is sparse, and reveals an exception for solely-owned corporations. The sole stockholder exception was

⁷http://www.courts.wa.gov/jislink/?fa=jislink.codeview&dir=stats_manual&file=ctlprose
⁸<http://www.courts.wa.gov/wscctr/docs/Courthouse%20Facilitator%20Program.pdf#xml=http://206.194.185.202/tehis/search/pdfhi.txt?query=report+litigants+without+lawyers&pr=www&prox=page&rorder=500&rprox=500&rdfreq=500&rwfreq=500&rlead=500&rdpth=0&sufs=0&order=r&cq=&id=4c75992811>, pg 13.

articulated by this court in *Willapa Trading Co. v. Muscanto, Inc.*, 45 Wn. App. 779, 787, 727 P.2d 687 (1986). That exception permits the sole owner of a corporation to represent his company “*pro se.*” *Id.*

Public policy supports the sole stockholder exception. In *Willapa Trading*, Judge Scholfield noted the reason for the rule: when the sole owner represents the company, the owner in fact represents himself and no other financial interests. *Id.* at 787. Similarly, in our case, Mr. Kirby is the sole owner. His interests and those of the corporation are one and the same. In this sense, despite the corporate form, he does not represent anyone other than himself.

The solely-owned corporation exception has remained undisturbed in Washington for almost 25 years. Indeed, the most recent appellate court decision recognized *Willapa Trading*. In articulating its holding, the court distinguished *Willapa Trading* from a case in which an unlicensed organizational representative attempted to represent an entity that included the interests of several other people. *Advocates for Responsible Development v. Western Washington Growth Management Hearings Board*, 155 Wn. App. 479, 484, 230 P.3d 608 (2010).

The *Advocates* court articulated the holding of *Willapa Trading*, “[A] non-lawyer could appear on behalf of himself and a corporation of which he was the president, director, and sole stockholder,” because “the litigant ‘was, in fact, acting on his own behalf’ and thus his personal interests were virtually indistinguishable from those of his corporation.” *Id.* at 483-484. Because the court of appeals decision reaffirming this exception was published only nine days

before the superior court hearing in our case, the superior court may not have had the benefit of the *Advocates* decision, which reaffirmed *Willapa Trading*.

The doctrine of *stare decisis* also favors preserving this exception. *Stare decisis* requires a clear showing that an established rule is incorrect and harmful before it is abandoned. See *In re Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (writing that without the stabilizing effect of *stare decisis*, “law could become subject to incautious action or the whims of current holders of judicial office.”); see also *State ex rel. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 665-66, 384 P.2d 833 (1963) (“Take away *stare decisis*, and what is left may have force, but it will not be law.”). This court should apply the sole stockholder exception, and reverse the superior court.

2. Grounds used to prevent *pro se* representation do not apply.

The court should not further curtail nor discourage *pro se* representation. Two tools have been used to curtail *pro se* representation: law concerning admission to practice, and Civil Rule 11.

Law concerning the admission to practice should not be used to exclude the sole-stockholder representative. The non-lawyer represents the employer at the administrative level in tasks traditionally thought of as lawyer tasks: drafting of pleadings and motions, RCW 34.05.437, collection of discovery and propounding of subpoenas, RCW 34.05.446, and introduction of evidence, including examination of witnesses. RCW 34.05.452. The superior courts are involved in an appellate review of the administrative adjudicative process. Also, under the sole stockholder exception, the court has already held that the sole stockholder is,

in fact, representing his or her own interests. *Willapa Trading*, 45 Wn. App. at 787.

In an analogous case, a state bar challenged agency rules permitting corporate self-representation before a commission. *Idaho State Bar Ass'n v. Idaho Public Util. Commis.*, 637 P.2d 1168, 1172, 102 Idaho 672 (1981). The court held the rules proper “to the extent they allow representation of a sole proprietorship by the owner, or representation by the partners, or representation of a corporation or non-profit organization by the officers of those entities.” *Id.* Like the Idaho court, our court should recognize the circumstance when *pro se* representation is appropriate.

Next, Civil Rule 11 should not be used to discourage self-representation in this context. The purpose of CR 11 is to assure truthfulness of the pleading and to discourage claims without merit. *Griffith v. City of Bellevue*, 130 Wn.2d 189, 194, 922 P.2d 83 (1996). The purpose of the rule can be served by holding the author accountable, whether or not the author is a lawyer. Accountability of non-lawyers fits the rule because the very terms of the rule contemplate *pro se* representation. The rule states, in part, “A party who is not represented by an attorney shall sign and date the party’s” document, and the “signature of a party or of an attorney constitutes a certificate by the party or attorney” as to the rules requirements. CR 11(a). The pleading is only stricken if it “is not signed[.]” *Id.* Lastly, CR 11 “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.” CR 1. The court should not use these legal doctrines to discourage self-representation.

3. Other Jurisdictions Permit the Practice.

The right to self-representation is deeply embedded in our law. Indeed, one of the first things that the First Congress did was to condify the right as Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92 – a law signed by George Washington himself. The law said “parties may plead and manage their own causes personally or by assistance of such counsel or attorneys at law” as the rules of courts allow. And at least one *pro se* has prevailed on his own brief and oral argument in the U.S. Supreme Court. *See S.E.C. v. Sloan*, 436 U.S. 103, 98 S.Ct. 1702, 56 L.Ed.2d 148 (1978).⁹

In a case analogous to ours, the lower court dismissed a petition when a corporation appeared through its sole owner. *In the Matter of Holliday's Tax Services, Inc.*, 417 F. Supp. 182 (E.D.N.Y. 1976). The reviewing court reversed, holding that a sole shareholder could appear for the corporation unless the court found a substantial threat of disruption or injustice. *Id.* In our case, the court made no such finding. Mr. Kirby should be permitted to proceed on the merits of his appeals.

Various courts have found other circumstances in which a corporation could appear through a non-lawyer representative. *Vermont Agency of Nat. Resources v. Upper Valley*, 621 A.2d 225, 159 Vt. 454 (1992) (reversing and remanding to

⁹ The superior court has permitted Mr. Kirby to represent Puget Sound Security in the past. An example of his representation was in another case against the state. Mr. Kirby represented his company in an administrative appeal from the Board of Industrial Insurance Appeals in *In re Puget Sound Security Patrol, Inc., v. Washington Dept. of Labor and Industr.*, King County Sup. Ct. Case No. 99-2-21085-9KNT. Mr. Kirby examined the department's expert witness and argued his case to a successful conclusion. This example was before the superior court in our case as persuasive authority. *See* VRP 30. The superior court acknowledged and rejected the argument.

permit non-lawyer to represent a party upon proof that representative can bind the party); *US v. Reeves*, 431 F.2d 1187 (9th Cir. 1970) (reversing default order and holding that a partner may appear for partnership); *Margaret Maunder Assoc. Inc. v. A-Copy, Inc.*, 499 A.2d 1172, 1173 (Conn.Supp. (1985)) (denying motion to dismiss when sole owner appeared for corporation); *Willheim v. Murchison*, 206 F. Supp. 733, 736 (S.D.N.Y.1962) (allowing non-lawyer acting *pro se* to bring action for benefit of corporation in stockholder's derivative suit); see *Chamberlin & Churchill v Mammoth Mining Co.*, 20 Mo. 96 (1854) (holding that corporation's president was the person appointed by law to defend it). While the department may find cases supporting its position, Washington law is not alone in recognizing exceptions to the general rule.

D. Mr. Kirby is an “authorized representative” of his own company.

1. Corporations may appear *pro se* in APA cases.

Puget Sound Security did not retain a lawyer for these administrative hearings because the company may appear through a non-lawyer representative. The Administrative Procedures Act explains the procedures that govern adjudicative proceedings. RCW 34.05.410(1). Under those procedures, the APA explicitly allows non-lawyer representatives: “A party to an adjudicative proceeding may participate personally or, if the party is a corporation or other artificial person, by a duly authorized representative.” RCW 34.05.428(1); see also WAC 10-08-083 (model APA rules permitting non-lawyer representative); WAC 263-12-020(3) (explicitly allowing “[d]uly authorized lay representatives”).

In an analogous case, the Michigan Supreme Court interpreted two similar statutes to permit non-lawyer representation in administrative matters. *State Bar*

of *Michigan v. Galloway*, 369 N.W.2d 839, 422 Mich. 188 (1985). One statute referred to employment securities: “Any individual claiming benefits in any proceeding before the commission or a court may be represented by counsel or other duly authorized agent,” and the other permitted, “Any employer may be represented in any proceeding before the commission by counsel or other duly authorized agent.” *Id.* at 192. The court rejected arguments about the practice of law and read the phrase “duly authorized agent” to permit non-lawyers to represent corporations in administrative matters.

If this court decided the case on the ground that it arose from an administrative appeal, the overall impact on the courts would affect less than eight-tenths of one percent of cases. APA cases are a trivial part of the superior court caseload. Courts track new filings. In the month of August 2010, there were 3,390 civil filings in King County Superior Court.¹⁰ Of those new filings, only 24 were categorized as “Administrative Law Review.” Statewide, year-to-date filings are similar: 92,705 civil filings, with only 724 administrative law review cases.¹¹

Other jurisdictions have found exceptions for non-lawyers representing corporations in administrative contexts. *See e.g., Division of Alcoholic Beverage Control v Bruce Zane, Inc.*, 239 A.2d 28, 99 NJ Super. 196, (1968) (holding that the general rule was inapplicable when the corporation’s principal shareholder

¹⁰http://www.courts.wa.gov/caseload/?fa=caseload.display_subfolders&folderID=content&subFolderID=htm/superior/monthly&fileID=civfilyr

¹¹http://www.courts.wa.gov/caseload/?fa=caseload.display_subfolders&folderID=content&subFolderID=htm/superior/ytd&fileID=civfilyr

Washington prohibits the practice of law without a license, but preserves the individual's right to represent his own interests. Jeff Kirby is Puget Sound Security and wants to represent himself.

Respectfully submitted this 13th day of October, 2010

ROCKE | LAW GROUP, PLLC



Aaron V. Roche, WSBA #31525
Attorney for Appellant

Declaration of Service

I caused a copy of the foregoing Appellant's Opening Brief to be served on the following in the manner indicated below:

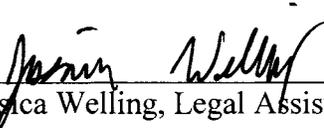
Via e-mail only by stipulation to leahh1@atg.wa.gov

Leah E. Harris
Attorney General's Office
800 5th Avenue, Suite 2000
Seattle, WA 98104

on today's date.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my belief.

SIGNED this 13th day of October, 2010, at Seattle, Washington.



Jessica Welling, Legal Assistant