

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

VOTERS EDUCATION
COMMITTEE, ET AL.,

PLAINTIFFS,

VS.

PUBLIC DISCLOSURE
COMMISSION, ET AL.,

DEFENDANTS.

CAUSE NO.

04-2-23351-1 SEA

04-2-03247-8 SEA

VERBATIM REPORT OF PROCEEDINGS

HEARD BEFORE THE HONORABLE RICHARD A. JONES

AUGUST 12, 2005

APPEARANCES:

JOHN WHITE, ATTORNEY-AT-LAW, APPEARING ON BEHALF OF THE
PLAINTIFFS;

LINDA DALTON, ATTORNEY-AT-LAW, APPEARING ON BEHALF OF THE DEFENDANTS;

**MICHAEL E. WITHEY, ATTORNEY-AT-LAW, APPEARING ON BEHALF OF
THE INTERVENOR;**

WHEREUPON THE FOLLOWING PROCEEDINGS WERE HAD AND DONE,
TO-WIT:

ORDERED BY: LINDA DALTON

REPORTED BY LADD A. SUTHERLAND, RPR, CSR,
OFFICIAL COURT REPORTER

KING COUNTY SUPERIOR COURT

1 FRIDAY, AUGUST 12, 2005; 11:03 AM

2

3 THE COURT: GOOD MORNING, AGAIN. PLEASE BE SEATED.

4

5 FIRST OF ALL I WANTED TO THANK ALL OF THE COUNSEL IN
6 THIS CASE FOR THE ADVOCACY AND THE MANNER IN WHICH YOU
7 REPRESENTED YOUR CLIENTS AND THE LEVEL OF DETAIL THAT YOU
8 PROVIDED TO THE COURT. THE BRIEFING AND MATERIALS
9 SUBMITTED WERE VERY INSTRUMENTAL AND HELPFUL TO THE COURT
10 IN REACHING THE DETERMINATION THAT I HAVE MADE. I ALSO
11 DEEPLY APPRECIATE THE MANNER IN WHICH YOU RELATED TO EACH
12 OTHER, AS WELL, COUNSEL.

13 THE FOLLOWING RULING APPLIES TO BOTH MOTIONS FOR
14 SUMMARY JUDGMENT AND THE TWO CAUSES OF ACTION.

15 AT THE OUTSET THIS COURT CONCLUDES THAT THE FOCUS OF
16 THESE MOTIONS PERTAINED TO TWO TELEVISION ADVERTISEMENTS
17 CONCERNING FORMER INSURANCE COMMISSIONER DEBORAH SENN. AT
18 THE TIME OF THESE ADS MS. SENN WAS A CANDIDATE FOR ATTORNEY
19 GENERAL. THE STATEMENTS IN THE ADS INCLUDE REFERENCES TO
20 PRESS COVERAGE OF MS. SENN AS INSURANCE COMMISSIONER.
21 THERE IS NO FACT DISPUTE REGARDING THE CONTENT OF THE
22 ADVERTISEMENT. HENCE THERE ARE NO GENUINE ISSUES OF
23 MATERIAL FACT, AND THE SOLE DETERMINATION CONCERNS
24 STATUTORY CONSTRUCTION. SUCH CONSTRUCTION IS A QUESTION OF
25 LAW THAT MAY BE RESOLVED BY THE COURT AT THIS TIME.

MS. SENN'S COUNSEL HAS CONCEDED DURING ARGUMENT THAT
KING COUNTY SUPERIOR COURT

1 THERE IS NO CR 56 MOTION OUTSTANDING, AND THAT THIS MATTER
2 IS RIPE FOR RESOLUTION, DESPITE THE REPRESENTATIONS IN HIS
3 BRIEFING.

4 THE ISSUES BEFORE THIS COURT ARE WHETHER THE VEC HAD
5 A DUTY TO REGISTER AS A POLITICAL COMMITTEE AND FILE
6 REPORTS TO DISCLOSE TO THE PUBLIC INFORMATION REQUIRED BY
7 STATUTE.

8 IN REACHING ITS CONCLUSIONS THIS COURT WISHES TO MAKE
9 A FORMAL RECORD OF ITS ANALYSIS OF THE APPLICABLE AND
10 CONTROLLING LEGAL AUTHORITIES.

11 THERE IS NO DISPUTE THAT BUCKLEY VS. VALEJO WAS
12 CONTROLLING AUTHORITY AT THE FEDERAL LEVEL ON POLITICAL
13 SPEECH PRIOR TO 2003. BUCKLEY CLEARLY PROVIDED A
14 DISTINCTION FOR PURPOSES OF CAMPAIGN FINANCING BETWEEN
15 ADVOCACY THAT WAS EXPRESS -- THAT IS, ADVOCATED FOR THE
16 ELECTION OR DEFEAT OF THE CANDIDATE AND THAT RELATED SOLELY
17 TO ISSUE STATEMENTS. THE SUPREME COURT CLEARLY CONCLUDED
18 IN BUCKLEY THAT THE MANDATORY DISCLOSURE REQUIREMENTS OF
19 THE FEDERAL CAMPAIGN LAWS APPLIED ONLY TO EXPRESS ADVOCACY
20 FOR THE ELECTION OR DEFEAT OF A CLEARLY IDENTIFIED
21 CANDIDATE FOR FEDERAL OFFICE.

22 THE COURT IN BUCKLEY ATTEMPTED TO CLARIFY EXPRESS
23 ADVOCACY BY GIVING EXAMPLES OF LANGUAGE AND TERMS THAT HAVE
24 SINCE BECOME KNOWN AS THE "MAGIC WORDS." OUR OWN STATE
25 SUPREME COURT HAS FURTHER DEFINED EXPRESS ADVOCACY IN THE
KING COUNTY SUPERIOR COURT

1 WASHINGTON STATE REPUBLICAN PARTY DECISION, WSRP,
2 HEREINAFTER TO INCLUDE STATEMENTS THAT EXHORT A LISTENER TO
3 VOTE EITHER FOR OR AGAINST A PARTICULAR CANDIDATE. THE
4 BUCKLEY AND WASHINGTON STATE REPUBLICAN PARTY DECISIONS
5 MAKE IT CLEAR THAT SPEECH THAT LACKS A SPECIFIC EXHORTATION
6 TO VOTE IN A PARTICULAR WAY IS TO BE IDENTIFIED AS ISSUE
7 ADVOCACY AND BEYOND THE REACH OF GOVERNMENT REGULATION AND
8 FULLY PROTECTED AS POLITICAL SPEECH UNDER THE FIRST
9 AMENDMENT.

10 IN 2003 IN MCCONNELL, THE UNITED STATES SUPREME
11 COURT'S MOST RECENT ANALYSIS OF THESE STATUTES CHANGED THE
12 RULES OF ENGAGEMENT ON THE DISTINCTION BETWEEN EXPRESS AND
13 ISSUE ADVOCACY. IN THIS COURT'S ANALYSIS THE UNITED STATES
14 SUPREME COURT IN MCCONNELL OVERTURNED A SIGNIFICANT PORTION
15 OF BUCKLEY AS RELIED UPON BY OUR STATE SUPREME COURT IN
16 WSRP, AND RENDERED A DISTINCTION BETWEEN EXPRESS AND ISSUE
17 ADVOCACY AS THE DECISION INDICATED, "FUNCTIONALLY
18 MEANINGLESS." THE SO-CALLED "MAGIC WORDS" NO LONGER
19 CONTROLLED IN THE ANALYSIS.

20 CONSEQUENTLY IN THIS COURT'S ANALYSIS THE DISTINCTION
21 BETWEEN EXPRESS OR ISSUE ADVOCACY IS NO LONGER THE
22 CONTROLLING LAW. WHILE THE COURT IS SATISFIED THAT THIS IS
23 A CORRECT CONCLUSION, THERE ARE NONETHELESS CASES AND
24 DECISIONS CONTINUING TO ANALYZE EXPRESS VERSUS ISSUE
25 ADVOCACY, AS HAD BEEN DONE PRIOR TO 2003, ANDERSON VS.

KING COUNTY SUPERIOR COURT

1 SPEARS, TO NAME ONE.

2 EVEN IF THIS COURT WERE TO CONCLUDE THE DISTINCTION
3 STILL EXISTED, THE COURT WOULD NONETHELESS HOLD AS A MATTER
4 OF LAW THAT THE AD REGARDING SENN IS CLEARLY EXPRESS
5 ADVOCACY UNDER THE AUTHORITY OF WSRP, WHICH CLEARLY HELD
6 THAT STATE RESTRICTIONS FOR REPORTING REQUIREMENTS CAN BE
7 APPLIED. WSRP INCLUDED IN ITS DEFINITION OF EXPRESS
8 ADVOCACY IF IN THAT AD THE CANDIDATE'S CHARACTER AND
9 CAMPAIGN TACTICS ARE ATTACKED, THE AD MAY BE SUBJECT TO
10 ONLY ONE REASONABLE INTERPRETATION AND EXHORTATION: TO
11 VOTE AGAINST A CANDIDATE.

12 WSRP ALSO DEFINED ISSUE ADVOCACY AS ADVOCACY THAT
13 INTENDS TO INFORM THE PUBLIC ABOUT PARTICULAR ISSUES
14 GERMANE TO AN ELECTION. IN THE INSTANT CASE THERE WERE TWO
15 ADVERTISEMENTS OF MS. SENN'S RECORD AS AN INSURANCE
16 COMMISSIONER. THE FIRST AD IS ISSUE ADVOCACY BEYOND THE
17 REACH OF GOVERNMENT REGULATION PROTECTED BY THE FIRST
18 AMENDMENT. THE SECOND GENERALLY FITS IN THE SAME CATEGORY
19 EXCEPT FOR ONE LINE WHICH CLEARLY TRANSITIONS THE SCOPE OF
20 THE AD FROM ISSUE TO EXPRESS ADVOCACY. THAT BEING, "SENN
21 EVEN TRIED TO COVER UP THE DEAL FROM STATE LEGISLATORS."

22 UNDER ANY NOTION OF RATIONAL INTERPRETATION THE
23 SUGGESTION THAT AN ELECTED OFFICIAL ENGAGED IN A "COVER UP"
24 IS AN ASSERTION THAT CLEARLY AND UNAMBIGUOUSLY SUGGESTS THE
25 OFFICIAL ENGAGED IN AN ACT OF DECEIT, DECEPTION, FRAUD OR

1 CONCEALMENT.

2 UNDER THE WORDS QUOTED BY THE SUPREME COURT IN
3 MCCONNELL IN FOOTNOTE 78, THE NOTION THAT THIS
4 ADVERTISEMENT WAS DESIGNED PURELY TO DISCUSS THE ISSUES AND
5 NOTED A PERSONAL ATTACK ON THE CHARACTER STRAINS CREDULITY.
6 ANY LISTENER KNOWING OF THE CITIZEN'S CANDIDACY FOR
7 ATTORNEY GENERAL WOULD HAVE ONLY ONE REASONABLE
8 INTERPRETATION: THAT IS, THAT THE AD WAS AN EXHORTATION TO
9 VOTE AGAINST SENN. IT IS CLEAR TO THIS COURT THAT AN
10 ASSERTION THAT A PUBLIC OFFICIAL WAS INVOLVED IN A COVER-UP
11 IS NOT A DISCUSSION OF ISSUES; IT IS A CLEAR ATTACK ON THE
12 CHARACTER OF THE CANDIDATE.

13 IN MAKING THIS DETERMINATION THE COURT AGREES WITH
14 VEC THAT A MAJOR PURPOSE OF THE FIRST AMENDMENT IS TO
15 PROTECT THE FREE DISCUSSION OF GOVERNMENTAL AFFAIRS,
16 INCLUDING THE DISCUSSION OF CANDIDATES. HOWEVER, WHEN THE
17 NATURE, SCOPE AND BREADTH, AS IN THIS CASE, EXCEEDS
18 CONSTITUTIONAL PROTECTIONS, IT CANNOT BE SANCTIONED BY THE
19 COURT.

20 IN THIS ANALYSIS THE COURT ALSO REJECTED VEC'S
21 ARTICLE I, SECTION 5 ARGUMENT. VEC'S GUNWELL ANALYSIS IS
22 FLAWED. THIS COURT HOLDS THAT AFTER REVIEWING THE ANALYSIS
23 OF THE RESPECTIVE PARTIES, ANY ADDITIONAL PROTECTIONS
24 SHOULD BE EXTENDED TO THE VOTERS' RIGHT TO INFORMATION
25 REGARDING POLITICAL ACTIVITY, NOT THE RIGHT OF VEC TO

KING COUNTY SUPERIOR COURT

1 RESTRICT DISCLOSURE OF THE INFORMATION.

2 THE FINAL GUNWELL FACTOR, THAT IS "MANAGED WITH
3 PARTICULAR STATE INTEREST OR LOCAL CONCERN" IS A MATTER OF
4 PARTICULAR IMPORTANCE IN THIS COURT'S CONCLUSION AND
5 ANALYSIS. THE AUTHORITIES CITED BY THE PARTIES PERSONALLY,
6 THE HISTORY, THE CURRENT STATEMENT OF STATE AND FEDERAL
7 LAW, INDICATES THAT THE GROWING TREND IN THIS COUNTRY IS TO
8 PROVIDE GREATER PROTECTION FOR THE LISTENING PUBLIC ON THE
9 FINANCING OF CAMPAIGNS.

10 IN THIS REGARD IF THERE IS TO BE GREATER PROTECTION,
11 WASHINGTON PRECEDENT MAKES IT CLEAR THAT IT IS TO BE
12 CONSISTENT WITH THE PROTECTION OF THE PUBLIC. MOREOVER,
13 WHILE THERE WAS NO EVIDENCE OR SUPPORT OF AUTHORITY OF
14 WASHINGTON CONSTITUTIONAL HISTORY ADDRESSING THE SCOPE OF
15 PROTECTION OF ARTICLE 1, SECTION 5, IT WOULD APPEAR A FAIR
16 READING SHOULD BE CONSTRUED TO PROVIDE GREATER OPPORTUNITY
17 FOR WASHINGTON VOTERS TO RECEIVE INFORMATION IN THE
18 ELECTION PROCESS THAN TO RESTRICT IT.

19 VEC HAS ALSO ALLEGED THAT REQUIRING THEM TO REGISTER
20 AND DISCLOSE CONSTITUTES A PRIOR RESTRAINT. THIS CLAIM IS
21 NOT SUPPORTED IN LAW OR IN FACT. THE PDC DEMAND TO
22 REGISTRATION IS NOT BEING DONE TO REGULATE THE CONDUCT OF
23 THE VEC AND/OR PROHIBIT ANY EXPRESSION OF SPEECH. THE
24 CLEAR STATUTORY PURPOSE OF THE REGULATION IS THE
25 IDENTIFICATION OF THOSE WHO SPONSORED THE SPEECH. THIS

1 ACTIVITY DOES NOT RISE TO THE LEVEL OF BEING A PRIOR
2 RESTRAINT.

3 LAST VEC SEEKS INJUNCTIVE RELIEF UNDER 42 USC,
4 SECTION 8, 1983. PLAINTIFFS' MOTION TO DISMISS IS GRANTED.
5 VEC HAS FAILED IN ALL RESPECTS TO PROVE ANY ELEMENT OF A
6 1983 CLAIM.

7 FOR ALL THE FOREGOING REASONS THE PDC'S MOTION FOR
8 SUMMARY JUDGMENT IS GRANTED. VEC'S MOTION FOR SUMMARY
9 JUDGMENT IS DENIED. AND INTERVENOR'S MOTION TO COMPEL
10 ADDITIONAL DISCOVERY IS DENIED BASED ON COUNSEL'S
11 CONCESSIONS IN ORAL ARGUMENT.

12 THIS IS THE COURT'S RULING IN THIS MATTER.
13 COUNSEL, DO YOU HAVE AN ORDER AVAILABLE FOR THE COURT
14 AT THIS TIME?

15 MS. DALTON: NOT AT THIS TIME.

16 THE COURT: I'LL GIVE YOU A DATE AND TIME FOR FORMAL
17 PRESENTMENT TO THE COURT. IF THE PARTIES ARE IN AGREEMENT
18 AS TO THE LANGUAGE, YOU CAN SUBMIT THE ORDER TO THE COURT
19 EX PARTE WITHOUT PRESENTATION. IF THERE'S ANY ISSUE OF
20 LANGUAGE TO BE INCLUDED, THE COURT'S BAILIFF AT THIS TIME
21 WILL GIVE YOU A DATE AND TIME FOR FORMAL PRESENTMENT.

22 COUNSEL, HOW MUCH TIME WILL THE PARTIES NEED FOR
23 FORMAL PRESENTMENT?

24 MR. WHITE: TWO WEEKS.

25 MS. DALTON: TWO WEEKS, YES.

1 THE BAILIFF: SETTING IT AS A MORNING MATTER, JUDGE?

2 THE COURT: COUNSEL, DO YOU THINK YOU'LL NEED MORE
3 THAN 15 MINUTES OR SO FOR PRESENTMENT?

4 MS. DALTON: NO. I THINK WE'LL AGREE TO THE TERMS OF
5 THE ORDER AS IS.

6 THE COURT: WE'LL SET IT AS A MORNING MATTER. AND,
7 COUNSEL, IF ALL PARTIES SIGN OFF ON THE ORDER, PLEASE
8 CONTACT THE BAILIFF, AND THE HEARING DATE WE'RE ABOUT TO
9 GIVE YOU WILL BE STRICKEN, AND NO PARTY NEEDS TO APPEAR.

10 THE BAILIFF: TUESDAY, SEPTEMBER 6TH AT 8:45 AM.

11 THE COURT: COUNSEL, IF THERE'S A POINT OF
12 CLARIFICATION IN WHATEVER ORDER THAT YOU'RE PREPARING, I'LL
13 GIVE YOU TWO ALTERNATIVES. THE FIRST IS IF THERE'S NO
14 OBJECTION, YOU CAN CONTACT THIS COURT, AND WE CAN SET UP A
15 TELEPHONE CONFERENCE TO MINIMIZE THE PARTIES HAVING TO COME
16 BACK TO THE COURT FOR CLARIFICATION. IF YOU WISH TO HAVE
17 THE ISSUES AND QUESTIONS A MATTER OF FORMAL RECORD, WE CAN
18 ALSO DO THAT IN COURT ON THE DATE OF THE FORMAL
19 PRESENTATION. I'M JUST TRYING TO MAKE IT EASIER ON THE
20 PARTIES, WHICHEVER WAY YOU WANTED TO DO IT. I'LL GIVE YOU
21 A DATE FOR FORMAL PRESENTMENT.

22 WE'LL BE IN RECESS.

23 (WHEREUPON THE HEARING IN THE ABOVE-ENTITLED MATTER
24 CONCLUDED AT 11:17 AM.)
25