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Eric T. Quinn, Editor

Joseph F. Quinn, Staff Writer

The law firm of Eric T. Quinn, P.S. is legal counsel to more than 40 Fire Departments in the State of Washington.

Our office is located at:

7403 Lakewood Drive West, Suite #11
Lakewood, WA 98499-7951

Mailing Address: See above
Office Telephone: 253-590-6628
Joe Quinn: 253 576-3232

Email Joe at joequinn@firehouselawyer.com
Email Eric at ericquinn@firehouselawyer2.com

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A Rare Case

It is very rare for the appellate courts in Washington to decide a case having to do with an unincorporated association. But on September 15, 2025, Division One of the Court of Appeals just did that. The opinion of the court may have some relevant guidance for associations with which many of our readers are familiar: volunteer firefighter associations and fire commissioner associations.

In *Chappel v. Johnson,* No. 86392-4-1,[1] a dispute arose between certain active and retired members of the Seattle Black Firefighters Association (SBFFA) and members of the board

[1] https://www.courts.wa.gov/opinions/pdf/863924.pdf

of the association. The SBFFA members filed the action, among other reasons, to enjoin the association from selling a house in Seattle's Central District. That house, since the 1970s, had historically been used extensively in the association's activities, including community and charitable work. That allegation was ultimately found to be moot by the court, as the board had not sold the house, but other issues in the case survived.

After much discussion, the court concluded that the SBFFA is not a charitable organization (such as a 501(c)(3) corporation) and never was one, as it wanted to engage in political activities, which of course a charitable organization cannot do. Because of that finding, we think the SBFFA case is instructive for associations like the State and local fire commissioners' associations. It also has some application to the typical volunteer firefighter association.

Here are some important takeaways from the *Chappel* decision:

1. Although an association board may not run the association perfectly, a few procedural mistakes (such as not creating regular meeting minutes) does not constitute a breach of fiduciary duty. Therefore, there is no real risk of individual liability for the board members unless they breach one or more fiduciary duties.

2. The bylaws are critical. In the case, the bylaws provided that firefighters remained members even after retirement, so there was no way the board could remove their voting rights or cancel their memberships.

3. The Washington Nonprofit Corporation Act was amended substantially, effective January 1, 2022. Because the board's conduct took place over several years—both before and after January 1, 2022—the courts needed to look at both the old version and the new version of the Act. Interestingly, while the old Act does not address director liability, the new Act provides that a director of a nonprofit corporation is not liable for any action taken, or any failure to take action, except for "a knowing infliction of harm upon the member; or an intentional violation of criminal law or [the statute] that results in harm or loss to the member." RCW 24.03A.540(5). Both the old and new Acts have language stating that directors owe duties of good faith, ordinary prudence, and a reasonable belief that their actions are in the corporation's best interests.

4. This discussion of directors' liability protections suggests that perhaps incorporating an unincorporated association under the provisions of the Nonprofit Corporation Act –RCW 24.03A—might be a good way to foster board "immunity".

Despite numerous violations of the Nonprofit Corporation Act, the trial court found no breach of fiduciary duty, as the court said, "I don't find anything malicious, nefarious, and—I [don't] even find any negligence. I really don't." The Court of Appeals criticized the parties' preparation of the record on appeal, so there is a possibility that the appellate court's conclusion that the plaintiff failed to *prove* breach of fiduciary duty may have turned out differently if an adequate record had been created and preserved. It just seems to us that failing to keep six years of financial statements, and the lack of minutes of meetings, might rise to the level of "negligence."

Nonetheless, the case is interesting and worth reading as it is fairly rare for an appellate court to weigh in at all on the governance of associations or nonprofit corporations.

ANOTHER RARE BUT INSTRUCTIVE CASE

The Court of Appeals, Division 3, issued an opinion on September 16th in a most unusual case involving the Washington Medical Commission.[2] The case presents fascinating issues arising under the First Amendment's freedom of speech provision.

During the COVID-19 pandemic, Dr. Richard Wilkinson, a medical doctor practicing in Yakima, treated patients with COVID and also published a blog, in which he promoted the use of ivermectin for treating the disease, and criticized the government's response to the pandemic. Acting on complaints about Dr. Wilkinson, the Commission, after investigation, disciplined the doctor for his negligent treatment of seven patients but also sanctioned him for the comments he made in the blog.

The details of the court's findings about the seven patients and Dr. Wilkinson's negligent treatment of them, and other professional misconduct are not particularly noteworthy, but the constitutional issues are. It is worthy of note that all seven patients testified that they never read Dr. Wilkinson's blog, so the two aspects of the case are not inter-related at all. Thus, the Commission was clearly sanctioning Wilkinson for the speech contained in his blog. Therefore, the question there became whether the (commercial) speech in his blog was constitutionally protected.

When Dr. Wilkinson moved to dismiss the charges by the Commission, the WMC responded that (1) it lacked authority to declare any part of the Uniform Disciplinary Act (RCW 18.130) unconstitutional and (2) the First Amendment did not protect false commercial speech or false medical advice to patients or prospective patients, (3) the blog posts constituted the "practice of medicine" over which the WMC has jurisdiction and (4) the WMC had a compelling interest in protecting the public from COVID-19.

In our discussion below, we will discuss how the court dealt with each of these contentions.

A three-member panel of physicians heard the case, which included testimony from five treating doctors and three expert witnesses. Dr. Wilkinson testified and also called an expert witness that the Commission did not find credible. The Commission's expert witness identified the false statements in the blog and cited many studies concluding that ivermectin is not an effective treatment for COVID-19. She also opined that the disinformation and misinformation in the blog endangered patients and the public by dissuading vulnerable people from taking treatments or other effective prevention and treatment modalities.

Dr. Wilkinson did not challenge on appeal any of the factual findings of the Commission, and that certainly did not help his appeal. Nevertheless, while the doctor was found to have committed professional misconduct in the treatment of the seven patients discussed in the opinion, he prevailed completely on his First Amendment free speech arguments.

[2] https://www.courts.wa.gov/opinions/pdf/400611_pub.pdf

On the merits of the doctor's appeal as to the blog comments, the court identified the issues as follows:

- Whether the blog comments constituted conduct or speech;
- Whether the First Amendment protects false speech;
- Whether the WMC's discipline discriminated on the basis of the content of the speech;
- Whether the rational basis or the compelling state interest test applied in this case;
- Whether the licensing authority could demonstrate a compelling or valid interest in regulating misleading public comments by a licensee; and
- Whether the discipline advanced any governmental interest.

The Court of Appeals held that the blog comments were speech and not conduct. Although the WMC claimed that the blog was "verbal conduct" it did admit that they disciplined him due to the falsity of his speech. Ultimately, based on U.S. Supreme Court precedent, the Court of Appeals held that false speech deserves First Amendment protection.

Doctor Wilkinson also contended that his blog constituted political speech but the majority opinion declined to address political speech. Leaving that endeavor to the concurring opinion. Since the Supreme Court will invalidate content-based restriction on speech, the Court of Appeals ruled in the doctor's favor. Recent and not-so-recent Supreme Court cases, such as *New York Times v. Sullivan,* recognize that the best way to deal with falsity is to allow refutation by other speech. In *United States v. Alvarez, 567* U.S. 709 (2012) the Supreme Court struck down, as unconstitutional, the Stolen Valor Act (which penalized false claims to the Medal of Honor), under the First Amendment, holding that false speech is protected by the amendment.

Although time, place and manner restrictions on speech do not violate the First Amendment, content-based limits do violate it, and clearly here the WMC was concerned with the content of the speech, as it was clearly not supported by valid scientific evidence. Given the strict scrutiny of this kind of speech, the Court held this regulation of content to violate the First Amendment.

The Court of Appeals agreed with the WMC in that a state law regulating the practice of medicine and *only incidentally* burdening free speech was reviewable under the "rational basis" standard. However, the Court held this speech regulation was not incidental. While the Court declined to rule that the blog fell within the practice of medicine, it viewed the negligence and misconduct as to patients quite differently than the blog comments. The WMC could validly discipline for prescribing ivermectin to his patients and for failure to disclose risks to his patients. He fell below the standard of care and could be disciplined, but there was no evidence at the hearing that any of his patients even read the blog!

The Court of Appeals remanded the case to the WMC to reconsider the appropriate sanctions, now that the Court had upheld the ruling as to treatment but sustained his claims that the ruling violated his constitutional rights in the way it applied its regulations. They dismissed the charges based on the blog comments.

Judge Fearing issued a concurring opinion, although he agreed to and signed the majority opinion, as he wanted to discuss political speech. In this stirring, strongly worded concurring

opinion, Judge Fearing noted that political speech is probably the most strongly protected free speech in America. While he disagreed with everything that Dr. Wilkinson expressed on his blog posts, this judge felt strongly that the doctor's free speech rights would be violated if the WMC could discipline him for this kind of speech.

It will be interesting in future months to see how the United States Supreme Court rules on the question of whether "conversion therapy" constitutes speech or conduct. That issue is presently before the Court in *Chiles v. Salazar*.[3] Although *Chiles* involves a limited issue not pertinent to EMS agencies, it may have relevance to other public agencies and certainly will have relevance for mental health professionals, as *Chiles* pertains exactly to that. The "conduct" versus "speech" question is highly relevant in the context of restrictions on the practice of law/medicine etc. Stay tuned.

[3] https://www.supremecourt.gov/oral_arguments/argument_transcripts/2025/24-539_3f14.pdf

https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/24-539.html