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COLORADO SUPREME COURT

Court Address: Ralph L. Carr Judicial Center
1300 Broadway
Denver, CO 80203

District Court, Denver County, Colorado
The Honorable Judge Shelley Gilman

Case No. 21CV000091

IN RE:

PETITIONERS:
Benjamin Wegener, Younge & Hockensmith, P.C., and Wegener, Scarborough, Younge & Hockensmith, LLP

v.

RESPONDENT:
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Case Number: 2021SA147

REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply Brief complies with all requirements of C.A.R. 28(g) and 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g):

■ It contains 2,341words (Microsoft Word 365).

I acknowledge that my Petition may be stricken if it fails to comply with any of the requirements of C.A.R. 28(g) and C.A.R. 32.

Original signature on file pursuant to C.A.R. 30(f)

/s/ Benjamin M. Wegener
Benjamin M. Wegener, No. 36952

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INTRODUCTION

This original proceeding involves Petitioners' (the "Wegener Defendants") request that Respondent be barred and enjoined from seeking any affirmative relief while appearing pro se in any present or future litigation in the state courts of Colorado. Respondent's Answer Brief does little to address the issues raised in the Petition or the Court's Rule to Show Cause, but rather focuses primarily on yet another attempt to relitigate issues previously decided many times over with respect to Pitkin County District Court Case No. 10CV201. None of these issues raised in the Answer Brief with respect to Case No. 10CV201 are at issue or properly before the Court in this proceeding. As such, they will not be addressed in further detail here, other than to reiterate that undersigned counsel's statements during oral argument to the Court of Appeals addressed by Respondent in his Answer Brief and in Denver County District Court 2021CV91 accurately reflected the case and the Pitkin District Court's findings of fact in 2010CV201.

The few issues which are relevant to this proceeding which are addressed in the Answer Brief (largely in a perfunctory manner) appear to involve allegations that (1) the Wegener Defendants were not involved in the twenty-eight proceedings initiated by Mr. Francis relating to challenging the outcome and rulings in Case No. 10CV201; (2) the holding in *Board of County Com'rs of Morgan County v.*

Winslow, 862 P.2d 921 (Colo. 1993) was limited to enjoining the respondent therein from filing in a single county in the State, and Respondent's conduct in this matter not comparable to the conduct in *Winslow*; and (3) the Colorado Constitution prohibits the relief sought by Petitioners. Each of these allegations is incorrect, and Respondent should be barred and enjoined from seeking any affirmative relief while appearing pro se in any present or future litigation in the state courts of Colorado for the reasons stated in the Petition for Rule to Show Cause and herein.

ARGUMENT

I. Cases involving Petitioners arising out of Pitkin County District Court Case No. 2010CV201:

In their Petition for Rule to Show Cause ("Petition"), the Wegener Defendants provided a list of at least twenty-eight cases Respondent has personally initiated arising out of Pitkin County District Court Case No. 2010CV201. Respondent contends in his Answer Brief that he did not name the Wegener Defendants as defendants in any of these proceedings. This contention is incorrect.

As discussed in further detail in the Petition, Respondent named Younge & Hockensmith, P.C., (the predecessor law firm to modern day Wegener Scarborough & Lane, P.C.) and Margaret E. Foley (who was then an associate attorney at Younge & Hockensmith) as defendants in Pitkin County Court Case

No. 15C28, which asserted the Pitkin County District Court had no jurisdiction over Respondent or his wife in Case No. 2010CV201, and therefore all of the judgments entered in 2010CV201 against Respondent, his wife, and the Children's Trust were void. App. 17, ¶23-37.[1] Respondent also named Younge & Hockensmith and Ms. Foley (among many others who had been involved in 2010CV201) in Pitkin County Court Case number 16C15, which asserted none of the plaintiffs thereto were parties to or involved in case number 10CV201. App. 21, ¶19-22. Likewise, Pitkin County District Court Case No. 17CV30014 included Younge & Hockensmith, P.C., Ms. Foley, and others as named defendants, as did Pitkin County District Court Case No. 17CV30093. App. 24; App. 28. Respondent also raised claims in Denver County District Court Case No. 21CV91 against Younge & Hockensmith, P.C., its successor firm, Wegener, Scarborough, Younge & Hockensmith, LLC, and attorney Benjamin M. Wegener. App. 57. Thus, Respondent's assertion that Petitioners have not participated in any of the underlying matters is incorrect.

In addition, the number of cases in which the Wegener Defendants were named as parties is not dispositive to the determination of this matter, and

[1] The citations to the appendices contained in this Reply Brief refer to the appendices filed with the Petition for Rule to Show Cause filed by the Wegener Defendants on May 5, 2021.

Respondent does not provide any argument or authority describing why the issue might be relevant. Colorado appellate courts "will not consider a bald legal proposition presented without argument or development. Counsel must inform the court both as to the specific errors asserted and the grounds, supporting facts, and authorities to support their contentions." *Barnett v. Elite Props. of Am.*, 252 P.3d 14, 19 (Colo. App. 2010) (internal citations omitted). "Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Holley v. Huang*, 284 P.3d 81, 87 (Colo. App. 2011).

In any event, presuming the issue is one of standing, the Wegener Defendants have demonstrated ample justification for the relief sought, given that Respondent has filed at least 28 actions in the courts of the State of Colorado, including five naming Petitioners or their predecessor entities and employees as defendants which collaterally attacked orders or judgments entered in Case No. 10CV201. This is especially the case given that several of these cases have involved district court conclusions that Respondent was engaging in continued frivolous and vexatious conduct. *See, e.g.*, App. 41, ¶¶ 26-28, 30-31, 36; App. 38; App. 47; App. 51, ¶ 11. Given Respondent's past course of conduct, it is fully expected this pattern of behavior would continue if the relief sought herein is not provided, with continued groundless lawsuits against the Wegener Defendants and

others associated with Case No. 2010CV201.

II. Respondent's continued conduct as detailed in the Petition justify the relief sought:

Respondent next argues his conduct does not justify the relief sought in this original proceeding. However, as discussed above and in the Petition, Respondent has and continues to file multiple lawsuits against Petitioners, AMCA, and other parties and attorneys connected with Pitkin County District Court Case No. 10CV201, which had no basis in fact or law, and many of which sought virtually identical relief. The multiple and seemingly endless lawsuits filed by Respondent serve only to harass and disrupt Petitioners, AMCA, and the other parties and attorneys involved in Case No. 2010CV201. As also discussed above, multiple Pitkin County District Court judges have categorized Respondent's repeated filings as groundless, frivolous, and/or vexatious. App. 41, ¶¶ 26-28, 30-31, 36; App. 38; App. 47; App. 51, ¶ 11. The relief sought herein is therefore entirely appropriate.

Respondent goes on to allege that in *Board of County Com'rs of Morgan County v. Winslow*, 862 P.2d 921 (Colo. 1993), the respondent therein was "only enjoined in the county in which the 162 cases occurred." Answer Brief, p. 20. This is incorrect, as the petitioners in *Winslow* sought and received an order enjoining the respondent from "seeking any affirmative relief while appearing pro se in any present or future litigation *in the state courts of Colorado*." *Id.* at 922;

924 (emphasis added).

In short, Respondent does not even attempt to explain or justify his actions. Answer Brief, p. 20; 24 ("The petitioner lists 28 cases in support of this Petition. Space and time restraints preclude a response to each." "It is impossible to address the cases listed"). Respondent appears to contend the number of cases he has filed must approach the 162 cases referred to in *Winslow* to justify the relief sought. Answer Brief, p. 20. This contention is not supported by the Court's precedent. In fact, the Court stated in *Winslow* that "[t]he only significant distinction between those cases [cited by the Court in its opinion] and the present one is that here, respondents' interference with efficient judicial processes has been much more acute," referring to the 162 separate legal proceedings respondent had filed in *Winslow*. *Winslow*, 862 P.2d. at 924.

Rather than focusing entirely on the number of cases a respondent has filed in these types of cases, the question is whether a respondent's "constant and duplicitous pro se complaints filed in our courts result in an unwarranted burden on the judicial process and are prejudicial to the public interest." *Board of County Com'rs of Weld County v. Howard*, 640 P.2d 1128, 1130 (Colo. 1982). *Howard*, for example, involved a respondent who had "initiated no fewer than fourteen actions." *Id*. at 1129. The matter of *People v. Dunlap*, 623 P.2d 408 (Colo. 1981),

involved a similar request to prohibit respondents from further representing themselves as plaintiffs in any actions related to or arising out of their involvement with public officers or public employees when apparently nine previous actions had been initiated. *See id*. at 409, 411. *People v. Spencer*, 524 P.2d 1084 (Colo. 1974) involved the Court enjoining an individual who had initiated eleven suits on various topics. *See id*. at 1085.

Thus, the Court's precedent makes it clear the number of cases which a respondent has filed is not an overriding factor to consider in determining whether an injunction such as the one requested here is appropriate. Rather, the Court looks to several factors, including whether a respondent's "actions clearly demonstrate that he seeks to use the judicial process in order to disrupt the lives of his adversaries." *Karr v. Williams*, 50 P.3d 910, 914 (Colo. 2002) (citing *Winslow*, 862 P.2d at 924). The Court also looks to whether a respondent's conduct and filings were "constant, duplicitous, and groundless," and whether the conduct has "resulted in an unjustifiable burden on the judicial process" and is "contrary to the public interest." *Id*. Thus, where prior monetary penalties have been ineffective and the Court's "disciplinary authority cannot curb the litigant's transgressions because he is not licensed, an injunction is the proper recourse." *Id*.

As a result, because (1) Respondent has and continues to file repetitious and

baseless suits, many seeking identical or nearly identical relief, against Petitioners, AMCA, and others associated with the Pitkin County District Court litigation in case number 10CV201; (2) Respondent has engaged in a vexatious pattern of conduct designed to punish and harass Petitioners, AMCA, and others associated which has resulted in a tremendous waste of resources; and (3) previous monetary penalties have been insufficient to curb Respondent's continued transgressions, an injunction barring and enjoining Respondent from seeking any affirmative relief while appearing pro se in any present or future litigation in the state courts of Colorado is appropriate. *See id*.

III. The Colorado Constitution does not bar the requested relief:

Respondent's final contention relevant to the Court's Rule to Show Cause is that the Colorado Constitution guarantees him access to the courts of the state, rendering the requested relief inappropriate. However, this contention is likewise not supported by any argument, but rather consists only of a single paragraph citing case law, and is devoid of any discussion or development. *See Barnett v. Elite Props. of Am.*, 252 P.3d at 19; *Holley*, 284 P.3d at 87.

In any event, Respondent's contention is once again incorrect. While every person has a constitutional right of access to Colorado courts, the right is not absolute, and is not without limits. *See Winslow*, 862 P.2d at 923; *Karr v.*

Williams, 50 P.3d 910, 913 (Colo. 2002). As discussed in further detail in the Petition, the "right of self-representation in civil suits must in a proper case yield to the principle that right and justice should be administered without sale, denial or delay. " *Winslow*, 862 P.2d at 923 (internal quotation omitted). These rights are "imperiled when a party appearing pro se pursues myriad claims without regard to relevant rules of procedural and substantive law." *Id*. Thus, this Court has noted an individual's constitutional right of access to the courts of the state must be balanced against the constitutional principle that "right and justice" should be administered without sale, denial, or delay. *See Karr*, 50 P.3d at 913. To maintain this balance, this Court has enjoined parties from appearing pro se in all the courts of the state on a number of occasions. *See id*.

This is because this Court "has both the duty and the power to protect courts, citizens, and opposing parties from such abuse." *Id*. (citing *Dunlap*, 623 P.2d at 410; *Howard*, 640 P.2d at 1129; Colo. Const. art VI, § 2(1), § 3). While "mere litigiousness is not grounds for an injunction prohibiting a party from proceeding pro se," it is clear no litigant "has a right to use the judicial process for the purpose of harassing or intimidating his adversaries. *Id*. at 914. The reasoning behind this tenet is that "[o]pposing litigants must bear the expense of defending against meritless claims, and citizens in general suffer the hardships brought about by

increased court costs, crowded dockets, and the unreasonable delay and confusion that accompany a disruption of proper judicial administration." *Id.*[2]

Here, Respondent's continued "constant, duplicitous, and groundless" filings were clearly filed with the purpose of harassing the Wegener Defendants, AMCA, and others associated with Pitkin County District Court Case No. 2010CV201. The repetitious cases initiated by Respondent identified in the Petition, as well as prior District Court rulings in these matters, make this abundantly clear. Respondent has not even attempted to justify his conduct, but rather, has yet again merely protested the results of Case No. 2010CV201, which has long been concluded. Because the repetitious, abusive, and vexatious conduct on Respondent's part outlined in the Petition outweighs his right of access to the state courts under clearly established law, this is an appropriate situation for the Court to issue injunctive relief barring and enjoining Respondent from seeking any affirmative relief in the state courts of Colorado in a pro se capacity.

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[2] The only additional potential constitutional limitation this Court has previously addressed regarding injunctive relief with respect to a pro se litigant outside of the balancing test described above was where the respondent was indigent, and therefore alleged an order preventing him from appearing without counsel would effectively prevent him from appearing in court at all. *See Karr*, 50 P.3d at 914. Respondent has made no such contention here.

CONCLUSION

Given the above, Respondent should be barred and enjoined from seeking any affirmative relief while appearing pro se in any present or future litigation in the state courts of Colorado.

Respectfully submitted this 1st day of July, 2021.

WEGENER SCARBOROUGH & LANE, P.C.
/s/ Benjamin M. Wegener, Original signature on file in the Law Offices of Wegener Scarborough & Lane, P.C.

By ___________________________________
Benjamin M. Wegener, #36952
Attorneys for Petitioners

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **REPLY BRIEF** was served this 1st day of July, 2021, by the following methods:

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