The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, et al., Plaintiff Intervenors, and LIBERTARIAN PARTY OF WASHINGTON STATE, et al, Plaintiff Intervenors, v. STATE OF WASHINGTON, et al, Defendant Intervenors, and WASHINGTON STATE GRANGE, et al, Defendant Intervenors.	No. CV05-0927 JCC RESPONSE OF WASHINGTON STATE DEMOCRATIC PARTY TO STATE'S MOTION TO RECOVER ATTORNEY FEES AND COSTS

INTRODUCTION

The State of Washington asks this Court to set aside a settlement between the Democratic Party and the State regarding attorneys' fees and costs incurred by the Democratic

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Party in connection with the Ninth Circuit portion of the State's appeal of this Court's summary judgment that Initiative 872 ("I-872") was facially unconstitutional. The State's motion should be denied for the following reasons: 1) The State should not be allowed to rewrite a contract based on an after-the-fact assertion of a unilateral, subjective, unexpressed limitation on its "offer of compromise on claims relating to costs and attorneys [fees] relating to the Ninth Circuit appeal in this case;" 2) Even if the settlement agreement between the State and the Democratic Party had been subject to the limitation the State seeks to impose after the fact, the State's argument that it eventually will be the prevailing party in this case is at best premature; and 3) The State's argument that the Democratic Party, were it ultimately to prevail in this case, would not be entitled to recover fees related to the Ninth Circuit appeal is speculative.

STATEMENT OF FACTS

The Washington State Democratic Party intervened in this action as a plaintiff in June 2005, challenging the State's proposed implementation of I-872 and seeking attorneys' fees and costs. At its initial status conference, the Court suggested that the political parties first see if the case could be disposed of with a facial attack on I-872 and, after briefing and argument, granted the Democratic Party summary judgment.[1] The State appealed the Court's summary judgment. The Republican Party sought clarification from this Court whether the Court's injunction applied not only to the filing statute passed as part of I-872 but also to the filing statute passed by the Legislature in connection with the Montana Primary. The Court

[1] The Court referred to its ordering of the proceedings in the case in its order granting summary judgment to the political parties. "The Court has previously directed the parties to limit their briefs to Plaintiffs' facial challenge of Initiative 872. The Court reserved issues related to Plaintiffs' as applied challenge." *Washington State Republican Party v. Logan*, 377 F. Supp. 2d 907, 926 n.13 (W.D. Wash. 2005).

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1 entered a supplemental order on August 12, 2005 clarifying that its order did not reach either
2 the Montana Primary filing statute or the Republican Party's equal protection argument and
3 staying proceedings pending the outcome of State and Grange appeals to the Ninth Circuit.
4 The Ninth Circuit affirmed the summary judgment and, separately, issued an opinion that the
5 political parties were entitled to attorneys' fees and costs from the State but not from its co-
6 defendant Washington State Grange.
7
8 Thereafter, on September 15, 2006, the Secretary of State (through Deputy Solicitor
9 General James Pharris) proposed to the Democratic Party:
10
11 I am prepared to make the following offer of compromise on the claims for costs and attorneys' fees relating to the Ninth Circuit
12 Appeal in this case:
13 1. The state will agree to compromise fees and costs relating to the Ninth Circuit appeal. Since there will likely
14 be further proceedings, fees and costs at the trial level will be deferred for later discussion...
15
16 2. The state will pay in full all court costs which the prevailing parties could reasonably claim under the applicable court rules.
17
18 3. The state will pay 90% of all attorneys [sic] fees claimed by each respondent as set forth in previous correspondence among the parties ...
19
20 If this compromise is agreeable, I suppose it should be incorporated in an agreed order...
21 *See* Declaration of David T. McDonald in Support of Response of Washington State
22 Democratic Party to State's Motion to Recover Costs and Fees ("McDonald Decl."), **Exhibit**
23 **A** (E-mail from Pharris to McDonald).
24
25 Counsel for the Democratic Party then replied to this offer: "The Democratic Party
26 agrees to this compromise of its current Ninth Circuit Fees and Cost Claims. *We understand*

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this settlement will be final as to our claims for attorneys' fees and costs for the Ninth Circuit ... irrespective of further proceedings in the case." McDonald Decl., **Exhibit B** (Email of September 15, 2006 (McDonald to Pharris) (emphasis added).

The State did not indicate any disagreement with the Democratic Party's understanding of the offer it was accepting. Thereafter the parties determined the amount reflected in the State's offer, entered an agreed stipulated order awarding fees as suggested by the State and the State paid the amounts.

After payment of the settlement, the State continued with further proceedings in the case, including appealing the Ninth Circuit's opinion affirming this Court's summary judgment to the United States Supreme Court. The Supreme Court reversed the Ninth Circuit and remanded the case for further proceedings. Thereafter the State asked the Ninth Circuit to vacate the parties' stipulated order and enter judgment against the Democratic Party for the amounts paid by the State in settlement of the claims. The Ninth Circuit vacated the stipulated order but did not grant the State's motion to set aside the settlement and enter judgment against the Democratic Party. Instead, the Ninth Circuit allowed this Court to "make appropriate findings concerning the parties' settlement of fees" and indicated that this Court should determine whether a further award of fees or an order requiring repayment of fees was appropriate in response to the State's motion.

ARGUMENT

A. The State's Unreasonable Interpretation Based on an Unexpressed Subjective Intent Would Be Rejected by a Washington Court and Should Be Rejected by This Court.

It is undisputed that a settlement exists between the parties; the issue is whether the State will be allowed at this late date to insert into the contract a condition upon its promise to

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1 pay a specified amount to the Democratic Party to compromise certain claims. A settlement
2 is a contract and its interpretation is governed by state law. *Jeff D. v. Andrus*, 899 F.2d 753,
3 759 (9th Cir. 1989). Under Washington law, the unexpressed "subjective intent of a party to a
4 contract with respect to its promises is irrelevant if the intent of the parties can be determined
5 from the actual words used." *Contractor's Equipment Maintenance Co., Inc. v Bechtel*
6 *Hanford, Inc.* 514 F.3d 899, 903 (9th Cir. 2008); *Hearst Communications, Inc. v. Seattle*
7 *Times Co*, 154 Wn.2d 493, 503-04, 115 P.3d 262, 267 (2005) (citing *City of Everett v. Estate*
8 *of Sumstad*, 95 Wn.2d 853, 855 (1981)). Under Washington law, courts "do not interpret
9 what was intended to be written but what was written." *Hearst*,154 Wn.2d at 504.
10 Here the exchange of communications is unambiguous. The State offered to
11 compromise the Democratic Party's claims for a specific amount without any limitation. The
12 Democratic Party accepted the offer, expressing its understanding that the settlement was final
13 "irrespective" of any further proceedings in the case. The State did not disagree with the
14 Democratic Party's understanding. If, in fact, the State intended its promise to pay to be
15 conditional it should have said so either in its initial offer or in response to the Democratic
16 Party's acceptance. But it did not do so. Indeed, the interpretation offered by the State—that
17 when the Democratic Party said it understood the settlement to be final, irrespective of further
18 proceedings, and accepted less than full payment of its claim, it meant that the State could
19 later rescind the settlement—strains credulity. The Court should give preference to a
20 reasonable interpretation as opposed to one that is unreasonable and would render the contract
21 illusory. *Kennewick Irrigation District v. United States*, 880 F.2d 1018, 1032 (9th Cir. 1989).
22 The intent of the parties as objectively manifested in the settlement agreement is clear. The
23 settlement agreement should be enforced.
24 The State cannot unilaterally rescind its settlement agreement with the Democratic
25 Party. *Dacaney v. Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978). The State's argument that
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1 it is the ultimate prevailing party in this litigation is without merit as explained below. But
2 even if the State was correct and it prevailed in the litigation after its agreement with the
3 Democratic Party, it would still not be entitled to set aside the settlement agreement.
4 Washington courts will sustain a compromise in good faith "even though a subsequent
5 judicial decision may show the rights of the parties to have been different from what they at
6 the time supposed." *Opitz v. Hayden*, 17 Wn.2d 347, 370, 135 P.2d 819, 828 (1943). Federal
7 courts similarly favor settlements. *Cia Anon Venezolana De Navegacion v. Harris*, 374 F.2d
8 33, 34-35 (5th Cir.1967).
9 The Court should deny the State's motion to rewrite its settlement with the Democratic
10 Party.
11 **B. The State's Assertion That it is the Prevailing Party in this Case is Premature.**
12 The State asserts that it is the prevailing party in this litigation but that issue remains
13 to be determined. The prevailing party is determined at the end of the case. *Farrar v. Hobby*,
14 506 U.S. 103, 111 (1992) ("Whatever relief the plaintiff secures must directly benefit him *at*
15 *the time of the judgment or settlement*." (emphasis added)). In this instance the State's claim
16 of eventual victory is optimistic. For example, the State has implemented I-872 so as to
17 create a system in which blanket primary voters are allowed to vote in the election of officers
18 of the party (precinct committee officers). The precinct committee officers of a political party
19 in Washington are not only officers of the party, as a group they constitute the county central
20 committee of the party. RCW 29A.80.030. The county central committee is the body,
21 according to the Constitution of the State of Washington, that nominates the electors eligible
22 to fill a vacancy in the legislature or local partisan office if an office held by a member of the
23 party becomes vacant. WASH. CONST. Art. II, § 15. It is settled law in the Ninth Circuit that
24 such a primary system is unconstitutional. *Libertarian Party of Arizona v. Bayless*, 351 F.3d
25 1277 (9th Cir. 2003); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214
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1 (1989).

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3 **C. The State's Argument that the Democratic Party Would Not Be Allowed to**
Recover Fees Related to the Ninth Circuit Appeal Even if the Democratic Party
4 **Prevails in this Case is Speculative.**

5 It is well established that a prevailing plaintiff may still recover attorneys' fees based
6 upon unsuccessful phases of the same litigation: "a plaintiff who is unsuccessful at a stage of
7 a litigation that was a necessary step to her ultimate victory is entitled to attorney's fees even
8 for the unsuccessful stage." *Gilbrook v. City of Westminster*, 177 F.3d 839, 876 (9th Cir.
9 1999) *citing Cabrales v. County of Los Angeles*, 935 F.2d 839, 1053 (9th Cir. 1991). The
10 rationale for such a rule stems from the fact that "[l]awsuits usually involve many reasonably
11 disputed issues and a lawyer who takes on only those battles he is certain of winning is
12 probably not serving his client vigorously enough; losing is a part of winning." *Cabrales*, 935
13 F.2d at 1053. Thus, as a general rule, "plaintiffs are to be compensated for attorney's fees
14 incurred for services that contribute to the ultimate victory in the lawsuit.... Just as time spent
15 on losing claims can contribute to the success of other claims, time spent on a losing stage of
16 litigation contributes to success because it constitutes a step toward victory" *Id.* at 1052.

17 The *Cabrales* rule is unambiguous and the State's claim that that Democratic Party
18 will not eventually be awarded fees is speculative: where "a [§1983] plaintiff ultimately wins
19 on a particular claim, she is entitled to all attorney's fees reasonably expended in pursuing
20 that claim-even though she may have suffered some adverse rulings." *Id.* at 1053. Although
21 the Democratic Party may not have prevailed on it s facial challenge to I-872—the only issue
22 appealed to the Ninth Circuit and reviewed by the Supreme Court—the state abandoned its
23 questionable implementation of I-872 and, in addition, other claims remain outstanding that,

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in light of the Ninth Circuit's remand, are squarely before this Court.[2] Until the remaining claims are decided it is premature to conclude that victory on those claims would be unrelated to the proceedings that have already occurred.

CONCLUSION

The State's motion to rescind its settlement agreement with the Democratic Party should be denied. The understanding of the parties manifestly was that the settlement would be final irrespective of any further proceedings in the case.

DATED this 8th Day of December, 2008.

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[2] Furthermore, prevailing party status does not solely depend on the ultimate successful litigant in a single stage of the litigation, but rather "the touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." *Farrar*, 506 U.S. 103, 111. In prior briefing before the 9th Circuit, the Democratic Party has contended that the State's modification of its rules implementing I-872 came about only as a result of the present (and ongoing) litigation, and that it is likely that future resolution of the Party's claims will bring additional alterations to the parties' legal relationship.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on December 8, 2008, I caused to be electronically filed the
3 foregoing with the Clerk of the Court using the CM/ECF system which will send notification
4 of such filing to the following:

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