No. 05-35774; 05-35780

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY, *et al.*,

Appellees/Plaintiffs,

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, *et al.*,

Appellees/Plaintiff Intervenors,

LIBERTARIAN PARTY OF WASHINGTON STATE, *et al.*,

Appellees/Plaintiff Intervenors,

v.

STATE OF WASHINGTON, *et al.*,

Appellants/Defendant Intervenors,

WASHINGTON STATE GRANGE,

Appellant/Defendant Intervenor.

APPELLEE WASHINGTON STATE REPUBLICAN PARTY'S OPPOSITION TO STATE'S FEE MOTION

The Court should deny the State's Motion for return of the attorneys' fees paid to the Washington State Republican Party on two independent grounds. First, the State's payment of fees was the result of a negotiated compromise between the parties in which the State obtained a reduction in the fees claimed as part of the settlement. The strong public policy in favor of respecting settlements outweighs the State's invocation of "buyer's remorse."

Second, the State is incorrect in asserting that there has been a final determination on the merits of the case before this Court. This Court expressly reserved ruling on other grounds that warrant affirming the District Court's injunction: "Because we have held Initiative 872 to be unconstitutional under the *First* and *Fourteenth Amendments*, we do not reach any of the other arguments that the political parties advance with respect to Initiative 872." *Wash. State Republican Party v. State of Washington*, 460 F.3d 1108, 1124 n.28 (2006). Likewise, the Supreme Court expressly disclaimed resolution of any issue in the case other than the facial invalidity of I-872 based on violation of the right of association. *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1195 n.11 (2008). This Court should proceed to address the other grounds advanced by the political parties to affirm the District Court's entry of its injunction, leaving the injunction in place *pendente lite*.

I. FACTS

Shortly after this Court affirmed the District Court's decision, counsel for the State contacted the political parties to suggest a settlement of claims for attorneys' fees. The State requested and received the parties' documentation of attorneys' fees and costs incurred before this Court. *See* White Decl., Ex. 2. On September 11, 2006, after reviewing the records provided by the political parties, the State's attorneys submitted a preliminary proposal to settle the parties' claims for fees and costs. *See* White Decl., Ex. 1. The State's counsel wrote: "For now, we prefer to discuss only the attorney fees relating to the Ninth Circuit portion of the case, because (1) those are the ones immediately requiring decisions and (2) it appears likely that there will be further proceedings in the trial court." *Id.* The State's proposed settlement included no reservation of rights or *caveat* regarding setting the settlement aside should the State succeed in having this Court's decision reversed.

Through e-mail exchanges over the course of several days, the State and political parties agreed to compromise and settle the fee claims. On September 14, 2006, the State's counsel confirmed the "concurrence from the client about proposing a 10% discount on each attorney fee bill" and advised that a formal proposal would follow the next day. *See* White Decl., Ex. 2.

On September 15, the State put its full settlement proposal in writing. The first point in the State's proposal was:

> The State will agree to compromise fees and costs relating to the Ninth Circuit appeal. Since there will likely be further proceedings, fees and costs at the trial level will be deferred for later discussion. We do hope to arrive at a reasonable compromise on those at a later date.

White Decl., Ex. 3. The State's proposed settlement still contained no reservation of rights or contingency regarding further appellate proceedings. The proposal stated that "[t]he State will pay 90% of all the attorneys' fees claimed by each respondent" and that the compromise "should be incorporated into an agreed order." *Id.* Counsel for the Democratic Party responded that it agreed to the final settlement of the fees before the Ninth Circuit, "irrespective of further proceedings." *Id.* That same day, counsel for the Republican Party also responded:

> The Republican Party also agrees to the terms of the proposed settlement of its costs and fees in the Ninth Circuit proceeding relating to the appeal of Judge Zilly's July 2005 decision through the date of settlement, *irrespective of further proceedings in the case.*

White Decl., Ex. 3 (emphasis added).

Over the next few days, minor revisions were made to the Stipulated Order to clarify that fees "related to any petitions for cert" were not included in the settlement. Counsel for the State authorized the affixing of his

signature to the document, and it was filed with the Court. *See* White Decl., Ex. 4. The terms of the settlement are shown by the e-mail exchanges among counsel, and at no point did the State ever suggest that the compromise was contingent on any act by the political parties, other than agreeing to reduce their fee claim by 10%, or any other condition.

II. ISSUE PRESENTED

May the State of Washington rescind a negotiated settlement and compromise of a claim for attorneys' fees where the settlement is not tainted by misconduct?

III. ARGUMENT

The State is not entitled to set aside its settlement and compromise of its liability for fees. The strong public policy in favor of settlement outweighs the State's "buyer's remorse." " 'The construction and enforcement of settlement agreements are governed by principles of local law . . . .' " *United Comm. Ins. Serv., Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992) (quoting *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989)). Under Washington law, settlement agreements are contracts governed by general principles of contract law. *See In re Estate of Harford*, 86 Wn. App. 259, 936 P.2d 48, 50 (1997); *Morris v. Maks*, 69 Wn. App. 865, 850 P.2d 1357, 1359 (1993).

Washington has a long-standing public policy in favor of settlement of disputes and their finality. "The law favors amicable settlement of disputes, and is inclined to clothe them with finality." *Handley v. Mortland*, 54 Wn.2d 489, 342 P.2d 612, 616 (1959); *accord Buob v. Feenaughty Mach. Co.*, 4 Wn.2d 276, 103 P.2d 325, 334 (1940). Here, the State's agreement to pay fees and the subsequent entry of the stipulated order was the result of an open and fair negotiation between the State and the political parties. The State obtained a discount from the political parties on the fees due and owing, and also avoided additional fees that would have resulted from opposing the award sought. The political parties expressly agreed to accept the State's offer, with its reduction of fees, "irrespective of further proceedings."[1]

The State did not seek a stay of the fee order pending the possibility of a petition for *certiorari*. In fact, the State suggested negotiations to resolve fees before the District Court as well, after the fees on appeal had been negotiated. *See* White Decl., Ex. 1. The State now seeks to add an unexpressed condition to the settlement. The question whether the State would petition for *certiorari* was a

[1] The e-mails conducting the negotiations are admissible under Fed. R. Evid. 408(b), because they are not introduced to prove that the State was liable for the fees. The e-mails are introduced to demonstrate that the State did not enter into the settlement subject to a reserved right to undo the settlement should a further appeal succeed. *See, e.g., Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1160-61 (9th Cir. 2007). Here, the State's motion is, in effect, an effort to undo the settlement agreement, and the State makes representations that are inconsistent with the negotiations and agreement at the time it entered into the stipulation.

matter entirely within its control. "Courts are especially loath to find a condition precedent when the alleged condition is peculiarly within the control of one of the contracting parties." *Lockwood v. Wolf Corp.*, 629 F.2d 603, 610 (9th Cir. 1980).

Settlements will be disturbed only upon a showing of misconduct by a party in obtaining the settlement, not merely because one party comes to view the resolution of the dispute as a bad bargain. *See Maynard v. First Bank of Colton*, 56 Wash. 486, 106 P. 182 (1910). Settlements necessarily involve compromise, and parties balance certainty against the possibility of success should the matter be fully litigated. As the U.S. Supreme Court has explained, "the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). The Court's stipulated order is like the consent decree from *Armour* and "embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve." *Id.* at 681-82.

The political parties did nothing to mislead the State. That the Supreme Court determined that Initiative 872 was not invalid on its face does not warrant allowing the State to set aside its bargain.

DATED this 7th day of May, 2008

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