The Honorable John C. Coughenour

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al., Plaintiffs, WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, *et al.*, Plaintiff Intervenors LIBERTARIAN PARTY OF WASHINGTON STATE, RUTH BENNETT and J. S. MILLS, Plaintiff Intervenors v. STATE OF WASHINGTON, *et al*., Defendants, WASHINGTON STATE GRANGE, *et al.,* Defendant Intervenors	Case No: CV05-0927-JCC LIBERTARIAN PARTY'S OPPOSITION TO MOTION BY STATE DEFENDANTS SET ASIDE FEE STIPULATION **NOTED FOR APRIL 10, 2009**

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LIBERTARIAN PARTY'S OPPOSITION TO MOTION BY STATE DEFENDANTS TO SET ASIDE FEE STIPULATION

At the conclusion of the initial appeal to the Ninth Circuit Court of Appeal, on the same date it rendered its opinion, the Court of Appeals ordered the State of Washington to pay the attorneys fees of the Plaintiff and the Plaintiff Intervenor political parties. See August 22, 2006 order. Under Ninth Circuit Rule 39-1.6[a], the petition for fees was due 28 days after the decision of the Court of Appeals,[1] or September 19, 2006.

Facing the potential of a substantially higher award, the State of Washington negotiated to settle its liability for a discount. That settlement was confirmed in a written stipulation filed with the Court of Appeals on September 19, 2006, in lieu of the requests for fees by the Plaintiff and Plaintiff-Intervenors. In exchange for a settlement of the issue, the Plaintiff and the Plaintiff-Intervenors permanently gave up their claim to greater fees, including fees for the preparation and defense of their fee request. In exchange for their agreement, the Defendant saved thousands of dollars in fees.

[1] The request is due 14 days after the time expires to file a petition for rehearing [9th Cir. Rule 39-1.6(a)]. The time to file a petition for rehearing expires 14 days after the opinion is filed [Rule 40[a][1], FRAP].

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I.
A DEAL IS A DEAL

The State defendants entered into a stipulation to gain the full financial benefit of the discount that they negotiated. Certainly, they would not permit the Plaintiffs to come back after a Supreme Court decision and claim that they were entitled to an increased fee because the Supreme Court had affirmed the Ninth Circuit. Of course not, because the parties each made an agreement to place one aspect of this litigation *beyond further dispute by stipulation*.

The attempt of the State to bootstrap the language of the last sentence of the stipulation into a basis for reopening the stipulation is to ignore the plain meaning of the sentence. The sentence excludes claims "for further proceedings in the appeal" or "other aspect[s] of the case." At the time of the stipulation the only thing the parties knew for sure was that there would be no rehearing in the Ninth Circuit [the time to file had expired]. It was reasonable for the parties to agree to put aside one aspect of the litigation without prejudice to either side's right to claim fees or costs in a *different aspect of the litigation*.

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II.
DETERMINATION OF A PREVAILING PARTY IS PREMATURE

Even if the State Defendants are permitted to withdraw from their stipulated agreement or if the fee award had been done by court order alone, it is premature to make a determination of the "prevailing party" in this litigation. While the Supreme Court reversed the decision of the Court of Appeals, it has left substantial issues to be decided by the District Court. Similarly, the Ninth Circuit in its order has directed the District Court to determine the "as-applied" challenges that were not decided by the Supreme Court. [See Order of the Court of Appeals filed 10/02/2008.] This is consistent with Supreme Court jurisprudence on this issue that

> …the intent of Congress [was] to permit such an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims….
>
> *Hanrahan v. Hampton*, 446 U.S. 754, 757 [1980]

Here, the State Defendants have obtained the reversal of the decision of the Court of Appeals but they have not obtained a dismissal and, therefore cannot claim "prevailing party" status. At best, the decision in the Supreme Court is an interim step in the resolution of this case. Assuming that the Plaintiffs are able to establish an as-applied challenge, they will have "prevailed on a

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significant issue in the litigation and have obtained some of the relief they sought." *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 793 [1989] Thus, they would be "'prevailing parties' within the meaning of § 1988. *Id.* See also *Hensley v. Eckerhart,* 461 U.S. 424, 433 [1983]

In the ever eloquent words of the irrepressible Yogi Berra, "it ain't over until it's over." In that spirit, a "prevailing party" determination must await the conclusion of the litigation.

III.
CONCLUSION

The motion of the State Defendants should be denied.

DATED: Monday, April 06, 2009, at Woodburn, Oregon.

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