The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
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, et al.,

Plaintiff Intervenors,

v.

STATE OF WASHINGTON, et al.,

Defendant Intervenors,

WASHINGTON STATE GRANGE, et al.,

Defendant Intervenors.

NO. CV-05-00927-JCC

REPLY MEMORANDUM IN SUPPORT OF MOTION TO RECOVER ATTORNEY FEES AND FOR COSTS

Noted for consideration without oral argument:

December 12, 2008

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I. INTRODUCTION

The fundamental premise underlying any award of attorneys' fees is that the party to whom the fees are awarded must qualify as a "prevailing party." 42 U.S.C. § 1988(b). The reversal of a decision on the merits "removes the underpinnings of the fee award." *Cal. Med. Ass'n v. Shalala*, 207 F.3d 575, 578 (9th Cir. 2000). The political parties ignore the language of the Stipulation and Order Regarding Attorneys' Fees and Costs on Appeal (Stipulation) that they signed and assert a right to attorney fees, even though they are not prevailing parties. The Ninth Circuit has declared it to be an abuse of discretion not to vacate a fee award when the underlying decision has been reversed. *Id.*, 207 F.3d at 577.

II. ARGUMENT

A. The State And Political Parties Stipulated Only To The *Amount* Of, And Not The *Liability* For, Attorneys' Fees, Subject To Future Proceedings

The political parties seek to escape the express language of the Stipulation they signed in order to retain fees and costs awarded on the basis of a decision that the Supreme Court reversed. The State and the political parties entered into the Stipulation as to the *amount* of attorneys' fees only after the Ninth Circuit had already issued an order finding the State liable for them. The underpinnings of the State's liability were subsequently removed by a reversal of the underlying decision, but the fact remains that the only point open to negotiation between the parties at the time they stipulated was the dollar amount to be paid. *See Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wash. 2d 493, 502, 115 P.3d 262 (2005) (under Washington law, the "intent of the contracting parties cannot be interpreted without examining the context surrounding an instrument's execution").

The political parties ignore the language of the Stipulation as to the amount of fees, and instead ask the Court to draw an erroneous conclusion from parol evidence. The parties stated directly in the Stipulation that, "No waiver is intended of any claims for *further proceedings in the appeal or in any other aspect of the case* (including district court

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proceedings)." Decl. of Jeffrey Even, Ex. C (Stip. at 2; emphasis added) (Docket #131). Ignoring this language from the written Stipulation, the political parties instead cite email messages among counsel, from which they ask the Court to draw the conclusion that the Stipulation means something other than what it says. But the terms of the Stipulation are those set forth in the Stipulation, not in preliminary email discussions. "Under the parol evidence rule, 'prior or contemporaneous negotiations and agreements are said to merge into the final, written contract,'[1] and evidence is not admissible to add to, modify, or contradict the terms of the integrated agreement."[2] *Lopez v. Reynoso*, 129 Wash. App. 165, 170, 118 P.3d 398 (2005). The parties' agreed that in stipulating to the amount of the fees they did not waive claims based on further proceedings *in the appeal or any other aspect of the case*, such as reversal by the Supreme Court. This is established by the language of the Stipulation itself, into which the prior negotiations merged under Washington law.[3] *Id.*

Both political parties place undue emphasis on parol evidence consisting of an email exchange among counsel, in which counsel stated various assumptions regarding the agreement. Decl. of John White, Ex. G (Docket #149); Decl. of David McDonald, Ex. A (Docket #145). They contend that if the State did not intend the outcome they assumed, counsel should have said so. But more to the point, if the political parties did not intend the outcome specified in the agreement they subsequently signed, *they should have said so in the Stipulation*. *Hearst*, 154 Wash.2d at 504 (Washington courts "do not interpret what was intended to be written but what was written"); *see also Pierce Cy. v. State*, 144 Wash. App. 783, 813, 185 P.3d 594 (2008) (declining to rely on unilateral intentions not expressed in the agreement). One fact that the parol evidence makes clear is that counsel for the Republicans

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[1] Quoting *Emrich v. Connell*, 105 Wash. 2d 551, 556, 716 P.2d 863 (1986).

[2] Citing *DePhillips v. Zolt Constr. Co.*, 136 Wash. 2d 26, 32, 959 P.2d 1104 (1998).

[3] The Republicans argue that the State could have sought a stay of the attorneys' fee award pending certiorari. They offer no reason why the absence of such a request would negate the very language to which the Republicans agreed. Even Decl., Ex. C (Stip. at 2).

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drafted the Stipulation. White Decl., Ex. G. Even if the Stipulation was ambiguous, as the political parties assert, that ambiguity should be construed against the drafter, not against the State. *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wash. 2d 678, 690, 871 P.2d 146 (1994) (quoting *McDonald v. State Farm Fire & Cas. Co.*, 119 Wash. 2d 724, 733, 837 P.2d 1000 (1992)) (reciting this principle of construction); *see also, Pierce Cy.*, 144 Wash. App. at 813 (same).

The Republicans misapply *Hearst* to this case, characterizing the State's argument as reliance upon an "unexpressed intention." Republicans' Resp. at 6 (quoting *Hearst*). But the State relies on the express language of the Stipulation that the Republicans signed; it is the Republicans and the Democrats who rely on intentions not expressed in the Stipulation. Similarly, the Republicans miss the mark in contending that the State's liability was at issue in the Stipulation because the State could still seek *certiorari*. *Id.* at 7. Once again, the express language of the Stipulation the political parties signed belies this claim, expressly making the Stipulation subject to further proceedings.

The Republicans are incorrect in claiming that if the Stipulation were construed as its plain language dictates, that it would be "illusory." A contract is only "illusory" if it is not supported by consideration. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 184-85, 110 P.3d 733 (2005) (citing *St. John Med. Ctr. v. Dep't of Soc. & Health Serv's*, 110 Wash. App. 51, 68, 38 P.3d 383 (2002)). But the Stipulation was supported by consideration on both sides: the State gave up the right to litigate the reasonable amount of fees, thus sacrificing the possibility of reducing the award even further; the political parties similarly gave up the opportunity to claim the full amount they initially demanded.

B. The State Is The Prevailing Party As To Proceedings Before The Court Of Appeals

Both the Republicans and Democrats assert that they are prevailing parties, but in order to prevail, they "must 'receive at least some relief on the merits of [their] claim'". *Sole*

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v. Wyner, ___ U.S. ___, 127 S. Ct. 2188, 2194, 167 L. Ed. 1069 (2007); *see also Farrar v. Hobby*, 506 U.S. 103, 111, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992) (same). A party who receives relief early in litigation, only to have it reversed on appeal, achieves only an "ephemeral" victory but does not prevail. *Sole,* 127 S. Ct. at 2196. The political parties have obtained none—not even nominal damages. *Farrar,* 506 U.S. at 112 (finding an award of nominal damages sufficient to prevail).

The Republicans claim to have prevailed, not because of any final ruling in their favor, but because the Secretary of State voluntarily changed his administrative rules governing formats of candidacy declarations and ballots. The Supreme Court has rejected this theory, sometimes termed the "catalyst theory," under which a defendant's voluntary change in conduct allegedly renders the plaintiff a "prevailing party" without actually winning in court. *Buckhannon Bd. & Care Home, Inc. v. West Virginia*, 532 U.S. 598, 605, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001) ("A defendant's voluntary change in conduct . . . lacks the necessary judicial *imprimatur*" to make the plaintiff a "prevailing party"). Following *Buckhannon*, the Ninth Circuit has likewise rejected the catalyst theory. *Bennett v. Yoshina*, 259 F.3d 1097, 1100 (9th Cir. 2001). A party that suffers a complete defeat on the merits, as did the political parties, cannot be regarded as prevailing parties solely because the Secretary voluntarily changed his administrative rules, without regard to whether he was motivated to do so by this litigation. *Id.* at 1101.[4]

The political parties additionally assert a right to keep attorney fees stemming from an appeal on which they did not prevail, based upon speculation that they might prevail as to other issues in the future. This argument fails, because a party that fails on its claims may not recover attorneys' fees based upon subsequent success as to unrelated claims. *Schwarz v.*

[4] The Republicans challenge the constitutionality of *both* the Secretary's old and new rules. Thus, even if the "catalyst theory" was valid, this litigation did not yield the Republicans the catalytic reaction they seek.

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Sec'y of Health & Human Servs., 73 F.3d 895, 901 (9th Cir. 1995). The decision of the United States Supreme Court makes clear that the claims as to which the Ninth Circuit awarded fees and costs avail them of nothing. *Wash. State Grange v. Wash. State Republican Party*, ___ U.S. ___, 128 S. Ct. 1184, 1187, 170 L. Ed. 2d 151 (2008); *Wash. State Republican Party v. State*, 545 F.3d 1125, 1126 (9th Cir. 2008). The political parties have been unsuccessful as to every issue adjudicated on appeal. Even if the political parties some day manage to prevail on some other claim, their conjecture that this imagined success might be related to their prior unsuccessful efforts is speculative at best and fanciful at worst. Moreover, they offer no reason as to why their speculation about the future entitles them to money now. It affords them no claim to attorneys' fees and costs based on an unsuccessful appeal. *Cal. Med. Ass'n*, 207 F.3d at 577.

III. CONCLUSION

For these reasons, and for the reasons set forth in the State's original motion, this Court should grant the State's Motion to Recover Attorneys' Fees and For Costs.

RESPECTFULLY SUBMITTED this 12th day of December, 2008.

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CERTIFICATE OF SERVICE

I certify that on this date I electronically filed Reply Memorandum In Support Of Motion To Recover Attorney Fees And For Costs with the Clerk of the Court using the CM/ECF system, which will send notification of such filing electronically to the following:

John White
Kevin Hansen
Richard Shepard
Thomas Ahearne
David McDonald

Executed this 12th day of December, 2008, at Olympia, Washington.

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