66439-5

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NO. 66439-5-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ROBERT F. UTTER and FAITH IRELAND,
in the name of the STATE OF WASHINGTON,

Appellants,

v.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,

Respondent.

REPLY BRIEF IN SUPPORT OF CROSS-APPEAL OF THE BUILDING INDUSTRY ASSOCIATION OF WASHINGTON ON THE ISSUE OF ATTORNEYS' FEES

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ORIGINAL

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*My sole reason for involvement in this matter was my great concern about the nature of the BIAW involvement in the **2006** election campaign involving a number of judges ....*[1]

My motivation actually stems from the unfair judicial campaign against Chief Justice Alexander orchestrated by BIAW [in 2006].[2]

Ireland said Friday it's partly personal, having witnessed what she described as the "despicable" campaign run against Supreme Court Justice Gerry Alexander [in 2006] ...[3]

Lowney said he hopes his lawsuits will taint the BIAW to the point that candidates will be "returning their money."[4]

I. INTRODUCTION

The defendant, BIAW, is a nonprofit trade association. It advocates its members interests in Olympia and provides education to the public and its membership about the industry. BIAW's for-profit subsidiary, BIAW-Member Services Corporation ("BIAW-MSC") is not a defendant in this case. BIAW-MSC provides services to members, primarily administration of a retrospective rating program, that generate revenue that would otherwise jeopardize BIAW's tax-exempt status. In the run up to the 2008 gubernatorial election, BIAW-MSC also engaged in

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[1] CP 896, Plaintiff Utter's Response to Interrogatory No. 27 (emphasis added).
[2] CP 901, Plaintiff Ireland's Response to Interrogatory No. 27.
[3] Gene Johnson, *Judge denies Rossi's request to drop lawsuit, available at* http://www.komonews.com/news/local/33228219.html. Cited at CP 850.
[4] Bob Young, *BIAW, Rossi's biggest backer explains what it wants,* SEATTLE TIMES, Oct. 17, 2008, http://seattletimes.nwsource.com /html/nationworld/2008276966_biaw17m0.html. Cited at CP 851.

certain fundraising and expenditure activity in support of candidate Dino Rossi.

For BIAW-MSC's exercise of its First Amendment rights, both BIAW and BIAW-MSC paid a heavy price. Lawyers Knoll Lowney and Mike Withey filed a class action suit on behalf of three BIAW members, claiming that use of revenue from the retrospective rating program was illegal and a breach of trust and demanded over ***$90 million*** in damages. After three years of litigation and millions of dollars in legal fees, BIAW prevailed on all substantive claims (some on summary judgment and some at trial) and avoided all monetary liability on the technical defects in the operation of the retro program identified by the court.

In addition, the same lawyers (and one of the plaintiffs in that suit) joined forces with retired justices Utter and Ireland to write the initial 45-day letter demanding that the Attorney General take action against BIAW and BIAW-MSC that started this litigation. As the quotations above help demonstrate, this case was about political payback and hampering a political adversary—punishment for past political speech they did not like. It was not enough for them that the PDC investigated the claims against BIAW (the only defendant in this case) and found them to be baseless. As detailed in BIAW's opening brief on the fee issue, Plaintiffs proceeded anyway, threatening extraordinary injunctive relief, obtaining an improper

ex parte order, demanding expedited discovery, and taking the highly publicized deposition of a gubernatorial candidate (and several others) in the days before the election. And when their candidate won the election, they largely lost interest in this case until BIAW filed a motion for summary judgment.

In response to BIAW's summary judgment motion, Plaintiffs indicated they were no longer pursuing their central claim (that BIAW improperly coordinated campaign expenditures with Rossi), and the court dismissed that and the remaining claims.

Despite granting judgment for BIAW on all claims, the trial court denied BIAW's motion for attorneys' fees under the Fair Campaign Practices Act ("FCPA" or "Act"), RCW 42.17.400(4) and 42.17.400(5). As explained in BIAW's opening brief on this issue, that decision was an error and an abuse of discretion because the trial court applied the wrong legal standard.

Plaintiffs' main arguments in response are that the suit, though dismissed on summary judgment, was not "frivolous" and that the plaintiffs are former judges (apparently hoping for some deference from this Court). As explained below, Plaintiffs apply the wrong standard (they even cite the wrong fee statute), and the fact that Plaintiffs are former judges is wholly immaterial. In addition, citing no authority and offering

no explanation, Plaintiffs assert that fees should not be awarded against the state because the statute does not apply here and that fees can never be awarded against the lawyers under RCW 42.17.400. These arguments ignore the language of the controlling statute and the history of this litigation, which was driven largely by Plaintiffs' lawyers, working in cooperation with the state. For the reasons set out in BIAW's opening brief and herein, the decision of the trial court to deny BIAW's motion for a fee recovery should be reversed and BIAW should be awarded its fees.

II. THE APPLICABLE LEGAL STANDARDS

Plaintiffs argue that "BIAW fails to even cite, let alone attempt to meet, its burden on appeal of establishing that the standard of review (abuse of discretion) has been met . . ." Appellants' Reply Br. and Resp. to Cross Appeal at 17 ("Resp."). Of course, this is false. BIAW set out the appropriate standard of review in its statement of the issues ("Whether the trial court abused its discretion by failing to award any attorneys' fees or costs to BIAW . . .).

It is well-settled that the trial court abuses its discretion if it applies the wrong legal standard in ruling on a fee motion: "An abuse of discretion occurs when a decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. A discretionary decision rests on 'untenable grounds' or is based on 'untenable reasons' if the trial

court . . . applies the wrong legal standard . . . " *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (quotations and citations omitted); *see also Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) ("A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law"; remanding for imposition of sanctions); *State v. Kinneman*, 155 Wn.2d 272, 289, 119 P.3d 350 (2005) (trial court abused discretion by applying "incorrect legal analysis"; remanding for hearing on restitution for attorneys fees and costs).

Here, the trial court applied the wrong legal standard. As explained in BIAW's opening brief, the FCPA provides for an award of fees in two circumstances: The FCPA authorizes a fee award against "the person commencing the action" if the action is dismissed and the court finds it was brought "without reasonable cause." RCW 42.17.400(4)(b). The FCPA also provides that a prevailing defendant "shall be awarded all costs of trial, and may be awarded reasonable attorneys' fees to be fixed by the court to be paid by the state of Washington. RCW 42.17.400(5). In deciding BIAW's motion, the trial court did not apply the appropriate standard and instead focused on whether the Plaintiffs had "improper motives" in filing suit.

Plaintiffs' response brief likewise asserts the wrong standard, arguing that fees are only available if the citizens' action was "frivolous" and citing RCW 4.84.185, the general frivolous claim statute applicable to all civil cases. *See* Resp. 25; *see also id.* at 26 (equating "brought without reasonable cause" with "frivolous"). But that is not the standard under the FCPA. First, interpreting RCW 42.17.400(4)(b) to mean the same thing as the (differently worded) RCW 4.84.185, renders the fee provisions of the FCPA without independent meaning and force. This, courts will not do. *Denning v. Quist*, 172 Wash. 83, 90-91, 19 P.2d 656, 659 (1933) ("It is a rule of statutory construction almost universal that it is the duty of the courts to give such construction to the language of a statute as will make it purposeful and effective, rather than futile and meaningless.").

Second, unlike establishing that a case is "frivolous" for purposes of RCW 4.85.185, establishing a "lack of reasonable cause" for purposes of a fee award under the FCPA is not difficult. A claim need not be facially invalid to result in a fee award, and fees may even be awarded as to claims that survive summary judgment. *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 111 Wn. App. 586, 49 P.3d 894

(2002) ("*EFF*"). A claim that fails for lack of proof merits an award of fees to the defendant. *Id.*[5]

III. THE CASE WAS FILED AND PROSECUTED WITHOUT REASONABLE CAUSE

Despite the summary judgment dismissing their claims, Plaintiffs assert that their case "always had merit," but apart from a vague reference to their briefing in opposition to the summary judgment motion below they rely primarily on just two facts: that the PDC and AG brought an action against ***BIAW-MSC*** (a different entity, not a defendant in this case) resulting in a fine and that the PDC investigated related allegations of coordination for a year before rejecting them. *See* CP 87 (PDC staff recommendation that no action be taken with respect to the coordination allegations because there was no evidence of coordination). This gets Plaintiffs nowhere.

The fact that the AG brought an action against a different entity based on Plaintiffs' 45-day letter (and refused to take action against BIAW, the defendant here) confirms what the record here shows: that this

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[5] The *EFF* court emphasized the importance of protecting against baseless claims and allowed an award of fees to defendants who prevail on individual claims, as opposed to the whole case. Plaintiffs argue that *EFF* does not set out the standard for fee awards under the FCPA, but that is obviously wrong. That case imposed fees under 42.17.400(4)(b)'s "without reasonable cause" standard (on claims that survived summary judgment). *EFF*, 111 Wn. App. at 615-16.

action, against this defendant, was baseless. The PDC and AG's actions show that the claims lacked any evidentiary or legal basis and that Plaintiffs lacked standing to bring the action to begin with. *See* Answering Br. and Opening Cross Appeal Br. of BIAW ("Answering Br.") at 34. The fact that the PDC investigated, found no evidence to support, ***and rejected*** claims of coordination in a different investigation likewise does nothing to suggest that the similar claims here had any merit. Plaintiffs cite no authority to the contrary.

Plaintiffs also assert that "former Justices Utter and Ireland" both "carefully considered the extensive evidence of BIAW's political campaign fundraising operation, as well as the Act's requirements." This is not only immaterial, it appears to be false, based on the sworn discovery responses. *See* CP 1022 ("[Utter] was in Africa when much of the preparation and litigation of this case occurred. He did not leave Africa until after the election."); CP 1029 (emphasizing the role of Plaintiffs' counsel in identifying, collecting, and maintaining the factual material upon which Plaintiffs relied).[6]

[6] If Plaintiffs intend to suggest that their assessment of the case is due some deference by the trial court or this Court, that assertion is arguably improper under the Code of Judicial Conduct, Rule 1.3 ("A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so") and comment 1

BIAW submitted extensive evidence and argument that the case was brought without reasonable cause:

1. Plaintiffs pressed claims that were precluded by the AG's action against BIAW-MSC. *See* Answering Br. 34.

2. Plaintiffs pressed claims against BIAW when all evidence indicated that the actions at issue were actions of its subsidiary BIAW-MSC, not BIAW. CP 57, 59; CP 69 ¶¶ 3.19, 3.21.

3. Plaintiffs pressed claims that the PDC and AG determined lacked merit and declined to pursue against BIAW (the only defendant in this case). CP 57; CP 59; 69 ¶¶ 3.19, 3.21; CP 109-114.

4. The urgency of the suit was manufactured so as to disrupt the campaign of and generate negative publicity regarding gubernatorial candidate Dino Rossi. *E.g.*, CP 893; CP 1047; CP 1049-51.

5. Plaintiffs themselves had no factual basis or other reasonable cause for pursuing a case against BIAW and relied on their lawyers' view of the facts and evidence. CP 1022; CP 1029.

6. Plaintiffs and their lawyers were motivated by their desire to punish BIAW for political speech they did not like, and they hoped to hamper BIAW's and BIAW-MSC's ability to participate in the political process. CP 896; CP 901; Gene Johnson, *Judge denies Rossi's request to drop lawsuit, available at* http://www.komonews.com/news/local/33228219.html (cited at CP 850); Bob Young, *BIAW, Rossi's biggest backer explains what it wants*, SEATTLE TIMES, Oct. 17, 2008, http://seattletimes.nwsource.com/html/nationworld/2008276966_biaw17m0.html (cited at CP851).

7. One of Plaintiffs' lawyers previously misused the legal process to disrupt the campaign of U.S. Senate candidate Mike McGavick, making spurious allegations to generate negative publicity on the eve of the election. The case was quietly dismissed after the election. *See Schwartzman v. McGavick* (W.D. Wash. Cause No. 2:06-cv-01080-MJP).

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thereto ("It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind.").

8. Plaintiffs' litigation tactics unreasonably increased the costs of the litigation. These included obtaining an improper *ex parte* order, despite a request from BIAW's counsel for notice of proceedings (CP 873; CP 801); seeking expedited discovery to support pre-election relief (that was never requested) (CP 873); acting improperly in Rossi's deposition (and being admonished for that by the trial court) (CP 906); cancelling depositions with little notice (CP 873); abandoning the promised motion for an injunction that was the justification for all the emergency discovery (CP 877-78); serving wide-ranging and improper discovery requests (CP 873); serving subpoenas on Rossi at home (rather than on his counsel) (CP 874); serving defective subpoenas (CP 874); coordinating their tactics with the AG's separate case against BIAW-MSC (CP 908-09, 911); refusing to drop their coordination claim and demanding an answer to the detailed complaint, only to drop that claim just days later when responding to BIAW's motion for summary judgment. CP 214-15; CP 758; CP 879.

Based on these facts, if the trial court had applied the appropriate standard, it should have awarded BIAW the costs and fees it was forced to incur to defend itself. The citizen's action, filed ***after*** the AG refused to take action against BIAW and maintained for two years without any factual or legal basis, was plainly harassing and filed without reasonable cause. An award of fees against citizen plaintiffs is appropriate in such circumstances. *See EFF*, 111 Wn. App. at 615; *Fritz v. Gorton*, 83 Wn.2d 275, 314, 517 P.2d 911 (1974). At a minimum, fees should have been awarded on the coordination claim that Plaintiffs abandoned after BIAW filed its motion for summary judgment. *See EFF*, 111 Wn. App. at 615.

IV. A FEE AWARD IS PARTICULARLY APPROPRIATE HERE

At its core, "the First Amendment prohibits the State from

silencing speech it disapproves, particularly silencing criticism of the government itself." *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 626, 957 P.2d 691 (1998); *see also San Juan Cnty. v. No New Gas Tax*, 160 Wn.2d, 141, 166-67, 157 P.3d 831 (2007) (Johnson, J. concurring). An award of fees under the FCPA is appropriate to protect parties from the burden of having to defend against baseless claims, otherwise a suit like this one can be used to intimidate or harass political opponents. Washington cases have observed that this protection is necessary, otherwise the FCPA is unconstitutional because of the burden the citizen's action provision imposes on political speech. *EFF*, 111 Wn. App. at 615 (citing *Fritz*, 83 Wn.2d at 314). The trial court's failure to award fees here opens the door to more baseless and politically motivated litigation, the very cases a fee award is supposed to deter.

Plaintiffs try to avoid the obvious significance of fee awards to protect First Amendment rights by arguing that BIAW suffered no violation of its First Amendment rights, that their goal here was not to chill speech, and that they are not state actors (apparently contending that they thus cannot chill speech in any improper way). These arguments reflect a misunderstanding of the First Amendment and of Washington's campaign finance laws. First, whatever Plaintiffs' motive, it is beyond dispute that saddling a nonprofit organization with extensive reporting

obligations, threatening fines of many millions of dollars (as Plaintiffs sought here), and forcing a trade association to spend hundreds of thousands of dollars to defend itself has a chilling effect on speech. *See, e.g.*, *Rickert v. Pub. Disclosure Comm'n*, 161 Wn. 2d 843, 855, 168 P.3d 826 (2007) (emphasizing that the "mere threat of process" can "chill political speech"); *Wash. State Republican Party v. Pub. Disclosure Comm'n*, 141 Wn.2d 245, 265, 4 P.3d 808 (2000) ("If speakers are not granted wide latitude to disseminate information without government interference, they will steer far wider of the unlawful zone, thereby depriving citizens of valuable opinions and information.") (quotation and citation omitted).

Second, by bringing a citizen's action under RCW 42.17.400, Plaintiffs became state actors. The statute expressly provides that the plaintiff in such an action stands in the shoes of the state. RCW 42.17.400(1) (authorizing Attorney General to bring action "in the name of the state"); RCW 42.17.400(4) (authorizing citizen to bring action "in the name of the state"); *see also EFF*, 111 Wn. App. at 607-08 (plaintiff in citizen suit and the state are identical for purposes of *res judicata*). Here, they even coordinated their efforts with the state. Plaintiffs' actions, just as if those actions were taken by the AG or some other arm of government, constitute government attempts to limit political speech. And

when the government uses campaign finance laws as a sword to attack political opponents or silence speech, citizens must be protected and the State must be held accountable. *See No New Gas Tax*, 160 Wn.2d at 169 (Johnson, J. concurring). If an award of fees is not called for in this case, when is it?

Finally, it is worth nothing that Plaintiffs inadvertently make BIAW's point: Plaintiffs complain that an award of fees would chill litigation like this. Resp. 27. Exactly! This case was baseless and harassing. Absent a fee award in a case like this, there would be nothing to deter litigation of meritless claims, and litigation like this will become a routine part of the electoral process.

V. AN AWARD OF FEES IS APPROPRIATE AGAINST PLAINTIFFS' COUNSEL

Apart from a simple denial that fees can be awarded against the lawyers, Resp. 19, Plaintiffs offer no argument or authority in opposition to BIAW's arguments. As BIAW demonstrated in its opening brief, an award of fees is appropriate against Plaintiffs' counsel (as well as against the Plaintiffs) based on the language of 42.17.400.

An award is appropriate against Plaintiffs' counsel because, under the circumstances here, they are "person[s] commencing the action." RCW 42.17.400(4). As the record shows, and Plaintiffs seem to concede,

this case was driven by Plaintiffs' counsel, and they are at least as responsible as the Plaintiffs for the decisions and tactics employed. *See* Answering Br. 46 (citing CP 1004 (Withey Declaration); CP 1022 (discovery responses); and CP 1029 (discovery responses)). As much as the Plaintiffs themselves, the lawyers in this case are responsible for the prosecution of the case and should be responsible for the consequences.

VI. AN AWARD OF FEES IS APPROPRIATE AGAINST THE STATE

Fees against the state are appropriate under the plain language of RCW 42.17.400(5). That section states that a prevailing defendant "shall be awarded all costs of trial, and may be awarded reasonable attorneys' fees to be fixed by the court to be paid by the state of Washington." RCW 42.17.400(5). Plaintiffs assert, without explanation, that this provision applies only in some other, unidentified circumstances but not here. They offer no statutory language or case law to support that assertion. Resp. 28.

By the plain language of the statute, the Court should have awarded fees against the state. The state was obviously aware of the litigation and followed it closely. It declined to pursue claims against BIAW based on Plaintiffs' 45-day letter and identified fatal procedural defects in Plaintiffs' lawsuit at the outset, CP 887-88; the state coordinated with Plaintiffs, CP 874; CP 908-09, 911, who prosecuted a largely

duplicative (and barred) suit; and the state kept itself apprised of the progress of the litigation. CP 875. The state watched the case so closely that within a week of the summary judgment decision, it contacted BIAW's counsel to ask if responses to certain public records requests were still necessary. CP 933.

Rather than intervene in the case (as the trial court recognized it could have done, CP 926) and put an end to the litigation by protecting the state's exclusive jurisdiction to take action on the allegations in Plaintiffs' 45-day letter, the state allowed the case to go forward. It followed the case closely and even coordinated discovery efforts with Plaintiffs. It is hard to imagine a case in which the language of 42.17.400(5) would compel an award of fees against the state if it does not do so here.

VII. CONCLUSION

For the foregoing reasons and the reasons set out in BIAW's Answering Brief and Opening Cross-Appeal Brief, this Court should affirm the summary judgment for BIAW and reverse the decision to deny a fee award. The case should be remanded with instructions to determine an appropriate award of fees to BIAW.

RESPECTFULLY SUBMITTED this 3rd day of June, 2011.

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CERTIFICATE OF SERVICE

1. The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

2. On June 3, 2011, I caused to be served in the manner noted below a copy of the document entitled **REPLY BRIEF IN SUPPORT OF CROSS-APPEAL OF THE THE BUILDING INDUSTRY ASSOCIATION OF WASHINGTON ON THE ISSUE OF ATTORNEYS' FEES** on the following:

Knoll Lowney c/o Lonnie Lopez Smith & Lowney, PLLC 2317 East John Street Seattle, WA 98112	Michael E. Withey Law Offices of Michael Withey 601 Union Street, Suite 4200 Seattle, WA 98101-4036
Via Legal Messenger	***Via Legal Messenger***

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 3rd day of June, 2011, in Seattle, Washington.

Barbara J. McAdams