

comply with the particular campaign requirements raised by plaintiffs.

The court's injunction covered two areas. The first area involved the receipt of cash contributions over the Internet. The campaign had failed to disclose names and addresses of approximately \$70,000 of those contributions on the grounds that the internet payment service would not release this information to the campaign.

Following the issuance of the preliminary injunction, Defendants were able to obtain the names and addresses of the contributors and file them with the Public Disclosure Commission. Defendants apparently do not contest that part of the injunction and concede the order granted was consistent with Washington law.

Second, the injunction addressed the use of radio programming time by principals of the campaign to promote the campaign. Plaintiffs alleged this programming was valuable and should be reported the same as any other in-kind contribution to the campaign under Washington law.

In granting the injunction this court expressly or impliedly made certain findings: (1) that Kirby Wilbur and John Carlson were principals in the campaign; (2) that they had intentionally promoted the campaign by advertising it in their regular radio show time slots; (3) that the on-air advertising was in addition to and different from any editorializing, comment, or discussion by the hosts on their shows; (4) that it had value to the campaign similar to advertising the campaign could have purchased on-air; (5) that the value of the advertising had not been disclosed to the Public Disclosure Commission in the manner of any other in-kind contribution; and (6) that requiring reporting of that value would not restrict Kirby Wilbur or John Carlson in their on-air speech in any way. In the volumes of pleadings submitted subsequent to that

injunction, this court has seen nothing to persuade it that those findings were factually incorrect.

Counsel at the time of the injunction requested this court provide more definition to what would be considered on-air advocacy, subject to reporting, as contrasted from on-air editorial comment, which would not be reportable. Under state law, a “contribution” does not include a “news item, feature, commentary, or editorial in a regularly scheduled news medium that is of primary interest to the general public, that is in a news medium controlled by a person whose business is that news medium, and that is not controlled by a candidate or a political committee.” RCW 42.17.020(14)(b).

This court declined to further define “contribution” because of the inherent limitations in a trial court’s focus on the issue before it and the litigants before it. In this case Kirby Wilbur and John Carlson were the principal organizers of the campaign and openly used their media time to advertise the campaign and solicit funds for it. Their relationship to the campaign and their open advocacy of the campaign demonstrated their intention to use valuable media time to support the campaign. Their actions were not accidental and the impact on the campaign was not incidental. Anything less than the facts in this case might well not be a reportable contribution.

Defendants complied with the preliminary injunction, sufficient signatures were obtained to qualify the initiative, and the matter is now on the general election ballot. Following the granting of and defendants’ compliance with the injunction, the case was for all practical purposes completed. Plaintiffs reportedly were prepared to dismiss the complaint when Defendants filed a counterclaim alleging fourteen counts of constitutional claims against plaintiffs for bringing the action and seeking the relief which was granted in the preliminary injunction. Although

Defendants have raised many theoretical problems that could have resulted from a case such as this, this court will restrict its consideration to the relief sought and granted by this court. To go beyond that would be to engage in speculation. This court serves parties with justiciable disputes. In this case, it considered such a dispute and issued a decision.

Plaintiffs have now filed a motion to dismiss Defendants' counterclaim under Civil Rule 12(b)(6). That rule requires the court to determine if Defendants have stated a claim which could result in the court granting them relief. Simply stated, the question is whether Defendants could prove that the granting of the preliminary injunction in this case violated the U.S. or Washington Constitutions and resulted in harm to Defendants.

To determine whether the state or federal constitutions were violated, the Court must evaluate the nature of the right allegedly infringed and then determine if the infringement is warranted under law. In this regard, as previously noted, Defendants have not challenged the portion of the preliminary injunction that required them to disclose names and addresses of internet contributors.

Defendants, however, are claiming that their right of free speech and association was infringed by reporting as a campaign contribution the on-air time which was "political advertising". They claim that their supporters were troubled about potential liability and thus unable to freely speak in support of the campaign. If so, this would be a fundamental right under the U.S. and Washington Constitutions that was infringed. In determining whether the limitation on speech alleged by Defendants was constitutionally permissible, the Court must evaluate the state interest involved in the campaign reporting law. That interest was set forth in the initiative which was the basis of the law:

It is hereby declared by the sovereign people to be the public policy of the state of Washington:

(1) That political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided.

(2) That the people have the right to expect from their elected representatives at all levels of government the utmost of integrity, honesty, and fairness in their dealings.

(3) That the people shall be assured that the private financial dealings of their public officials, and of candidates for those offices, present no conflict of interest between the public trust and private interest.

(4) That our representative form of government is founded on a belief that those entrusted with the offices of government have nothing to fear from full public disclosure of their financial and business holdings, provided those officials deal honestly and fairly with the people.

(5) That public confidence in government at all levels is essential and must be promoted by all possible means.

(6) That public confidence in government at all levels can best be sustained by assuring the people of the impartiality and honesty of the officials in all public transactions and decisions.

(7)

(8) That the concepts of disclosure and limitation of election campaign financing are established by the passage of the Federal Election Campaign Act of 1971 by the Congress of the United States, and in consequence thereof it is desirable to have implementing legislation at the state level.

(9)

(10) That the public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private.

(11) That, mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.

The provisions of this chapter shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying, and the financial affairs of elected officials and candidates, and full access to public records so as to assure continuing public confidence of fairness of elections and governmental processes, and so as to assure that the public interest will be fully protected. In promoting such complete disclosure, however, this chapter shall be enforced so as to insure that the information disclosed will not be misused for arbitrary and capricious purposes and to insure that all persons reporting under this chapter will be protected from harassment and unfounded allegations based on information they have freely disclosed.

RCW 42.17.010

And in Fritz v. Gorton, 83 Wn. 2d 275 (1974), the Washington Supreme Court determined that the interest of the state in ensuring full disclosure of financial and other support for campaigns was a substantial state interest.

We accept as self-evident, the suggestion in the brief of intervenors (the League of Women Voters) that the right to receive information is the fundamental counterpart of the right of free speech.... Freedom of speech without the corollary – freedom to receive – would seriously discount the intent and effect of the first amendment.

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Focusing on the period of the campaign covered by this case (from filing to qualification of the initiative for the ballot), Defendants have alleged no inability on the part of the campaign, its sponsors, or its contributors to effectively advocate and qualify the campaign. Even a minor limitation on their freedom of speech and association during that time period, by the requirement in the preliminary injunction for disclosure of on-air in-kind contributions, is permitted under well-established state and federal law. This court cannot find a basis for the counter-claim, therefore, and will dismiss it as a matter of law.

Defendants argue that campaign contribution limits (particularly within three weeks of the election) might limit the ability of supporters such as Kirby Wilbur and John Carlson to speak freely. Certainly campaign contribution limits on speech present a complex and uncertain legal problem to any courts that might be asked to determine the validity of those limits [e.g. McConnell v. Federal Election Commission, 540 U.S. 93 (2003)]. Yet those limits are not before this court. This court is aware of no contribution limits that were triggered by the issuance of the preliminary injunction.

Defendants have also argued that Plaintiffs have violated their due process rights by contracting with private counsel who have exercised their own rights of free speech and association. But Defendants have presented no authority that Plaintiffs do not have the right to retain private counsel or that those counsel should be restricted in their speech. All claims related to Plaintiffs' manner of bringing this suit are, therefore, similarly without merit and will be dismissed.

Plaintiffs have sought attorneys fees under RCW 42.17.400 for prevailing in this action. This court will find that Plaintiffs have prevailed but will exercise its discretion in this matter and deny the request for fees. The court is not persuaded that Defendants were dilatory or contemptuous in complying with its injunction. Courts should exercise restraint in granting fees in the midst of a political campaign, because of the potential for significant harm to the ability of the campaign to present its message to the voters. Since the period of non-compliance was short, the remedy quick, and the compliance satisfactory, the court will decline to award fees.

Plaintiffs have indicated their intention to dismiss this case upon this court's granting of their motion to dismiss Defendants' counterclaims. This court is prepared to grant Plaintiffs' motion

for an order of dismissal, thereby completing all matters before this court.

In summary, then, this Court finds that any impacts on the campaign or its supporters by the campaign reporting requirements included in this court's preliminary injunction were minimal and are not actionable under the U.S. or Washington Constitutions. Defendants have not alleged facts which could support granting an injunction or damages. All relief requested by both sides having been fully addressed, Plaintiffs' Motion to Dismiss the Counterclaim is granted, Plaintiffs' Motion to Dismiss its Claim is granted, and this case is dismissed.

October 26, 2005

Chris Wickham
Superior Court Judge