No. 77966-0

J.M. JOHNSON, J. (concurring)—Today we are confronted with an example of abusive prosecution by several local governments. San Juan County and the cities of Seattle, Auburn, and Kent (hereinafter Municipalities) determined to file a legal action ostensibly for disclosure of radio time spent discussing a proposed initiative. This litigation was actually for the purpose of restricting or silencing political opponents and was quickly dismissed after the filing deadline for the initiative. The disregard for core freedoms of speech and association in this case, and resulting interference with these constitutional rights, is described in the majority. The Municipalities augmented their prosecuting attorneys and legal staff[1] with an interested[2] private law firm to engage in this prosecution of No New Gas Tax (NNGT), in a transparent attempt to block filing of an initiative, which is also

[1] The legality of the expenditure of public funds to prosecute private citizens for political speech may also be subject to review by the state auditor with enforcement by the attorney general. RCW 43.09.260.

[2] Before agreeing to represent the Municipalities, Foster Pepper PLLC was an active member of "Keep Washington Rolling," a coalition of groups formed to defeat Initiative 912 (I-912). *See* majority at 5; Clerk's Papers (CP) at 437.

a constitutional right in Washington.

I concur with the majority's holding construing the statute in a constitutional manner to not apply to the political speech of the defendants. I write separately to emphasize that the contrary positions of the Municipalities and court below resulted in infringing constitutional rights. Thus, the majority properly reverses and remands for further proceedings. At the least, this remand requires that NNGT receive reasonable attorney fees and trial costs. There are three separate legal grounds: the failed injunction, the statute under which the case was prosecuted (chapter 42.17 RCW), and the federal civil rights actions under 42 U.S.C. §§ 1983 and 1988).[3]

Analysis

The Municipalities involved expected millions of dollars from increased tax revenue if Initiative 912 (I-912) failed to qualify for the ballot. The private law firm would potentially derive financial benefit from its role as one state bond counsel and volunteered to help litigate against NNGT "on behalf of the State of Washington." (The term "pro bono publico" is not

[3] NNGT pleaded for attorney fees and costs in its "Answer and Counter Claim." *See* CP at 433. Specifically, it asked for fees, costs, and expenses by citing 42 U.S.C. § 1988, RCW 42.17.400(5) and "any other legal and equitable relief as this Court may deem appropriate and just." CP at 434.

appropriate here.) CP at 1206-08, 1233-39; majority at 5.

An early motion in the Municipalities' litigation resulted in this preliminary injunction, which had the effect of requiring Fisher Communications and radio station 570 KVI to limit discussion of I-912 on the radio. NNGT argues that the "record is clear that the Municipalities sued NNGT to interfere with its efforts to pass I-912." *See* Opening Br. of Appellants No New Gas Tax and Jeffrey Davis at 40. I agree.

The preliminary injunction required that KVI's on-air commentary be counted as an in-kind campaign contribution reported before any further campaign expenditures. CP at 388; *see also* Tr. of Proceedings (July 1, 2005) at 35. Since the injunction mandated nearly immediate reporting, and it was not possible to completely segregate the relevant portions of the talk show, almost all the air time was reported. The full effect of this injunction's characterization of talk show commentary as in-kind contribution is evident when RCW 42.17.105(8) is also considered. That statute states in relevant part any in-kind campaign contribution in excess of $5,000, within 21 days of the general election, is a violation of the Fair Campaign Practices Act (FCPA). *Id.* Thus, the injunction was "chilling" of speech because of the

substantial risk that KVI on-air commentary regarding NNGT, in the three weeks preceding the general election, would be a donation in excess of the $5,000 cap, thereby incurring financial sanctions. The majority noted that the Public Disclosure Commission (PDC) determined after the preliminary injunction that the $5,000 limit would apply. Majority at 7. Additionally, the Municipalities' complaint requested penalties, treble damages, attorney fees, and costs. CP at 30-32.

The Municipalities now contend that RCW 42.17.105(8) would not apply to all KVI's speech because they only sought disclosure for the time period prior to May 31, 2005.[4] However, the Municipalities do not propose any rational distinction which allows KVI's speech to be actionable before May 31, 2005, and then magically transform into protected speech after that date.[5] Clearly, the trial court's preliminary injunction labeled the talk radio

[4] *See* Ruling Den. Mots. to Shorten Time and Stay Enforcement of Order (Oct. 7, 2005) (the Court of Appeals commissioner noted that the Municipalities "have represented that they have not and will not seek application of the Fair Campaign Practices Act" after May 31, 2005). CP at 1043; *cf.* Municipalities Complaint (does *not* so limit the claims to speech made prior to May 31, 2005). CP at 30-31.

[5] *See Timberline Air Serv., Inc., v. Bell Helicopter-Textron, Inc.,* 125 Wn.2d 305, 313, 884 P.2d 920 (1994) (where the same words are used in different parts of the same statute, there is a strong presumption that the legislature intended the same meaning). Here, the "contribution" limitation in RCW 42.17.105(8) explicitly applies to all "contributions reportable under RCW 42.17.090."

speech at issue a "contribution" under the reporting requirements of RCW 42.17.090, which also subjects it to the spending limits of the FCPA later. This erroneous characterization left KVI open to potential prosecution after the resolution of this case.[6]

The United States Supreme Court examined effects of such threatened or potential prosecutions on free speech when it held "[i]t makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes." *NAACP v. Button*, 371 U.S. 415, 435, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). In other words, the chilling effect upon the exercise of First Amendment rights may derive from the threat of prosecution, and not just by the prospects of its success. Here, the injunction's erroneous characterization of the commentary as an in-kind "contribution" placed defendants in jeopardy of prosecution at a later date, and the only way to completely mitigate the risk was self-imposed silence.

[6] The Public Disclosure Commission (PDC) was not bound by the Municipalities' assurance and has previously indicated that it regarded on-air commentary as a "contribution" under RCW 42.17.020(14) and that it would prosecute any violation of the statute. *See* Resp'ts'/Cross-Appellants' (1) Resp. Br. to NNGT's Appeal; and (2) Opening Br. in Supp. of Resp'ts/Cross-Appellants' Cross-Appeal, App. 3, PDC Declaratory Ruling No. 5A (1992); *see also id.* App. 4, PDC Advisory Op. (Aug. 29, 1995).

Clearly, "the First Amendment prohibits the State from silencing speech it disapproves, particularly silencing criticism of government itself. Threats of coerced silence chill uninhibited political debate and undermine the very purpose of the First Amendment." *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 626, 957 P.2d 691 (1998). Prosecutors must not use the threat of a punitive lawsuit, amounting to an unconstitutional prior restraint on free speech, to block political opponents from exercising their constitutional rights.

Granting NNGT complete reasonable attorney fees and trial costs is appropriate and required here. This may serve to deter future state actors from using their authority to act similarly to deprive individuals of constitutional rights of speech (or initiative).

A first obvious legal basis for attorney fees derives from the ultimately failed injunction against free speech, which was held invalid by this court today. NNGT must be awarded attorney fees due to the invalid nature of the injunction alone. The Municipalities sought and were granted a preliminary injunction under CR 65, which was *not* converted to permanent injunction and was ultimately held improper. Indeed, the government parties apparently

abandoned their complaint once they failed to block the initiative filing. According to well established law of this court, such an enjoined party is entitled to attorney fees. *See also* CR 65(c).

We held in *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 143, 937 P.2d 154, 943 P.2d 1358 (1997) that a court shall award reasonable attorney fees when a person prevails in dissolving a wrongfully issued temporary injunction. *See Trummel v. Mitchell*, 156 Wn.2d 653, 677, 131 P.3d 305 (2006); *see also Wash. State Labor Council v. Reed*, 149 Wn.2d 48, 60-61, 65 P.3d 1203 (2003) ("Granting attorney fees where a challenge to an injunction is successful is based on the premise that a temporary injunction prohibits a party from engaging in a particular activity. That party's only option, other than submitting to the order, is to take legal action. Attorney fees are awarded for the damages suffered from the injunction."). The damages for unlawful injunction include reasonable costs of legal defense.

The prevailing party must recover attorney fees unless special circumstances would render such an award unjust. *See Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n,* 141 Wn.2d 245, 4 P.3d 808 (2000) (*WSRP*).

The statutory scheme, which was invoked by the Municipalities here, provides an express alternative basis for the attorney fees. The statute relied on by both parties in their pleadings below is RCW 42.17.400(5), which provides, in part:

> If the defendant prevails, he shall be awarded all costs of trial, and may be awarded a reasonable attorney's fee to be fixed by the court to be paid by the state of Washington.

Generally, the calculation of attorney fees is determined using the lodestar method. *Bowers v. Transamerica Title Ins. Co,* 100 Wn.2d 581, 593, 675 P.2d 193 (1983). A court arrives at the lodestar award by multiplying a reasonable hourly rate by the number of hours reasonably expended on the matter. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149-50, 859 P.2d 1210 (1993). The lodestar amount may be adjusted to account for subjective factors such as the level of skill required by the litigation, the amount of potential recovery, time limitations imposed by the litigation, the attorney's reputation, and the undesirability of the case. *Bowers*, 100 Wn.2d at 597; *see also* RPC 1.5(a). Here, the court should also consider that a combined city-county/private firm effort of many attorneys prosecuted this case against NNGT.[7]

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[7] The rates of comparably skilled law firms are the likely basis for a reasonable hourly fee.

Central to determining the reasonable attorney fees is the underlying purpose for authorizing the collection of such fees. *Brand v. Dep't of Labor & Indus*., 139 Wn.2d 659, 667, 989 P.2d 1111 (1999). This court has recognized that specific statutes authorizing the award of reasonable attorney fees are designed to serve purposes other than the general purpose of most fee shifting statutes, e.g., to punish frivolous litigation and encourage meritorious litigation. *Id.* (citing *Scott Fetzer Co.*, 122 Wn.2d at 149).

Similarly, 42 U.S.C. § 1988(b) is relied on by the answer and counterclaim. This statute allows a prevailing party to recover attorney fees when defending against infringement of civil rights under color of state law. It provides in relevant part that:

> In any action or proceeding to enforce a provision of sections . . . [1981-1983, 1985, 1986] [of this] title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .

Id. (first alteration in original). Reasonable attorney fees should always be awarded to the prevailing private party under this section, absent some rare, special circumstance. *Hensley v. Eckerhart*, 461 U.S. 424, 429-30, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (the United States Supreme Court

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The Municipalities insistence on contracting with private attorneys suggests that the services (and rates) of these attorneys suggest a "reasonable" rate.

acknowledged congressional intent that a prevailing plaintiff should ordinarily be awarded attorney fees unless special circumstances would make an award unjust). The term "reasonable attorney's fee" should be construed liberally under 42 U.S.C. § 1988. *See, e.g., Louisiana-Pacific Corp. v. ASARCO, Inc.*, 131 Wn.2d 587, 605 n.81, 934 P.2d 685 (1997) (Sanders, J., concurring) ("holding the term 'reasonable attorney's fee' as used in 42 U.S.C. § 1988 'must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit[]'" (alteration in original) (quoting *Missouri v. Jenkins*, 491 U.S. 274, 285, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989))).

In the instant case, it appears that the Municipalities' prosecution of the case, and especially the preliminary injunction, was calculated to muzzle media support of the NNGT initiative. This behavior sought to keep the initiative from ballot qualification during the very limited window between passage of the disputed legislation and the initiative filing deadline.[8] This

[8] Because this action was brought by the Municipalities, it is important to note that "'attorney's fee[s are] available even when damages would be barred or limited by "immunity doctrines and special defenses, available only to public officials."'" *WSRP*, 141

lawsuit was not justified under the law (the majority so holds) and was offensive to the notion of free and open debate.

Conclusion

We recognize that the amount of an award of reasonable attorney fees may be determined in the first instance by the trial court, which may be the same court that erroneously entered the injunction. Therefore, it is important to direct the court on remand to award NNGT reasonable attorney fees and costs under the statute relied on by both parties, RCW 42.17.400(5). Alternatively, the invalid temporary restraining order alone also requires fees under this recognized ground in equity. Finally, the answer and counterclaim are based on 42 U.S.C. § 1983, which also requires attorney fees under § 1988.

The voters had their say on I-912, as is appropriate under our constitution. The legal action and injunction below meant the advocates on one side of their issue were denied their rights to speak before the voters decided. I concur with the majority in reversing the rulings below and remanding for appropriate relief.

Wn.2d at 291 (Sanders, J., concurring) (quoting *Pulliam v. Allen*, 466 U.S. 522, 543, 104 S. Ct. 1970, 80 L. Ed. 2d 565 (1984), *superseded by statute as to judicial immunity as stated in Kampfer v. Scullin*, 989 F. Supp. 194 (N.D.N.Y. 1997)).

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Justice Richard B. Sanders