No. 85361-4

J.M. JOHNSON, J. (concurring/dissenting)—I concur with the majority's decision to affirm the trial court in dismissing the recall petition as factually and legally insufficient under article I, section 33 of the Washington State Constitution. I write separately, however, because I cannot agree with the decision to affirm the award of $50,000 in attorney fees against the petitioners who sought to exercise their constitutional right of recall under that provision. This aspect of the trial court's ruling should be reversed.

Facts and Procedural History

Petitioners Albert O. Ugás and Daniel B. Fishburn filed a recall petition against Pierce County Prosecuting Attorney Mark Lindquist. Judge James Cayce found the recall petition to be factually and legally insufficient and further held that the petition was brought in bad faith. Judge Cayce then awarded Lindquist $50,000[1] in attorney fees against the private citizen

petitioners for violating CR 11. Lindquist was represented by private counsel. Petitioners moved for direct review.

Analysis

CR 11 gives the court discretion to award attorney fees when pleadings are filed in bad faith.[2] *See* CR 11(a). However, a court may not award expenses and attorney fees against a petitioner who brings a merely frivolous recall petition. *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 266-67, 961 P.2d 343 (1998). In this case, the trial court held that petitioners' recall petition was filed in bad faith, finding that it was *intentionally* (not merely) frivolous and intended as political harassment. Clerk's Paper's (CP) at 959. The issue is whether an award of $50,000 was an *appropriate* sanction against a nonlawyer citizen for violating CR 11.[3]

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[1] This rounded amount makes the award even more questionable.

[2] CR 11 requires that every pleading, motion, and legal memorandum be signed by an attorney of record or, if the party is not represented by an attorney, by the party itself. CR 11(a). By signing, the attorney or party certifies that he or she has read the pleading, motion, or legal memorandum, and that to the best of the attorney or party's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. *Id.*

[3] If a pleading, motion, or legal memorandum is signed in violation of CR 11, "the court,

We review a trial court's CR 11 sanction decision for abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). An abuse of discretion exists when the trial court's decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *State v. Dixon*, 159 Wn.2d 65, 76, 147 P.3d 991 (2006). A decision is based "'on untenable grounds'" or made "'for untenable reasons'" if it rests on facts unsupported in the record or if it was reached by applying the wrong legal standard. *Id.* (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). The trial court abused its discretion because its decision was reached by applying an incomplete legal standard – it did not consider the appropriateness of a $50,000 sanction in the context of a recall petition filed pursuant to article I, section 33.

The purpose of CR 11 is to deter baseless filings and curb abuses of the judicial system. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). CR 11 requires consideration of both its intent to deter baseless legal claims, as well as the potential chilling effect sanctions may have on

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upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an *appropriate* sanction, which *may* include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee." CR 11(a) (emphasis added).

meritorious claims. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992). The trial court did not perform this analysis on the record. *See* Verbatim Report of Proceedings at 48-55 (Dec. 22, 2010); CP at 955-61, 975-76. *Cf. Biggs*, 124 Wn.2d 193 (holding that an order imposing CR 11 sanctions must specify the offending conduct, explain the basis for the sanction imposed, and quantify any amounts awarded with reasonable precision).

The substantial award of attorney fees in this case has the potential to chill meritorious recall petitions. This is especially concerning because our state constitution mandates that "[t]he right of petition . . . shall never be abridged." Wash. Const. art. I, § 4. Rather than award monetary sanctions, the trial court could have imposed some other type of sanction that would adequately address the petitioners' conduct. *E.g.*, *Joseph Tree*, 119 Wn.2d 210 (holding that the trial court should impose the least severe sanction necessary to carry out the primary purpose of CR 11); *see also Miller v. Badgley*, 51 Wn. App. 285, 753 P.2d 530 (1988) (holding that, although CR 11 specifically mentions monetary sanctions, this does not preclude the court from imposing some other type of remedy or combination of remedies).

I do not condone the intentional filing of frivolous recall petitions but defer to the constitutional mandate that the right of the petitioner "shall never be abridged." Wash. Const. art. I, § 4. Awarding $50,000 in attorney fees here does not appropriately protect the constitutional right of the people to participate in government through recall.

Conclusion

The trial court's findings are insufficient to establish that an award of $50,000 in attorney fees against petitioners is an appropriate sanction in a case involving the right of the people to petition for recall. The trial court's decision on this issue should be reversed.

AUTHOR:

Justice James M. Johnson

WE CONCUR: