No. COA 12-455 THIRTY-B DISTRICT

NORTH CAROLINA COURT OF APPEALS

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Friends of Joe Sam Queen, a political committee, Plaintiff	)	
	)	From Haywood County
v.	)	No. 11 CVS 89
Ralph Hise for NC Senate, a political committee; and North Carolina Republican Party, a political committee, Defendants	)	

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REPLY BRIEF

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REPLY BRIEF

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ISSUE PRESENTED

I. WHETHER N.C.G.S. § 163-278.39A AND THE REMEDY IT PROVIDES ARE CONSTITUTIONAL?

Plantiff-Appellant, Friends of Joe Sam Queen, (hereinafter "Plaintiff" or "Queen Committee") hereby submits this Reply Brief to the honorable Court of Appeals, pursuant to Rule 28(h)(2) of the North Carolina Rules of Appellate Procedure. The Plaintiff hereby shows the Court that the Defendants have addressed new or additional issues in their brief which was filed with the Court on August 17, 2012, and the Plaintiff hereby responds to those new or additional issues. Plaintiff hereby incorporates by reference the Statement of the Case and Statement of the Facts presented in its original brief.

ARGUMENT

The Defendants contend that N.C.G.S. § 163-278.39A violates the United States and North Carolina Constitutions, or is preempted or invalidated by Federal law. In support of their arguments, the Defendants have cited cases which are completely distinguishable and have no bearing on the statutory scheme which our General Assembly has provided to create a remedy for those political candidates whose opponents failed to abide by the "Stand By Your Ad" statutory requirements. The Defendants' arguments are without merit, and this Court should reverse the trial court's grant of summary judgment in favor of the Defendants.

I. N.C.G.S. § 163-278.39A AND THE LEGAL REMEDY IT PRESCRIBES DO NOT VIOLATE A DEFENDANT'S FREE SPEECH RIGHTS.

The Defendants contend that North Carolina's Stand By Your Ad statutes violate the free speech requirements of the First Amendment of the United States Constitution and Article I, Sections 12 and 14 of the North Carolina Constitution. Their arguments are specious and contradicted by established United States Supreme Court authority. The Stand By Your Ad provisions simply require disclosure to the voting public of the sponsor or sponsors of political advertisements and provides a remedy for violations which both compensates the party damaged by the violation and deters potential violations.

A. SIMILAR FEDERAL PROVISIONS HAVE PASSED CONSTITUTIONAL MUSTER.

Provisions similar to those at issue here are found in the McCain-Feingold Bipartisan Campaign Reform Act ("BCRA") and were considered by the United States Supreme Court in the constitutional challenge brought against BCRA in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) and held constitutional by the Supreme Court. No subsequent Federal court analysis of BCRA's Stand By Your Ad provisions has undercut the Supreme Court's affirmation of the constitutionality of the Federal counterpart to Stand By Your Ad. There is, therefore, no basis in the case law for Defendants' contentions.

In fact, more recent Supreme Court authority speaks directly to and endorses the importance of truthful and honest disclosure. In *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), the Supreme Court acknowledged

that the enactment of BCRA arose, in part, from the existence of a system without adequate disclosure. In this regard, the Court quoted the District Court for the District of Columbia in *McConnell I*, 251 F. Supp. 2d 176 (D. D.C. 2003), "the public may not have been fully informed about the sponsorship of so-called issue ads." *Id*. at 55. In his opinion for the Court, Chief Justice Roberts noted that the First Amendment protected political speech, and accompanying disclosure permitted citizens to evaluate that speech, saying, "[t]his transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id*. From that portion of the Court's decision endorsing disclosure, there was only one dissent among members of the Court. In no way does the disclosure obligation of N.C.G.S. § 163-278.39A impair or limit the free speech of the Defendants. The statute simply imposes an obligation to disclose correctly (and not falsely) the identity of the person or entity paying for the advertisement.

B. THE STATUTORILY PROVIDED DAMAGES DO NOT AMOUNT TO A CONTRIBUTION TO A POLITICAL OPPONENT; RATHER, THEY REPRESENT DAMAGES AWARDED TO AN INJURED PARTY.

In claiming that the remedy provision violates their First Amendment Rights, Defendants claim to rely on two principles of constitutional law which, have no relation to the remedy which is provided in this case. Defendants argue

that the remedy called for in N.C.G.S. §163-278.39 A(f) would amount to a contribution being made by the Defendants to the Plaintiff, who was, in 2010, a political opponent. In support of this proposition, the Defendants cite to cases which involve parties being required to give funds to entities which engage in political activities or other forms of speech with which the required contributors disagree. *See Glickman v. Wileman Brothers & Elliott Inc.*, 521 U.S. 457 (1997); *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977). Defendants link these cases with the recent *Citizens United* case which likens money to speech in the political context. *See Citizens United,* 130 S. Ct. at 905.

However, the cases deal with situations in which a plaintiff is required to make a mandatory contribution, whether by union dues or co-op membership, to an entity, which in turn chooses to make certain political contributions or run certain advertisements with which the party disagrees. In each case, the plaintiff was either the member of a labor union, whose dues were being utilized for purposes with which they disagreed, or was a member of a co-op or other entity whose otherwise voluntary contributions were being utilized for purposes with which the plaintiff disagreed. None of these cases involved unlawful activities on the part of the entity making the payment. The payments were not damages awarded as a result of a violation of the law.

In this case, Plaintiff is seeking compensatory damages which are provided by a statute for wrongdoing on the part of the Defendants. Plaintiff certainly is not seeking a voluntary contribution by the Defendants, but instead is seeking the remedy to which it is entitled as a result of the wrongful and unlawful conduct engaged in by the Defendants. If the reasoning utilized by the Defendants is carried to its natural conclusion, then a political candidate plaintiff would be unable to utilize the legal system to recover damages from his political candidate opponent for defamation. Under this reasoning, the plaintiff would not be entitled to receive any damages even though he was wronged in a manner which is recognized by law and for which the law prescribes specific compensatory damages. *See, e.g. Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 568 S.E. 2d 893 (2002).

Defendants further argue that the statutorily prescribed damages are solely punitive in nature, because, they argue, the Plaintiff has not suffered actual damage as a result of the improper disclosures of the Defendants' advertisements. Nevertheless, the General Assembly has recognized in its enactment of N.C.G.S. § 163-278.39A(f) that an opposing candidate necessarily suffers damages as a result of these violations. The opposition candidate bears the extra burden of compliance and was the target of advertisements that concealed the true identity of its sponsors. The General Assembly recognized that such damages would be difficult

to prove and quantify, and therefore, has statutorily prescribed the amount of damages as the amount of money spent on the advertising which bore the improper disclosures.

The prescription of statutory damages is quite common. Our General Assembly has seen fit to create statutory damages in certain instances. For example, North Carolina's Unfair or Deceptive Trade Practices Act allows for a trebling of damages in those instances in which a violation of the act takes place. *See* N.C.G.S § 75-16.1 (2011). The General Assembly has also created a statutory damages remedy in instances in which telephone solicitors violate the provisions of N.C.G.S. § 75-100, *et seq.* N.C.G.S. § 75-105 provides a private right of action on behalf of a telephone subscriber who has received calls from telephone solicitors in violation of the Article in the amount of $500.00 for the first violation, $1,000.00 for the second violation, and $5,000 for the third and subsequent violations. *See* N.C.G.S. § 75-105(b).

Further, Congress has provided statutorily defined damages for violations of federal law. *See, e.g., The Cable Piracy Act,* 47 U.S.C. § 605(E)(Granting plaintiffs a recovery from $1000.00 to $10,000.00, in an amount the court considers just and $10,000.00 to $100,000.00 for willful violations committed for commercial advantage)*; The Copyright Act,* 17 U.S.C. § 504(C)(Providing plaintiffs statutory damages between $750.00 and $30,000.00 for each act of

infringement); *The Fair Debt Collection Practices Act of 1978,* 15 U.S.C. § 1692k(a)(Providing plaintiffs an entitlement to $1,000.00 per violation); *The Telephone Consumer Protection Act of 1991,* 47 U.S.C. § 227(b)(3)(B)(Providing statutory damages of $500.00 per junk fax received and $1,500.00 for willful violations of the act).

The constitutionality of these types of remedies has been upheld. The United States Supreme Court has considered such statutorily created damages provisions, specifically in the case of one created by state statute. *See St. Louis, I.M. & S. Ry. Co. v. Williams,* 251 U.S. 63 (1919) (upholding an Arkansas law which allowed statutory damages for a railroad's violation of the legally allowed amount of a fare). In that case, the Court turned away a due process challenge to the statutory damage provision, noting that the plaintiff railroad had ample opportunity to challenge the provision in court at the time of its passage and subsequently thereto. *Id.* at 66. The Court went on to say that:

> When the penalty is contrasted with the overcharge possible in any instance, it of course seems large, but, as we have said, its validity is not to be tested in that way. When it is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence …, we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.

Id. at 67.

Similarly, in this case, our General Assembly has established a measure of damages in which it has taken into account the harm to both the plaintiff and the general public and the opportunities presented to potential defendants for violation of the law. In cases involving a violation of the Stand By Your Ad statute, it is most likely that violations would only be detected at a time just prior to or after an election has taken place, and therefore, many of the potential remedies which might be available to an opposing candidate are unavailable after the election has taken place. Such post-election remedies would be inadequate, and the General Assembly has recognized that by creating an effective deterrent for potential violators by creating a significant penalty for violations of the law. Just as in *Williams* above, the penalty may "seem large" but when considered in the context of the damages that are created by a violation and the opportunities that exist for such violations to occur, it cannot be said to be disproportional or constitutional. *See id.*

C. THE SUPREME COURT'S RECENT *BENNETT* DECISION REGARDING "MATCHING" FUNDS HAS NO BEARING ON THIS CASE.

Defendants place great emphasis upon the recent decision of the United States Supreme Court in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011). In that case, the Supreme Court struck down a "matching" funds provision related to the state's public campaign financing

scheme. Additional funds were to be given to a publicly financed candidate when an opponent who was not publicly financed spent more than the amount given to the publicly financed candidate by the program or if independent expenditure groups exceeded that amount. The Court struck down the provision because it called for a "windfall" to a publicly financed candidate from public funds in those instances in which either the opponent or other independent expenditure groups exercised their political speech rights by spending money in support of the opponent. *Id.* at 2822.

The Defendants in this case make a tortured comparison between public matching funds and the statutory compensatory damages provision in North Carolina's Stand By Your Ad statute. Defendants attempt to equate publicly sourced funds, which are to be given to a candidate to spend in a political campaign, to those funds which are received as compensatory damages due to the wrongful and unlawful activities of the Defendants. *Bennett* is completely distinguishable on its facts and circumstances, and bears no relationship to the case before the Court. Defendants would like the Court to ignore the fact that the remedy provision in this case results from unlawful activities. Defendants would have the Court believe that the remedy provided in N.C.G.S. §163-278.39A(f) requires an obligation on their part to make a mandatory political contribution to a former opponent. However, Defendants' mischaracterization of what are damages

for wrongdoing should not mislead the Court. The remedy in this case is in no way voluntary, and is not a contribution. It is the penalty to be paid for unlawful actions. This Court should find that the statute and its remedy are constitutional and should reverse the trial court's grant of summary judgment in favor of the Defendants.

II. N.C.G.S. § 163-278.39A DOES NOT VIOLATE DEFENDANTS' DUE PROCESS RIGHTS.

Defendants also contend that N.C.G.S. § 163-278.39 A violates their rights to due process because they claim it to be unconstitutionally vague. *See* Appellee's Brief, p. 32. Defendants' entire argument revolves around the term "purchase" which is utilized in the statute to indicate those persons or entities which must be disclosed as having "paid for" the advertisements.

The Defendants are now asking this court to hold that a properly enacted statute is unconstitutionally vague when in practice, Defendants have for many years known precisely how to act in a manner which is in compliance with the statute and which is completely legal in the context of the Stand By Your Ad law. Ever since the enactment of N.C.G.S § 163-278.39A in 1999, both the Defendants as well as the North Carolina Democratic Party and its candidates have been able to read the statute, and comply with the statute by properly noting on their various advertisements the identity of the purchaser. No prior activities of the Defendants

or other political parties had previously garnered a protest or objection by the other side.

However, in 2010, the Defendants intentionally and deliberately chose a different mechanism for providing payment for television advertisements run by the Hise Committee. The Defendants chose to send money directly from the Republican Party to the television advertising buyer, rather than contributing the money to the candidate for whom advertisements were to be purchased. The Plaintiff timely objected to this change of procedure and the resulting violations of the law and noted that because the funds went directly from the party to the television buyer, they were never in the actual possession and owned by the candidate committee which is alleged to have paid for the advertisement. It is this difference in the means by which the advertisement was paid for that the Plaintiff believes is a violation of the Stand By Your Ad statute. The funds utilized to pay for the airing of the advertisement were never in the actual possession nor were they owned by the candidate committee which was alleged to have paid for them.

Defendants allege that the word "purchase" is vague, because, by their own actions, they have changed the paradigm and now, somehow, cannot understand what it means. In fact, in the context of the language of the statute, the meaning of "purchase" is easily ascertainable. Our Supreme Court has said:

> Legislative intent controls the meaning of the statute; and in ascertaining this intent, a court must consider the act as

> a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish. The statutes words should be given their natural and ordinary meaning unless the context requires them to be construed differently.

Hyler v. GTE Products Co., 333 N.C. 258, 262, 425 S. E. 2d. 698, 701 (1993) (*quoting Shelton v. Morehead Memorial Hospital* 318 N.C. 76, 82, 347 S. E. 2d. 824, 828 (1986)). As was stated earlier in Plaintiff's brief, the remedy provision of N.C.G.S § 163-278.39A(f) provides insight into the meaning of the word "purchase" in that the remedy provides that the amount of damages should be the "dollar amount of television and radio advertising time that was aired" without the proper disclosures. N.C.G.S § 163-278.39A(f)(2); *see* Plaintiff-Appellant's Brief, pp. 23-26.

Prior to the initiation of this case, the Defendants were more than capable of ascertaining the regular and ordinary meaning of the word "purchase". In those instances, the Republican Party contributed money to their individual candidates, and then individual candidates utilized those funds to pay for television advertising. The television advertisements then bore the disclaimer "Paid for by (the individual candidate)". The mysterious nature of the word "purchase" has only arisen when the Defendants chose to bypass their usual and ordinary procedure. Only in this instance in which they have chosen a new path, a shortcut, which creates a situation in which the advertisement says it was paid for by a

candidate, but where the candidate never possessed and owned the money which paid for the advertisement, is the statute now unconstitutionally vague. Defendants' arguments as to vagueness are without merit, and this Court should reject them.

Contrary to the Defendants' assertions, the Stand By Your Ad provisions operate in concert with the Federal Communications Act. Indeed, the Federal Communications Act grants certain benefits to candidates in connection with their purchase of television and radio advertising, and, in connection with such benefits, it relieves television and radio stations from potential defamation liability. *See* 47 U.S.C. § 315, *et seq*. In addition, the purchase by a candidate entitles the candidate to a lowest unit rate when such rate is sought. *See id*. Here, advertising purchased by the North Carolina Republican Party was obtained for the benefit of a candidate on the misrepresentation to the television station that the candidate had paid for the advertising. This misrepresentation by American Media in a required representation to the television station is violative of the intent of the Federal Communications Act, and here, the North Carolina Stand By Your Ad provisions and the Federal Communications Act work together to prohibit such misrepresentations.

CONCLUSION

For the reasons stated herein, N.C.G.S. § 163-278.39A and the remedy it provides are not unconstitutional. The judgment of the trial court granting summary judgement in favor of the Defendants should be reversed.

This the 4th day of September, 2012.

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N.C. R. App. P. 33(b) certification:
I certify that all of the attorneys listed herein have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing brief complies with the requirements of Rule 28(j) of the North Carolina Rules of Appellate Procedure with respect to the length of the brief, which utilizes a proportional typeface. The brief, excluding the cover page, index, table of cases and authorities, and certificate of service, does not exceed 3,750 words.

__/s/ Joseph A. Newsome_____
Joseph A. Newsome

CERTIFICATE OF SERVICE

This is to certify that the undersigned counsel, in conformity with Rule 13 of the North Carolina Rules of Appellate Procedure, has filed a copy of the foregoing brief with the North Carolina Court of Appeals and has served a copy of the foregoing brief upon counsel for all other parties by depositing a copy in the United States Mail, first class, postage prepaid, and addressed as follows:

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This the 4th day of September, 2012.

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