

**NORTH CAROLINA:**

**IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION**

**WAKE COUNTY:**

**07-CVS-16422**

**CATHERINE M. EL-KHOURI, et al.,**

**Plaintiffs,**

**v.**

**STATE OF NORTH CAROLINA, et al.,**

**Defendants.**

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**MEMORANDUM OF DECISION AND ORDER RE: MOTION FOR SUMMARY  
JUDGMENT PURSUANT TO RULE 56, NORTH CAROLINA RULES OF CIVIL  
PROCEDURE**

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**THIS MATTER** came on for hearing before the undersigned Judge of Superior Court at the August 3, 2009, civil session of the Wake County Superior Court upon cross Motions for Summary Judgment pursuant to Rule 56 and Rule 56(c), North Carolina Rules of Civil Procedure.

**Factual and Procedural Background**

Plaintiffs filed this civil action on October 10, 2007 to challenge the constitutionality of the fifty dollar (\$50.00) surcharge assessed by the North Carolina General Assembly against all active members of the State Bar of North Carolina. The surcharge funds, in part, the North Carolina Public Campaign Fund. The Defendants filed a Motion to Dismiss based on sovereign immunity and failure to state a claim for relief. On August 28, 2008, the motion to dismiss was denied by Judge Cashwell. Answer was filed on September 17, 2008 and Defendants filed a Motion for Summary Judgment on November 13, 2008. The Summary Judgment motion was heard on August 3, 2009.

Prior to the hearing the Court was provided with memoranda from the parties. The Court read all the memoranda prior to the hearing. At the conclusion of the hearing the Court took the matter under advisement. The Court has now taken time to consider the arguments made at the hearing, the memoranda and authorities cited therein. This matter is ripe for disposition.

The facts are not in dispute. The plaintiffs, Catherine M. El-Khoury and W. Anthony Purcell are attorneys duly licensed to practice law in North Carolina and are active members of the North Carolina State Bar ("State Bar"). The defendants are the State of North Carolina, the State Bar, the State Bar

treasurer, and all members of the State Bar Administrative Committee. The State Bar is an agency of the State and is charged with regulating the practice of law in North Carolina and with collecting the statutory membership fee and surcharge at issue in this case. The Administrative Committee is authorized to "oversee the membership function of the State Bar, including collection of dues, [and] the suspension of members for failure to pay dues and other fees." 27 N.C. Admin. Code 1A .0701(5).

G.S. 84-34 states in pertinent part: "Every active member of the North Carolina State Bar shall, prior to the first day of July of each year, pay to the secretary-treasurer an annual membership fee in an amount determined by the Council but not to exceed three hundred dollars (\$300.00), plus a surcharge of fifty dollars (\$50.00) for the implementation of Article 22D of Chapter 163 of the General Statutes...."

Article 22D of Chapter 163 of the General Statutes is captioned "The North Carolina Public Campaign Fund" ("Campaign Fund") and established the Campaign Fund "as an alternative source of campaign financing for candidates who demonstrate public support and voluntarily accept strict fund-raising and spending limits." G.S. 163-278.61.

The Campaign Fund was created in 2002 by the North Carolina General Assembly to provide the option of publicly - financed campaigns for appellate judicial candidates and to provide for voter education about appellate judicial races in North Carolina.

As a result of this statutory scheme, funds from the Campaign Fund are distributed in two (2) separate and distinct ways:

**First**, funds are made available to members of the State Bar who are candidates for justice of the Supreme Court and judge of the Court of Appeals and **(1) have demonstrated public support and (2) have agreed to accept the strict fund-raising and spending limits as a condition for campaign funds for that appellate judicial candidate.** G.S. 163-278.64

The first appellate judicial elections for which the Campaign Fund was available occurred in 2004. The Campaign Fund does not provide financial support to candidates for judicial elections for Superior or District Court seats.

The State Board of Elections, **not the State Bar**, is charged with certifying a participating appellate judicial candidate's eligibility for participation in the Campaign Fund. The State Board of Elections is required to distribute to a certified candidate revenue from the Campaign Fund in such amounts as may be determined by G.S. 163-278.65(b)(4) and the candidate is authorized to use that revenue in the judicial election campaign. Elections for appellate judges in North Carolina are non-partisan and were non-partisan in 2004, 2006 and 2008.

**Second**, funds are made available for the publication of a Judicial Voter Guide which "explains the functions of the appellate courts" and includes specified information on **all candidates** for the North Carolina Supreme Court and the North Carolina Court of Appeals. The Judicial Voter Guide is to be distributed "to as many voting age individuals in the State as practical." G.S.163-278.69(a) and (b). Judicial Voter Guides were published and distributed for the 2004, 2006 and 2008 General Elections. [In 2008 the Voter Guide contained voter information on candidates for State Auditor, Insurance Commissioner and Superintendent of Public Instruction in addition to the appellate judicial candidates.]

In 2004, there were 4,000,000 copies printed for distribution to the voting public at a cost to the Campaign Fund of \$192,000. In 2006, there were 4,000,000 . copies printed for distribution to the voting public at a cost to the Campaign Fund of \$236,000. In 2008, there were 3,700,000 copies printed for distribution to the voting public at a cost to the Campaign Fund of \$1,406,000.

Monies to support appellate judicial campaigns and the Voter Guide come from many sources, including State appropriations and individual and corporate donations. In 2005 the General Assembly amended G.S. 84-34 to require all active North Carolina licensed attorneys (membership in the State Bar is mandatory) to pay a \$50.00 surcharge for the benefit of the Campaign Fund. The surcharge was implemented in 2006. Attorneys paying the surcharge have no choice as to how their surcharge is applied by the State Board of Elections to expenditures made by the Campaign Fund.

G.S. 163-278.63 (a) established the Campaign Fund and directs that "All expenses of administering this Article, **including production and distribution of the Voter Guide required by G.S. 163-278.69** and personnel and other costs incurred by the Board, including public education about the Fund, shall be paid from the Fund and not from the General Fund..... The Board shall administer the Fund.

G.S. 163-278.63(b) set out the sources of funding. "Money received from all the following sources must be deposited in the Fund: (7) Money collected from the fifty-dollar (\$50.00) surcharge on attorney membership fees in G.S. 84-34".

There is nothing in G.S. 84-34 that directs where the surcharge must be spent when received by the Campaign Fund and there is nothing that prohibits the surcharge funds from being used entirely for the expense of the Voter Guide that is required to be distributed or from being used entirely to support the public campaign financing side, or for that matter, for the surcharge to be divided and used for the Voter Guide and for public campaign funds.

G.S. 163-278.68 provides that the State Board of Elections with the advice of an Advisory Council shall administer the provisions of the Article and is authorized to adopt Rules to ensure the effective administration of the Article.

In this case, the plaintiffs failed to pay the 2006 surcharge and received Notices to Show Cause as to why they should not be suspended from the practice of law for failure to pay the surcharge.

On October 18, 2006, plaintiffs appeared before the Administrative Committee to show cause. They argued that the surcharge was a violation of their constitutional rights to freedom of speech, an impermissible tax and a violation of state laws including, but not limited to, that the State Bar had no authority to collect the surcharge. The Administrative Committee deferred the matter until January, 2007 and on January 17, 2007 took up the show cause hearing. On January 19, 2007, the State Bar issued Orders of Suspension for Non-payment of the 2006 surcharge and ordered each plaintiff to pay within 30 days or face suspension of their licenses to practice law. Plaintiffs paid the surcharge under protest and continue to do so through the present time. This lawsuit followed.

## **DECISION**

The Court concludes, based upon the foregoing undisputed facts, as a matter of law that:

### **A. The surcharge created pursuant to G.S. 84-34 is not an unconstitutional tax in that:**

(1) The surcharge created pursuant to G.S. 84-34 requiring licensed, active members of the State Bar to pay \$50.00 into the Campaign Fund is in furtherance of a valid and compelling governmental interest in that the surcharge in support of the Campaign Fund is rationally and reasonably related to a legitimate interest of the State of North Carolina – to promote public awareness of the role of the appellate judiciary and to promote credibility and integrity in the courts. Accordingly the imposition of the surcharge and its payment into the Campaign Fund **is not arbitrary, nor in violation of the plaintiffs' right to equal protection of the law under the Fourteenth Amendment to the United States or Article I, Section 19 of the North Carolina Constitution.**

(2) The surcharge created pursuant to G.S. 84-34 including its collection and enforcement by the State Bar does not constitute an unlawful abdication or delegation of legislative authority to the State Bar and is not in violation of the separation of powers doctrine,

(3) The surcharge created pursuant to G.S. 84-34 is rationally and reasonably related to the goals of the State of North Carolina in protecting appellate judicial races from impropriety or the appearance of impropriety as well as those valid

reasons set forth in subparagraph (1) above. Accordingly, the surcharge is not based on an arbitrary and capricious classification, is uniform and does not violation the Uniformity of Taxation Clause of the North Carolina Constitution.

B. The Surcharge created by G.S. 84-34 to provide funds for the Campaign Fund does not, in and of itself, violate Plaintiffs' Freedom of Speech as Guaranteed by the United States and North Carolina Constitutions – However, the present policy requiring that the plaintiffs have no right to select how their \$50.00 surcharge is spent once those funds reach the Campaign Fund, compels political speech and violates their guarantees of free Speech contained in the United States and North Carolina Constitutions. *Keller v. State Bar of California, 496 U.S. 1 (1990)* This determination does not require a declaration that G.S. 84-34 is unconstitutional. *Baker v. Martin, 330 NC 331,336 (1991)*. Here's why.

In this case, the Court can fashion a simple, common sense and non-invasive remedy for the constitutional violation complained about without declaring GS 84-34 or the Campaign Fund unconstitutional in any respect. When it comes to plaintiffs' **real complaint** about the mandated surcharge, their Memorandum of Law says it best:

**Plaintiffs, against their will, are forced to support candidates with whom they do or may ideologically disagree in that they are required to make a contribution to the Campaign Fund which distributes money to candidates without authorization from Plaintiffs. Financing from the Campaign Fund is available to candidates for appellate judgeships who meet the participation requirements of G.S. 163-278.64. Members of the State Bar have no control over distributions from the Campaign Fund to qualifying and participating candidates but are nonetheless required to pay the judicial surcharge which funds, in part, the Campaign Fund. Distributions have been made and will be made from the Campaign Fund to candidates Plaintiffs do not support. Consequently, the judicial surcharge of G.S. 84-34 compels political speech and so violates the guarantees of free speech embodied in both the United States and the North Carolina Constitutions. (Pls. Memo. p. 5)**

The remedy for plaintiffs' gripe – to wit: having their money go towards candidates they do not like for appellate judicial office – is an easy one. The plaintiffs, and those other lawyers who are chafing under the collar because some of their \$50.00 may go to an appellate judicial candidate they despise or disagree with, should simply be permitted to designate that their \$50.00 go into the pot for the very constitutional and very legitimate Voters Guide that the Campaign Fund is required, by law, to fund so as to provide the North Carolina

voting public with information about the appellate courts and candidates for each election cycle.

Once this easy solution is in place and implemented, the Court doubts there will be very many active members of the State Bar who will elect to designate on their annual dues statement that their \$50.00 surcharge only be spent on publishing and distributing the Voter Guide. However, with this election in place, the plaintiffs can be content knowing that their \$50.00 will only go towards informing the voting public about appellate judicial elections in North Carolina.

This simple act is not hard to accomplish as the State Bar is merely the collection conduit for the money and the accounting folks at the State Bar can easily report the amount of funds designated for the Voter Guide by plaintiffs and others of like suit.

Accordingly, the "unconstitutional" mandate complained of is to be eliminated and plaintiffs will have their remedy. No longer will they be at risk of losing their license and their right to free speech will no longer be impinged.

**IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:**

**A. The surcharge created pursuant to G.S. 84-34 is not an unconstitutional tax for the reasons set forth above.**

**B. The surcharge created by G.S. 84-34 to provide funds for the Campaign Fund does not, in and of itself, violate Plaintiffs' Freedom of Speech as Guaranteed by the United States and North Carolina Constitutions and is declared to be constitutional.**

**C. The present policy requiring that the plaintiffs have no right to select how their \$50.00 surcharge is spent once those funds reach the Campaign Fund, compels political speech and violates their guarantees of free Speech contained in the United States and North Carolina Constitutions. *Keller v. State Bar of California, 496 U.S. 1 (1990)*. This determination does not require a declaration that G.S. 84-34 is unconstitutional. *Baker v. Martin, 330 NC 331,336 (1991)*.**

The remedy for the violation of plaintiffs' constitutional rights is simple and easy and is Ordered to be implemented as follows:

**D. The State Bar is to provide a check off box, or similar process, in conjunction with the Annual Bar Membership and surcharge Notice which will permit any active member of the State Bar to designate that his or her surcharge may be spent only on the Voter Guide. The State Bar and the State Board of Elections are to create an internal accounting system to ensure that the amount of funds designated by active members of the bar**

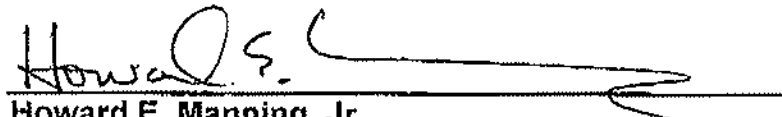
directing their surcharge be used only for the Voter Guide are spent only for that purpose. For any active member of the State Bar who does not so designate, those funds collected may be used for any purpose under the Campaign Fund rules and regulations.

E. To the extent relief has been granted for the reasons as set forth above, the plaintiffs' Motion for Summary Judgment based on violation of their rights under the First Amendment to the United States Constitution and the North Carolina Constitution is allowed. In all other respects, the defendants' Motion for Summary Judgment pursuant to Rule 56(e), N.C. Rules of Civil Procedure, is granted as to the First and Second Claims for Relief.

F. Based on the foregoing, the defendants' Motion for Summary Judgment pursuant to Rule 56(e), N.C. Rules of Civil Procedure is granted as to the Third, Fourth, Fifth, Sixth, Seventh and Eighth Causes and those claims are dismissed.

G. The Court retains jurisdiction over this action pending implementation of the remedy by the Defendants.

This the 10th day of August, 2009.

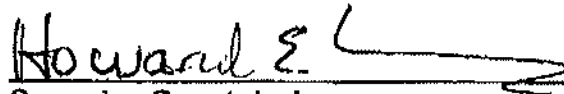
  
Howard E. Manning, Jr.  
Superior Court Judge

**Certificate of Service**

**This is to certify that the foregoing Order Re: Motion for Summary Judgment 07CVS 16422 Wake County Superior Court was served by facsimile transmission this the 10th day of August , 2009 as follows:**

**Alexander McC. Peters  
Special Deputy Attorney General  
State of North Carolina  
Facsimile 716-6763  
Raleigh NC**

**Robert F. Orr  
Jeanette K. Doran  
Facsimile 838-5316  
Raleigh NC**

  
**Howard E. L.**  
**Superior Court Judge**

FAX ONLY MEMORANDUM

August 10, 2009

FROM: JUDGE HOWARD E. MANNING, JR.

TO:

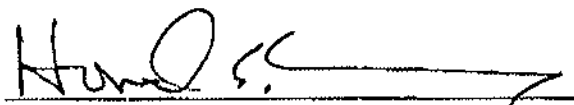
**Alexander McC. Peters**  
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**Raleigh NC**

Subject: El-Khouri v. State, et al., 07 CVS 16422 Wake County

Enclosed is Memorandum of Decision and Order in this case which has been filed this date. This constitutes service of the MDO on the parties.

This the 10th day of August, 2009.

  
Howard E. Manning, Jr.  
Superior Court Judge

9 pages