

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

THE EXECUTIVE BOARD OF THE)
MISSOURI BAPTIST CONVENTION, et al.,)
)
Plaintiffs,)
vs.)
ROBIN CARNAHAN, et al.,)
)
Defendants.)

Case No: 02 CV 325096-02
Judge Frank Conley

ORDER ON PLAINTIFF’S APPLICATION FOR ATTORNEY FEES

A previous Judgment and various Amended Judgments thereafter ordered the Missouri Baptist Foundation to pay the attorneys’ fees incurred by the Executive Board of the Missouri Baptist Convention, but said the amount could be determined in “further proceedings” after an appeal. Such further proceedings are now concluded. On November 22, 2013, the Court heard evidence and argument from both parties. As set forth below, this Court enters final judgment for the amount of attorneys fees and costs to be paid by the Foundation.

The Appeals Opinion also questioned whether the trial court made findings of intentional misconduct to support the fee award. This Court believes that the Amended Judgment made adequate findings, which are summarized below.

1. The Foundation engaged in intentional misconduct in the breakaway scheme outlined in the Amended Judgment, and knowingly and purposefully violated the Convention’s rights. See Amended Judgment, pages 8-11, facts numbered 7-11, and pages 26-30.¹

¹ At page 26, the Amended Judgment states: “Finally, this argument fails for a much more basic, and troubling, reason. It is simply unconscionable for the Foundation to purposefully violate the Convention’s right to approve amendments to the Foundation’s Charter (and Articles) and then argue that this right is unenforceable because of an inconsistency that the Foundation itself created. The Court has held, above,

2. Plaintiff had rights grounded in the 1994 MBF Charter as approved by *pro forma* decree by this Court pursuant to Chapter 352. See Amended Judgment, pp. 21-22, including footnote 4. Among those rights was the right to approve amendments. When the MBF attempted to change from a Chapter 352 corporation to a Chapter 355 corporation, and then sought to amend away the MBC rights, all without MBC approval, defendant MBF violated §355.606. And the failure to seek permission was not inadvertent. It was intentional and purposeful. See Amended Judgment, pages 29-30.

3. These facts show a secretive, bad faith scheme to cheat the Convention out of its rights, which constitute “special circumstances” justifying an award of attorneys fees in this declaratory judgment action.²

DETERMINATION OF AMOUNT OF ATTORNEYS FEES AND COSTS

I. Plaintiff’s Application for Fees and Costs.

1. Plaintiff filed its Application for Fees and Costs under seal on November 21, 2012. It then filed an Amended Application on December 13, 2012. Finally, it filed a Supplement to the Amended Application about November 20, 2013.

2. According to undisputed evidence, Plaintiff³ has been billed, and has paid, attorneys’ fees and costs in excess of \$6.1 million for all legal actions to recover all five

that there is no inconsistency between the provisions of the 1994 Charter (or the original Articles) and Section 355.606. But even if there is, Section 355.606 would never have applied—consistently or otherwise—if the Foundation had not decided to cheat the Convention out of its rights to begin with.”

At page 28, the Court stated: “For the Foundation now to attempt to take advantage of the discrepancies (actual or otherwise) that the Foundation *itself* created...is more than absurd, it borders on the offensive.”

² In footnote 12, the appeals opinion says: “In the instant case, the legal basis for an attorney fees award requires a finding of intentional misconduct by the Foundation and both parties challenge whether such a showing was made; this necessarily requires an adjudication of the factual and legal issues remaining between the parties.” The Plaintiff does not challenge whether such a showing was made. Neither does this court.

³ The Court uses the term “Plaintiff” herein to refer to the association, the Missouri Baptist Convention, and its corporate representative, The Executive Board. For purposes of this judgment, the term is

agencies since the breakaways began in September 2000, through December 31, 2010. See affidavit of Samantha Spencer, corporate representative for MBC.

3. In the Amended Application, Plaintiff requests \$3,684,325.92 for fees and costs against the MBF, plus interest at the statutory rate of 9% per annum, for work performed through December 31, 2010, the date of Judge Wilson's judgment.

4. In the Supplement to the Amended Application, Plaintiff requested an additional \$356,663.68 from MBF, for work done since the Wilson judgment, on and after January 1, 2011.

5. Thus the total amount requested by Plaintiff MBC against Defendant MBF is \$4,040,959.60 for attorneys' fees and costs through November 22, 2014.

6. Paraphrasing the Amended Judgment at page 2, this is a complex case involving many parties represented by some of the best lawyers in this state. The case has been pending more than eleven years, it has found its way to the court of appeals at least four times, and it has generated tens of thousands of pages of filings in the Court record. In these pleadings, the parties raise every conceivable argument, not once but several times, and cling tenaciously to their position even when they have lost.

7. The case is also complicated by the fact that five agencies broke away at about the same time, and then entered a joint defense strategy to assert common legal arguments. This multiplied the work facing the plaintiff, and made this case much more expensive to litigate.

interchangeable between the two. Fees / costs owed by the Convention but paid for by the Executive Board are recoverable against the Foundation, by an award to the Executive Board.

8. MBF continues to litigate aggressively and tenaciously.⁴ This is its right. But the MBF cannot then be heard to say that Plaintiff has spent too much time defending this case.

9. In the Amended Judgment, the Court ordered that “the Foundation shall pay the Convention’s costs and attorneys fees in prosecuting the claims that resulted in this Judgment and such additional costs and fees as the Convention may incur in defending this judgment or as a result of any additional proceedings called for in this Judgment, with the amount of such fees being determined in additional proceedings before this Court. See Amended Judgment, p. 31.

10. Plaintiff was represented throughout this proceeding by a team of attorneys lead by Michael K. Whitehead, Whitehead Law Firm, LLC, in Kansas City. Mr. Whitehead is the general counsel for the Missouri Baptist Convention. Assisting him have been individual attorneys with non-profit law expertise in other law firms, including:

- a. Charles Hatfield, Stinson Morrison Hecker LLP (now Stinson Leonard Street, LLP), Jefferson City.
- b. Stan Masters, Masters Law Firm, PC, Kansas City.
- c. James Freeman, III, Swanson Midgley, Kansas City.

⁴ Since the mandate, the Foundation has taken a half dozen depositions and filed briefs in opposition to Plaintiff’s Application for Fees and Costs. The Foundation has filed a Motion to Clarify Pending Issues and to set aside the judgment; a Motion for Summary Judgment inviting the court to reconsider legal and factual issues, and to enter judgment for the Foundation instead of the Convention; a Motion to Dismiss for failure to join necessary and indispensable parties, viz. the MBF trustees. The Court held a hearing on November 22, 2013 on all motions pending at that time. At the request of the Foundation, the Court took the matter under advisement while the parties participated in a global mediation. Plaintiff advised the Court on January 31, 2014, that mediation had terminated and issues remained unresolved. On February 4, 2014, defendant MBF filed yet another Motion for Summary Judgment, alleging mootness because the Foundation had amended its articles a second time, so that the first amended articles voided by the Wilson-Kinder judgment were not the real articles.

d. Jonathan R. Whitehead, Sonnenschein; Graves Bartle Marcus, Kansas City; and now the Law Offices of Jonathan R. Whitehead, LLC, Lee's Summit.

11. With its Application for Attorneys Fees and Costs, Plaintiff submitted substantial evidence in support of its Application, including affidavits and copies of billing invoices. Throughout the pendency of this case, Plaintiff's counsel have maintained time and billing records, and have regularly submitted fee statements to Plaintiff Executive Board, which has promptly paid all fees and costs. In addition, some court reporting firms and other vendors have submitted invoices for services directly to the Executive Board, and the Board has directly paid such invoices.

12. Michael Whitehead was the lead attorney on the case, and all services were rendered under his direction and supervision.

13. Plaintiff submitted detailed invoices which are sufficient to allow the Court to determine the work done and the rates charged.

14. The rates indicated for each attorney and paralegal are at or below standard rates for professionals of similar experience levels in Missouri.

15. Defendant MBF submitted suggestions in opposition to the fee request. Those suggestions did not challenge the reasonableness of the hourly rates charged, the reasonableness of the time expended on the matter or the adequacy of the documentation of same. Defendant MBF did not offer any evidence to counter the reasonableness of rates and time.

16. Defendant argued that the work involved some duplication of effort, but failed to provide substantial evidence on that point, or to suggest a dollar amount to subtract from the fee request.

17. The claims were combined in one petition because of common questions of law and fact. While each corporation had a separate board of directors, and changed its charter at a separate time, the changes were pursuant to a common strategy to breakaway from the Missouri Baptist Convention and align themselves with more center-left groups like the Cooperative Baptist Fellowship.

18. The Defendant MBF defended this case as a part of a joint defense agreement with all other defendants. As part of the joint defense agreement, MBF legal counsel cooperated and coordinated discovery and motion practice with counsel for the Baptist Home, Missouri Baptist College, Windermere and Word and Way. Pursuant to the joint defense agreement, each deposition was attended by separate counsel for each defendant. Each witness was cross-examined by counsel for the Foundation as well as separate counsel for the other four agencies.

19. Defendant MBF's suggestions objected to the Application on the basis that Plaintiff included time which for common to work as to all defendants and which could not be reasonably segregated or allocated just to one party. The Court finds the Plaintiff's argument persuasive under the circumstances.

20. Defendant MBF's Suggestions objected to the Application on the basis that Plaintiff did not prevail on all issues in the litigation or that Plaintiff achieved only limited success. In the Court's view, the Plaintiff obtained exactly the relief which it most desired, namely the restoration of its foundation.

21. The Defendant offered no evidence whatsoever outside of the pre-existing record in support of its opposition to the Application. Nor did the Defendant question the

facts set forth in Plaintiff's Application (with exhibits). Defendant Foundation did take the deposition of five attorneys regarding their time records.

22. The Defendant suggested no dollar figure that would be an appropriate award. It did suggest that since there were five corporations, the Court should assess at most 20% of the fees against the Foundation. It offered no clear methodology for a reduction of the fee amount to limit it as generally argued for in their suggestions.

A. Legal Analysis –Plaintiff's Fees and Costs.

1. A plaintiff may be considered a prevailing party if he “succeeds on any significant issue in litigation which achieves some of the benefit ... sought in bringing suit.” *Id.* at 433. This standard brings the plaintiff across the statutory threshold in terms of entitlement to attorneys fees.

2. Once this issue is decided (as has already been done in this case), only the amount of fees remains. An award of attorneys fees is committed to the trial court's sound discretion, based upon the circumstances of each case. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) See also *Williams v. Finance Plaza, Inc.*, 78 S.W.3d 175, 184 (Mo. App. W.D. 2002).

3. The trial court is considered an expert on the subject of attorneys fees, and is presumed to know the character of services rendered, the zeal and ability of the attorneys and the value of their services according to custom, place and circumstance. *Williams*, 78 S.W.3d at 184.

4. In determining fees, the court may consider the significance of the legal issues on which the plaintiff prevailed and the public purpose of the litigation. See *Flaherty v. Marchand*, 284 F. Supp.2d 1056, 1067-68 (N.D. Ill. 2003).

5. Factors to consider include: 1) the time and labor required; 2) the novelty or difficulty of the questions; 3) the skill requisite to perform the legal services properly; 4) preclusion of other employment due to acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) time limitations imposed by the circumstances; 8) the amount involved and the results obtained; 9) the expertise, reputation and ability of the attorneys; 10) the “undesirability” of the case; 11) the nature and length of the professional relationship with the client; and 12) awards in similar cases. *Hensley*, 461 U.S. at 430 n.3.

6. If the plaintiff succeeds on some but not all claims, the amount to award depends, in part, on whether the claims on which he was not successful are related to the claims on which he was successful. If the unsuccessful claims are “distinct in all respects” from the successful claims, the hours spent on the unsuccessful claims should be excluded. *Hensley*, 461 U.S. at 440.

7. However, if the claims involve a common core of facts or related legal theories, and much of counsel’s time is devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis, the trial court should not view the claims as severable, but instead focus on the significance of the overall relief obtained by the plaintiff. *Id.* at 435.

8. Time spent on unsuccessful claims is compensable if it contributes to the success of the winning claim. *Jaffee v. Redmond*, 142 F.3d 409, 413 (7th Cir., 1998). In other words, where the facts or legal issues are related, or general work contributes to the vindication of rights, the court need not and should not sever an attorney’s work into “issue parcels” but rather, should look to the degree of success for guidance on any adjustment. See *Miller v. Carson*, 628 F.2d 346, 348 (5th Cir. 1980).

9. In this regard, a plaintiff who has won substantial relief should not have his attorneys fee reduced:

10. When a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally, this will encompass all hours reasonably expended in the litigation and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances, the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the litigation. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters. *Hensley*, 461 U.S. at 435.

11. Time expended on the application for attorneys fees is included in the award. See *Thompson v. Pharmacy Corp. of America*, 334 F.3d 1242, 1245 (11th Cir. 2003); *City of Detroit v. TXU Energy Retail Co.*, 2007 WL 551600 *4 (E.D. Mich., Feb. 20, 2007)(citing *Coulter v. Tennessee*, 805 F.2d 146, 151 (6th Cir. 1986)).

12. “The most useful starting point for determining the amount of a reasonable [attorneys] fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” *Hensley*, 461 U.S. at 433. This “lodestar” amount is strongly presumed to be reasonable. See *Quarantino v. Tiffany & Co.*, 166 F.3d 422, 425 (2d Cir. 1999); *Denius v. Dunlap*, 330 F.3d 919, 930 (7th Cir. 2003). Here, the Defendant does not challenge the hourly rates, only the number of hours to be compensated.

13. To obtain the lodestar amount, the number of hours expended by each timekeeper is multiplied by his or her reasonable hourly rate and then added together for an aggregate total.

B. Conclusions of law –Plaintiff’s Fees and Costs.

1. Upon review of the documentation submitted with Plaintiff’s Application, the Court finds that all of the time expended was reasonable and necessary to properly represent Mr. Plaintiff at the trial and appellate levels.

2. Based upon the affidavits of counsel and another counsel in the area, the Court finds that the hourly rates charged in this matter were reasonable and appropriate.

3. Plaintiff achieved complete success on his primary issues regarding restoration of the former charter including the right to elect new trustees and approve any charter changes. This is substantial relief for Plaintiff. This result vindicated Plaintiff’s rights, and serves a significant public purpose. Because Plaintiff obtained excellent results overall, counsel should recover “a fully compensatory” fee. *Hensley*, 461 U.S. at 435; *Williams*, 78 S.W.3d at 185.

4. Although the MBF urges the Court to reduce the Attorneys fees by some unspecified amount because Plaintiff did not prevail on all of his legal theories, it is not appropriate to segregate counsel’s time into “issue parcels” in this case because the core facts and legal theories were substantially intertwined, and all work on the claims contributed to Plaintiff’s success on the winning claim.

5. The facts and legal issues were related, and all work which plaintiff’s attorneys submitted, even though related to other counts and other defendants in Cole County, nonetheless contributed to the success represented by the ultimate determination in this case. Thus, no time should be segregated for exclusion and the overall success of the litigation should be the focus. *Hensley*, 461 U.S. at 440.

6. Even if this Court were to consider a reduction of the fee for certain “issue parcels,” the factors considered in determining whether the lodestar amount should be adjusted, however, support either an unreduced lodestar figure or an upward adjustment of any reduced figure arrived at by separating out issue parcels.

7. The time and labor required in this matter were significant. The case involved complex issues requiring specialized knowledge and skills regarding legislative and constitutional issues. Attorneys in private practice with such specialized skills are fairly unique. All of the attorneys who represented Plaintiff in this matter have extensive experience in these kinds of issues, and also are exceptional litigators of excellent reputation. At various points in the litigation process, including the appeal, time expended on this case was to the preclusion of other matters.

8. The issues in the case attracted controversy within the denomination and across the country, making the case “undesirable” in the sense of publicity and public criticism. The legal issues were significant and of public policy concern. As already discussed, the results obtained were excellent. Based on all these factors, the amount that should be awarded is, at minimum, the lodestar figure.

9. Multiplying the total number of hours expended by each professional from 1/02/02 through 11/22/2014, by his or her hourly rate, the aggregate lodestar amount of attorney fees is \$4.1 million, which is the amount the Court awards.

10. A prevailing party is entitled to post-judgment interest, which is calculated to affect the entire judgment, including attorneys fees and costs. The Defendant MBF has not objected to Plaintiff’s request for interest on the attorneys fees.

11. Interest should be calculated based on the statutory rate under state law. The Court finds that an award of interest at the rate of 9% is also appropriate in this case, commencing on December 31, 2010.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That Plaintiff The Executive Board of the Missouri Baptist Convention's Application for fees and costs is sustained for the reasons set forth in the Motion and Suggestions, and in this opinion.

2. That Defendant Missouri Baptist Foundation shall pay Plaintiff an amount of \$3,684,325.92 for fees and costs against the MBF through December 31, 2010, the date of Judge Wilson's judgment. Interest shall accrue on this amount at 9% per annum, from a term commencing on December 31, 2010, until fully paid.

3. That Defendant Missouri Baptist Foundation shall pay Plaintiff an additional amount of \$356,663.68, for work done on and after January 1, 2011 until November 22, 2013. Interest shall accrue on this amount at 9% per annum, from a term commencing on the date of this order until fully paid.

SO ORDERED this 6th day of JUNE, 2014.


Frank Conley, Circuit Court Judge