For Opinion See 91 Fed.Appx. 655

United States Court of Appeals,

Eleventh Circuit.

John/Jane DOES 1-13, Plaintiffs/appellees,

v.

Jeb BUSH, et al., Defendants/appellants.

No. 03-12117.

July 28, 2003.

On Appeal from the U.S. District Court for the Southern District of Florida Case no. 92-589-Civ-Ferguson

Appellants' Initial Brief

Charles J. Crist, Jr., Attorney GeneralJason Vial, Assistant Attorney General, Florida Bar no. 298824, Office of the Attorney General, Suite PL-01, the Capitol, Tallahassee, FL 32399, (850)414-3300, Counsel for Defendants/appellants

STATEMENT REGARDING ORAL ARGUMENT

The defendant/petitioners request oral argument.

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***1 STATEMENT OF JURISDICTION**

The district court has jurisdiction under 28 U.S.C. s. 1331. The claims arose under 42 U.S.C. s. 1396 a.

The trial court issued the order on appeal, R627, on March 25, 2003. The defendants filed a timely notice of appeal on April 22, 2003. R628.

STATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion by awarding fees when the plaintiffs failed to identify the attorneys, who each had different hourly rates, doing the work for a substantial part of the time claimed.
2. Whether the district court abused its discretion in awarding plaintiffs' attorneys' fees and costs when plaintiffs failed to meet their burden to produce adequate explanations for their attorneys' time and costs.
3. Whether the trial court abused its discretion for awarding without explanation a different hourly rate for appellate work.
4. Whether the trial court abused its discretion by awarding fees for 311 hours for work on an appeal, including 173 hours for researching and drafting a single brief.
***2** 5. Whether the trial court abused its discretion by failing to deduct duplicative and inadequately explained attorney hours.
6. Whether the trial court abused its discretion by awarding a 2x multiplier to the lodestar in the absence of a showing that a multiplier was necessary for a reasonable fee.

STATEMENT OF THE CASE AND FACTS

This is an appeal of a post-judgment order awarding the plaintiffs $678, 000 in attorneys' fees and costs, an amount reached after application of a 2x multiplier. It includes 311.5 hours for the appellate defense of the defendants' merits appeal (with 173.85 hours alone devoted to researching and drafting a single answer brief); 138 hours for work done before the filing of the complaint, with little or no indication of the work's relevance to the case; and 400 hours for which explanations of the work done were inadequate.

The Merits Case

Filed in March 1992, the underlying case was an attack on waiting lists for ICF/DD services. Rl. These are services provided to individuals with developmental disabilities under the joint federal-state Medicaid program. The plaintiffs alleged that waiting lists violated the federal requirement that Medicaid ***3** services be provided with “reasonable promptness.” Rl, 42 U.S.C. s. 1396a(a) (8).

The trial court granted summary judgment and entered final judgment for the plaintiffs in August 1996. R439, 449.

The defendants appealed, and this court affirmed. Does 1-13 v. Chiles. 136 F.3d 709 (l1t Cir. 1998) (the merits appeal).

Post-judgment Litigation

Two years after judgment, the plaintiffs launched a campaign to have the defendants held in contempt for a series of alleged failures to comply with the final judgment. R490, 505, 506, 510, 515, 519, 520, 530, 542, 587, 599. Eventually the trial court held a bench trial on the plaintiffs' allegations, R601-603, and ultimately found the defendants in contempt and sanctioned them $10,000 a day until they came into compliance. R587.

This court reversed the contempt order because the actions the plaintiffs asserted, and the trial court found, violated the final judgment were actually outside the scope of the judgment. Doe 1-13 v. Bush, 261 F.3d 1037 (11th Cir. 2001) (the contempt appeal).

Fees Litigation

Fees litigation in this case has occurred both in this court and in the trial court.

In the merits appeal, the plaintiffs moved for fees. This court granted the motion, and remanded to the trial court for a ***4** determination of the amount. See docket in the merits appeal, Eleventh Circuit case no. 96-5144, R618 (a copy of the materials the plaintiffs filed in this court); As we will see below, the plaintiffs sought and obtained a determination of the amount in the trial court, which the defendants contest.

The plaintiffs also sought fees of $300, 000 in the contempt appeal. This court awarded $27, 983. Appendix 7.

The course of fees litigation in the trial court is a bit convoluted, marred by multiple fee filings and objections and orders denying fees then granting them.

The plaintiffs filed their initial fees and costs motion in September 1996. R452, 453, 454. The filing included their raw time sheets, R452. The plaintiffs sought fees of $679, 901 for 1193.5 hours of attorney time, 736.8 for a "Sr. Partner" at $350/hour, 107.4 for a "Jr. Partner" at $195/hour, and 349.3 for "Associates" at $175/hour. R453 p. 6. The total amount was inflated by a 2x multiplier. Id.

Neither the time records in R453 nor the memorandum, R452, identified who was the senior partner, the junior partner, or the associates, but there is no dispute that Steven Weinger was the senior partner and Helena Tetzeli was the junior partner. The associates were never identified. How the plaintiffs managed to break down these 1193 hours by attorney is unclear. The time records at R453 do not indicate which attorney did what work.

***5** The plaintiffs also sought $27, 091.61 in expenses. R453 p. 17. These included: almost $13, 780 in copying costs, $1, 982 in Federal Express and courier charges, a $16.63 "conference expense," and $1, 152 in fax charges. Neither the plaintiffs' memorandum nor the attached invoices in R453 provided any detail on how each individual expense was reasonable and necessary for the litigation.

The defendants filed specific, line-by-line objections to fees and costs. R492.

In March 1999, the plaintiffs filed a supplemental fees and costs motion, seeking compensation for 183 hours. R537 p. 1. They sought total fees of $94, 650 (the result of a 2x multiplier). They now identified Weinger as the senior partner, who claimed 81.6 hours; and Tetzeli as the junior partner, who claimed 51 hours. Id. at 2. However, the associates, who claimed 50.4 hours, were still not identified. Id. The accompanying time records now identified which attorneys did what work, at least some of the time. And it appeared that at least one associate may also be identified as Peter Hofer (PH in the time records). R545. However, Mr. Hofer was only admitted to the Florida Bar in April 1998, R550 p. 3 n. 1, and the supplemental request for fees covers January 1998 to January 1999. R537.

One difficulty with these time records, however, is that the hours reflected in the invoices add up to more than 183 - in ***6** fact, they add up to 246. R550 ex. A p. 20. Yet there is no indication in these records which hours were excluded from the claim.

The plaintiffs also sought $3, 273.04 in expenses. R537 p. 3. However, the supporting invoices lack any explanation of how any particular expense was reasonable and necessary for the litigation. Moreover, like the time records, the expense invoices add up to more than the amount claimed, yet there is no indication in any of the plaintiffs' papers which items were included and which were not. R550 ex B p. 11.

Finally, the plaintiffs filed their papers supporting the fee claim for work on the merits appeal. R618. These supporting documents were the same ones filed earlier in this court. They sought $85, 304.50 (disregarding the claim for a request for a 2x multiplier), reflecting 311.5 hours - 158.75 for the "Sr. Partner" at $350/hour, 152.10 hours for the "Jr. Partner" at $195/hour, and.5 hours for "Associates" at $175/hour. R618, memorandum in support of fees p. 4. The plaintiffs apparently did not seek costs, although their supporting papers included cost invoices. Id.

Again, the defendants filed detailed, line-by-line objections, both to the supplemental request and appellate fees ***7** and costs. R550 (supplemental fees and costs) and R492, ex. A (appellate fees).[FN1]

> FN1. For some reason it seems that the defendants filed line-by-line objections to the plaintiffs' appellate fee claim before the plaintiffs filed their supporting documentation in the trial court.

Oddly, the trial court first denied the plaintiffs' fees motions without prejudice "to renew at the conclusion of this litigation." R612. The court did not explain why it took this tack.

Evidently, the trial court had in mind the fact the contempt appeal was then pending and it wanted to wait to see what happened. For shortly after this court issued the mandate on the contempt appeal, the trial court entered an order awarding fees and costs. R616. The court awarded fees of $430, 156.25 on the initial and supplemental fee motions. In doing so it applied a 2x multiplier, giving the plaintiffs every cent they asked for, and ignored every single defense objection. But it awarded no costs and said nothing about appellate fees. R616 p. 3-4.

Not surprisingly, the order provoked some consternation, and the plaintiffs promptly moved for clarification, R619 (at this point filing their appellate fee documents, R618).

The defendants reemphasized their numerous objections. R620.

And the court finally entered the order on appeal, R627.

***8** First, the trial court reduced hourly rates for work in the trial court. Although the plaintiffs asked $350/hour for Weinger, $195/hour for Tetzeli, and $l75/hour for associates, the trial court awarded $250, $175, and $125 per hour respectively. The court gave no explanation for this. R627 p. 6.

Second, on the number of hours worked in the trial court, the court denied every single defense objection and found every fraction of a minute claimed to be reasonable. The trial court did so without evidently studying the defendants' detailed, line-by-line objections. Instead, the trial court dismissed them with the comment: "the Court finds the Defendant's assertions to be insufficient as a basis for a finding that the work was reasonable or to defeat the sworn assertions by the attorneys that the hours were necessary." R627 p. 4, 6. The trial court overrode every defense objection apparently because it thought that the hours claimed for trial level litigation, 1, 376.5 (the total hours claimed) were reasonable in the aggregate: they are "a relatively low number considering that the plaintiffs' attorneys accrued these hours pursuing complex litigation over a ten (10) year period." Id.

Third, the trial court accepted the plaintiffs' accounting of the number of hours each billing lawyer worked, id. at 6, despite the lack of any factual basis in the supporting documents for the accounting. The court applied the reduced hourly rates to ***9** the plaintiffs' hourly breakdown to reach a sub-lodestar for each billing lawyer. It then added the sub-lodestars to get a composite figure, which it enhanced by a factor of 2. Id.

Fourth, the trial court justified the 2x multiplier "because this is a rare and exceptional case where an upward adjustment of the lodestar is appropriate due to exceptional success" and "groundbreaking results." Id. at 4, 5.

Fifth, the court awarded costs of $27, 091.61. R627 p. 7. This is the same amount the plaintiffs sought in their initial fee petition, R453. The court rejected the defendants' detailed, line-by-line objections to costs without ruling on any one specifically.

Oddly, the trial court failed to award costs sought by the supplemental petition, R537, which came to $3, 273.04. R537 p. 3. The court gave no explanation for why it did not award these expenses.

Sixth, the trial court's treatment of appellate fees was also odd. The trial court made no appellate fee lodestar determination. It failed to fix hourly rates or determine the reasonable number of hours expended on appellate work. R627 p. 7. Nonetheless, it awarded $85, 304.50 in appellate fees. This number happens to be the amount of fees sought before application of a 2x multiplier. R618 fees memorandum p. 4. This congruence is probably not a coincidence. It must mean that the trial court ***10** intended to adopt as an appellate lodestar the rates and hours suggested by the plaintiffs.

The plaintiffs reached this pre-multiplier lodestar by applying rates which were higher than the ones granted for trial work ($350 vs. $250; $195 vs $175; $175 vs. $125). If the court meant to adopt the plaintiffs' appellate lodestar, it did not explain why it awarded a higher hourly rate for appellate work than for trial court work.

Nor did the trial court address the defendants' specific, line-by-line objections to this appellate work. R492 ex. A part 2; R627 p. 7.

Altogether, the trial court awarded fees as follows:

Type	Hours	Rate	Lodestar	2x Multiplier
Initial Fee Petition				
Sr. Partner	736.8	$250.00	$184, 200.00	$368, 400.00
Jr. Partner	107.4	$175.00	$18, 795.00	$37, 590.00
Associate	349.3	$125.00	$43, 662.50	$87, 325.00
Total	1193.5		$246,657.50	$493,315.00
Supplemental Fee Petition				
Sr. Partner	81.6	$250.00	$20, 400.00	$40, 800.00
Jr. Partner	51 $175.00	$8, 925.00	$17, 850.00	
Associate	50.4	$125.00	$6, 300.00	$12, 600.00
Total	183		$35,625.00	$71,250.00
Fees on the Merits Appeal				
Jr. Partner	??	??	??	
Associate	??	??	??	
Total Appellate Fees	$85,304.50			
Total Lodestar	$167,587.00			
Total Fee Award	$649,869.50			

***11** With costs of $27,091.61, the total award came to: $676.961.11. R627 p. 7.

The defendants filed a timely notice of appeal. R628.

The plaintiffs did not cross-appeal the denial of supplemental costs or the decisions about their hourly rates.

THE STANDARD OF REVIEW

This court reviews decisions awarding attorneys' fees and costs for abuse of discretion. Gray v. Lockheed Aeronautical Systems Co., 125 F.3d 1387, 1389 (11th Cir. 1997). The court reviews questions of fact involved under the "clearly erroneous" standard. Brochu v. City of Rivera Beach, 304 F.3d 1144, 1155 (11th Cir. 2002); Brooks v. Georgia State Board of Elections, 997 F.2d 857 (11th Cir. 1993). The court closely scrutinizes questions of law that are decided in reaching a fee award. Gray, 125 F.3d at 1389.

The trial court abuses its discretion if it fails to apply the proper legal standard or to follow proper procedures in ***12** making the determination, or it bases an award or a denial on findings of fact that are clearly erroneous. Drill South Inc. v. International Fidelity Insurance Co., 234 F.3d 1232 (11th Car. 2000).

SUMMARY OF ARGUMENT I.

The trial court lacked a factual basis for its award of "reasonable" hours. For about 1,200 hours of attorney time, the trial court had no real idea how many hours each of three categories of billing lawyers actually worked. It had only the breakdowns in the billing attorneys' briefs. The time records submitted in support - the actual evidence - failed to say which attorney did what work. This was important because each of the three categories of attorneys (senior partner, junior partner, and associates) sought, and received, a different hourly rate. So the sub-lodestar for each attorney was different. Without a breakdown in the time records, neither the court nor the defendants could be sure the hours claimed for the highest billing attorney were accurate, for instance, or identify and eliminate duplicative time.

Also, in the supplemental fee petition, the plaintiffs time records failed to indicate which hours related to this case. They claimed 183 hours on the case, but the time records submitted in ***13** support of the petition indicated 246 hours of work. The plaintiffs should have marked those they did not claim.

II.

The fee petitions were inadequately documented. The main defect was a failure to sufficiently describe the nature of the work done so the reviewing court could determine whether the work claimed was reasonable and necessary to secure a result in the litigation. The plaintiffs described much of this time in a Spartan fashion: "research," "conference," "dictate letter," "telephone call," and so on.

So, for instance, the court awarded 138.3 hours for pre-filing work, although the descriptions failed to say how that work related to the case. The plaintiffs claimed, and were awarded, fees for 400.35 hours described simply as "research." They were awarded fees for 85.7 hours for inadequately described conferences, and 168 hours for phone calls.

III.

The trial court erroneously awarded fees for 65 hours for work on an unsuccessful motion for contempt. Although the plaintiffs prevailed in the trial court on this effort, this court reversed on the ground that the matters they raised and litigated were outside the scope of the final judgment - and hence outside the scope of the case. They were not entitled to ***14**

fees for work on issues outside the scope of the final judgment. On those issues, they were not prevailing parties.

IV.

The trial court awarded fees for excessive time spent on the merits appeal. The plaintiffs obtained fees for 311.5 hours for the defense of the defendants' merits appeal, with 173.85 hours alone devoted to researching and drafting a single answer brief. This is excessive time for this appeal, which involved filing only one brief.

The trial court also failed specifically to determine a lodestar for appellate fees, but it appears that it just adopted the plaintiffs' claim without using a multiplier. If this was its intention, it awarded higher fees for the appeal than for trial work. The court did not explain this different treatment.

V.

The plaintiffs failed to meet their burden of proving their costs. They submitted barebones invoices, which amounted only to a listing of expenses: “courier services,” “Federal Express,” “fax,” and so on. They did not provide any receipts of documents to backup the expenditures, did not explain which expenses were properly billed or for the convenience of counsel, and did not explain at all how each expense was reasonable and necessary for the litigation.

***15 VI**.

The trial court abused its discretion by awarding a 2x multiplier. Multipliers, once not uncommon, are now disfavored. They can only be awarded under special circumstances, when they are necessary to ensure a reasonable fee. Here, the trial court awarded the multiplier for a discredited reason: because the plaintiffs obtained excellent relief. The trial court failed to find the necessary special circumstances, because they do not exist.

Because of these numerous defects, which resulted from the plaintiffs' failure to meet their burden of proof, the court should deny cost and fees.

If it is inclined to award fees, it should set the fee itself rather than remanding for yet more fees litigation. A remand just rewards the plaintiffs for their inefficiency, since they can then bill additional “fees-on-fees” time.

Rather, this court should cut the lodestar fixed by the trial court, $367,587, by 50 percent to account for the problems related to hourly rates and the failure to provide the evidence necessary to establish how many hours each attorney worked. Then the court should make a second 50 percent reduction to address the remaining defects in these petitions, for a final figure of $91,896.75.

***16 ARGUMENT**

I. **The trial court lacked a factual basis for the lodestar**.

There were at least three categories of billing lawyers involved in the case - senior partner (Weinger), junior partner (Tetzeli), and associate (largely unidentified). Each of them requested (and was awarded) a separate hourly rate. Because each demanded and got a separate hourly rate, the court was required to determine a “sub.-lodestar” for each billing attorney. The final lodestar was the sum of these sub-lodestars.

The trial court indeed fixed a sub-lodestar for each billing category of attorney for trial court work. However, there was no record evidence supporting the apportionment of hours to each attorney category for about 1,200 hours claimed for

trial level litigation. Because the court lacked that factual record, its apportionment - and by extension its final lodestar - lacked a factual predicate.

It is the fee applicant's burden to present a well-documented claim. See Oxford Asset Management Ltd. v. Jaharis, 297 F.3d 1182, 1195-1196 (11th Cir. 2001); Walker v. U.S. Dept. Of Housing and Urban Development, 99 F.3d 761 (5th Cir. 1996) (plaintiffs have no right to recover for inadequately documented time); Kennecott Corp. v. EPA, 804 F. 2d 763, 767 (D. C. Cir. 1986). Accord Von Clark v. Butler. 916 F.2d 255 (5th Cir. 1990). This burden necessarily requires the identification of all hours ***17** worked by each billing attorney in a multi-lawyer case. Ramos v.

713 F.2d 546, 553 (10th Cir.1983) ("These records must reveal, for each lawyer for whom fees are sought, all hours for which compensation is requested and how those hours were allotted to specific tasks - for example, how many hours were spent researching, how many interviewing the client, how many drafting the complaint, and so on.").

This is important when there is more than one attorney billing on a case, with different hourly rates. Without a factual basis evident in billing records for who did what work, the court cannot be assured that sub-lodestars, per billing attorney, are properly calculated. For example, the highest billing attorney might be credited with hours he did not work, artificially inflating the award. It is also impossible to spot and to eliminate duplicative work.

In this case, the plaintiffs failed to make a factual record of the hours any attorneys worked for any of the 1,183 hours in the initial fee claim and for 144.7 hours in the supplemental fee claim. R453, R537. The time records attached to R543 do not identify any attorney who did the work listed. The time records attached to R537 fail to identify the billing attorney for 48 entries.[FN2]

FN2. Invoices dated Sept. 15, 1998; Dec. 18, 1998; Feb. 26, 1999.

***18** The plaintiffs tried to fill in this evidentiary deficit by claiming in their memoranda that Weinger worked 736 hours, Tetzeli worked 107 hours and unidentified associates worked 349 hours between 1990 and 1996, and that Weinger worked 81.6 hours, Tetzeli worked 51 hours, and unidentified associates worked 50.4 hours from 1998-1999. R453 p. 6, R537 p. 2. However, these are unsupported assertions in a brief. "Unsupported assertions in a brief cannot substitute for evidence in the record." American Civil Liberties Union v. Barnes, 168 F.3d 423, 436 (11th Cir. 1999).

Another problem with the plaintiffs' attorney time records is that they have not designated which time belongs to this case and which does not. For instance, the time records accompanying the supplemental fee request delineate 246 hours, but the plaintiffs only claim 183 hours of compensable time. R537 p. 2. Yet the plaintiffs did not flag which of those 246 hours pertain to other cases and therefore should not be considered - and which should be. The failure to indicate which tasks pertain to the case deprives any lodestar calculation of a factual basis.

These lapses are troublesome enough. But they become even more so when one tries to deduct time improperly documented from the lodestar calculation. Unless one knows who did the objectionable work (and the hourly rate they were awarded), one cannot determine how. much money to deduct from the final fee. As ***19** we will demonstrate below, there are hundreds of inadequately documented hours that should have been disregarded.

II. The fee petitions for trial court work were inadequately documented.

To be compensable, the work done must be "'useful and of a type ordinarily necessary' to secure the final result in the litigation." Pennsylvania v. Delaware Valley Citizens' Council for Clear Air. 106 S.Ct. 3008, 3096 (1986). The billing lawyer "should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise

unnecessary...” Henslev v. Eckerhart, 103 S.Ct. 1933, 1939-1940 (1983). As Justice Burger said in his concurring opinion in Hensley

A District Judge may not, in my view, authorize the payment of attorneys' fees unless the attorney involved has established by clear and convincing evidence the time and effort claimed and shown that the time expended was necessary to achieve the results obtained.

Id. at 1943.

If billing counsel does not cull the request of excessive, redundant and unnecessary time, the court must do so. Id. at 1939;;. _ Civil Liberties Union v. Barnes, 168 F.3d 423, 428 (11th Cir. 1999) (“If applicants do not exercise billing judgment, courts are obligated to do it for them, to cut the amount of hours for which payment is sought, pruning out those that are ‘excessive, redundant, or otherwise unnecessary.”’).

The remaining hours should be well documented, Oxford Management, 297 F.3d at 1195-1196, and should, at a minimum, ***20** contain a “‘short but thorough description of the services rendered”’ so that the court can determine whether the work done was necessary for the litigation and reasonable in amount. Freiler v. Tanqipahoa Parish Board of Education, 185 F.3d 337, 349 (5th Cir. 1999).

A. The court awarded fees for excessive, unnecessary and unjustified time for pre-filing work.

The trial court awarded fees for 138.3 hours for work done before the filing of the complaint. Some of that work occurred almost two years before the filing of the complaint. R453, time records; Appendix I. A fraction of this work may be properly explained and justified. For the rest, the plaintiffs failed to provide sufficient explanations to show how the work claimed was necessary and reasonable. The court abused its discretion by awarding fees for this inadequately documented time.

There is no per se bar to obtaining fees for work done before the filing of the complaint. American Civil Liberties Union v. Barnes, 168 F.3d at 435-436. The test for when fees for pre-filing work are allowable is the same as for post-filing litigation: whether the work was reasonable and necessary to secure results in the litigation. Webb v. Board of Education of Dyer County, Tenn., 105 S.Ct. 1923, 1928 (1985); Schneider v. Colegio de Abogados de Puerto Rico, 187 F.3d 30, 33 (1st Cir. 1999). Thus, fees for drafting of the complaint, for work associated with the development of the theory of the case, or for ***21** necessary research are compensable. Webb, supra; In re General Motors Corp., 110 F.3d 1003, 1024 (4th Cir. 1997). Conducting a pre-filing investigation also may be compensable, although soliciting and interviewing potential clients is not. American Civil Liberties Union v. Barnes, 168 F.3d at 435-436.

But the movant's attorney time records must be properly detailed to show the work's need and reasonableness, Id. at 436. “Bare entries” that Mo not establish that the time was expended on the litigation” are insufficient. Id.

Unfortunately, the bulk of entries for pre-filing work are bare. These are typical:

05/04/90	Conference with Les Leech; Research; Dictate Letter	2.00
05/07/90	Preparation for Final Draft of Letter; Telephone Conversation with Les Leech	0.40
05/10/90	Telephone Call to Jon Rossman, Advocacy Center	0.20

05/11/90	Letter to Rossman, ESQ	0.20
03/15/91	Telephone Call to Jon Rossman; Brief Visit with Lee Leech	0.70
05/10/91	Telephone Call with Jon Rossman	0.30
07/26/91	Conference with Clients; Conversation with Advocacy Center	1.50
07/29/91	Telephone Calls from Potential Clients	1.20
07/30/91	Telephone Calls from Prospective Clients	0.30
07/31/91	Telephone Calls with Potential Plaintiff, etc	0.50

At most the plaintiffs might be entitled to 29.5 hours of pre-filing work. Entries covering this amount of time appear to bear some relationship with the lawsuit (although this work is ***22** lumped together with inadequately described tasks so the court cannot tell how much time was actually expended on potentially compensable work).[FN3]

FN3. See entries for 1-17-92, 1.2 hours; 2-10-92, 1.5 hours,- 2-12-92, 2 hours; 3-5-92, 1.2 hours; 3-6-92, 3.5 hours; 3-9-92, 5.8 hours; 3-10-92, 6.8 hours; 3-11-92, 7.5 hours.

B. The plaintiffs failed to properly document their fees requests.

The trial court approved fees for 469 hours of attorney time expended in the trial court after the filing of the complaint that lacked the necessary "short but thorough description of the services rendered." Appendix 2. This amounted to about 38 percent of total hours claimed for post-filing work in the trial court. The trial court abused its discretion in awarding fees for this time.

The case law requires the court to examine each individual task and determine whether it was reasonable and necessary to the litigation. Civil Liberties Union v. Barnes, 168 F.3d 423, 429 (11th Cir. 1999). See also Case v. Unified School District No. 233, 157 F.3d 1243, 1250 (10th Cir. 1998).

To be an adequate description of services rendered, the subject matter of the activity must be clearly indicated; vague entries such as "conference with", "telephone call to _____", "letter to client" or "research" are not sufficient. ***23** In Re Ol son, 884 F.2d 1415, 1428 (D.C. Cir. 1989). The purposes of conferences, phone calls, and such must be clearly stated and the issues covered specifically spelled out. See Daly v. Hill, 790 F.2d 1071, 1079 (4th Cir. 1986) (counsel's time records failed to "specify the substance or purpose of each conference" for which fee compensation was sought, thereby failing to "illuminate the way in which the many hours of client conferences may have aided (counsels') preparation of the case.") Terms used to describe the work performed must be clear; amorphous words like "review", "analysis", or "trial preparation" will not suffice without elaboration. Spell v. McDaniel, 616 F.Supp. 1069, 1087 (D.C.N.C. 1985); Orshan v. Macchiarola, 629 F.Supp. 1014, 1019 (E.D.N.Y. 1986) (the court criticized time record entries such as "review correspondence" and "prepare correspondence" that did not identify the nature of the correspondence).

In this case, however, the trial court approved blocks of time that lacked sufficient descriptions to determine whether it was necessary and reasonable. For example, the trial court approved fees for this work:

11/17/92	Telephone Conversation with Mitch Horwich	0.20
01/06/93	Conference with Ray Vaughn; Reviewed Documents	2.00
01/06/93	Telephone Conference with F.A.R.F.; Research Law Re: Pending Motions	3.10
01/12/93	Conference with Several Witnesses & Reviewed Documents	1.00
03/23/93	Various Telephone Calls	0.40
06/20/94	Memo on Assurances and Finding	9.00
06/21/94	Reviewed FARF Documents	2.60
06/29/94	Reviewed Memo	0.50
10/05/95	Research	1.20
05/24/96	Telephone Calls from Marsha Beach; Research	1.20
05/28/96	Continued Research	2.50
06/01/96	Draft Memo of Law; Research Doe v. Chiles	6.00
08/14/96	Telephone Calls	0.40
08/29/96	Legal Research	0.50
08/30/96	Legal Research	3.50
09/01/96	Legal Research	6.00
09/03/96	Legal Research; Begin Drafting	5.50

***24** Appendix 2.

We noted a few entries above in which the plaintiffs claimed undescribed research time. Altogether, we identified 400.35 such undescribed hours for research in the trial court. Appendix 3.

We identified 85.7 hours that involved conferences in which the issues or participants were inadequately described. Appendix 4. That information was critical to making a determination whether the time spent was reasonable and necessary for the litigation. See Michigan v. U.S. Environmental Protection Agency. 254 F.3d 1087, 1093-1094 (D.C. 2001) (entries that did not identify the individuals involved in conversations and conferences were inadequate; time for them not awardable).

We identified 168.5 hours involving phone calls in which the issue or participants were inadequately identified. Appendix 5. ***25** For many of these hours, the numbers are only estimates. Fixing the precise number of objectionable hours is impossible because many of these undescribed activities are lumped together with other tasks. When tasks are lumped together into large blocks of time, the court cannot determine how much time was expended on a particular matter, and thus whether the time was reasonable. See e.g., Loranger v. Steirheim, 10 F.3d 776, 784 (11th Cir. 1994), disapproving

the lumping of expense claims.

In Jane L. v. Bangerter, 828 F.Supp. 1544 (D. Utah 1993), the court found that on some of the attorneys' records the total hours spent during the course of a day was not broken down among the tasks performed, but rather was given as one lump sum. Id., 828 F.Supp. at 1548. For instance, one attorney recorded 16, 5 hours spent on "preparation for a hearing, attendance at the hearing, a meeting with clients, travel and 'discussion"' Id. Since the court was unable to separate the compensable from the noncompensable activities, it reduced the award substantially.

Similarly, in Fuddruckers, Inc. v. Doc's B.R. Others, Inc., 623 F.Supp. 21 (D.C. Ariz. 1985), reversed on other grounds 826 F.2d 837 (9th Cir. 1985), the court deducted for "lumped" entries. The court bemoaned the fact that it was unable to determine how much time was spent in each task and deducted over $5, 000 for the lumped entries. Fuddruckers, Inc., 623 F.Supp. at 24. Other courts have also criticized the indiscriminate lumping ***26** together of different activities under the same time entries. See e.g. Walker v. U.S. Dept of Housing and Urban Development, 99 F.3d 761 (5th Cir. 1996); In Re Olson, supra; Keith v. Volpe, 644 F.Supp. 1317, 1322 (D.C. Cal. 1986).

We identified 595.1 hours expended in the trial court where "lumping" occurred. Appendix 6.

The plaintiffs also sought fees for work on documents that were never filed and thus had no effect on the litigation. For example, they were awarded fees for 5.4 hours for researching and drafting a Rule 11 motion they never filed.[FN4]

FN4.

06/19/98	PH	Research law on con-tempt/Rule 11 for cases on proposed order and improper purpose	1.20
01/12/99	HT	Received and reviewed def. plan and draft Rule 11 Motion	3.00
01/19/99	HT	Continue to draft Rule 11 motion for sanctions	1.20

III. The trial court erred in granting fees for 65 hours work on an unsuccessful motion for contempt.

In mid-1998, the plaintiffs began a campaign to have the defendants held in contempt for allegedly violating the final judgment. R491, R510, R511, R576. After a three-day hearing in May 1999,[FN5] the trial court held the defendants in contempt and fined them $10, 000 a day. R587. This court reversed on the ground ***27** that the matters cited by the plaintiffs and found by the court to be contemptuous were, in fact, outside the scope of the final judgment. Does 1-13 v. Bush. 261 F.3d 1037 (11th Cir. 2001).

FN5. R601-603

All told, the court awarded the plaintiffs fees for all the time they asked for on this subject, 65.1 hours.

The trial court should not have awarded fees for this time. Because the time addressed alleged bad acts that were outside the scope of the final judgment, it was not expended on the litigation. Loranger v. Stierheim, 10 F.3d at 782 (compensable time must be expended on the litigation). Those matters constituted new relief, not the enforcement of old

relief, and they were not prevailing parties on them. See e.g., Reynolds v. Roberts, 207 F.3d 1288, 1299 (11th Cir. 2000) (injunction is an inappropriate way to enforce a judicial decree); Does 1-13, 261 F.3d at 1063.[FN6]

> FN6. "If the problems the district court perceived with the way in which defendants are providing Medicaid services - the lack of sufficient funding, the change in the eligibility criteria, the time limit for determining eligibility, or the manner in which alternative services are provided - result from violations of state or federal law requiring judicial intervention, they can be addressed in another action."

We note on this score - and on the others discussed in this brief - that the plaintiffs moved for attorneys fees and costs in the contempt appeal. Their petition sought appellate fees, and was rife with the same documentation defects we face today in their trial court time records. This court effectively sustained ***28** all the defendants' objections and awarded substantially reduced fees. See Appendix 7.

This court should again reduce the award here.

IV. **Appellate fees are excessive**.

The trial court failed to determine a lodestar for appellate fees. But given the fact the court gave the plaintiffs exactly the amount they asked for to the penny, $85, 304.50, it seems reasonable to conclude that it simply adopted the plaintiffs' suggested lodestar. This means the trial court gave the defendants each minute of time they claimed as well as the hourly rates they sought - which were much higher than the ones granted for trial work. Compare R627 p. 7 with R550 exhibit C, which is the plaintiffs' chart of hours claimed and fees sought.

The trial court failed to explain why it apparently had decided to award a higher hourly rate on appeal, a significant error in itself. Gilmere v. City of Atlanta, Ga., 931 F.2d 811, 813 (11th Cir. 1991). Had the trial court used the same hourly rates for the appeal as it did for trial court work, the composite appellate lodestar would have been $66, 367.50.

By failing to cut a single minute of attorney time, the trial court awarded excessive fees for work on the appeal as a whole (311.5 hours), for the drafting of a single answer brief (173.85 hours), and for more than 134 hours of unexplained duplicative work.

***29 A. Total time claimed for the appeal is excessive on its face**.

The "lodestar" method, the reasonable hourly rate times the hours reasonably expended on the litigation, is the one generally used to determine the reasonable attorneys' fee. Hensley v. Eckerhart, 103 S.Ct. 1933 (1983). The resulting figure is presumptively reasonable. Delaware Valley, 106 S.Ct. at 3098.

But the calculation only gives rise to a presumption. The award may, and should, be reduced in the appropriate circumstances. Many courts have not parsed time records when deciding to reduce an award but rather looked at the aggregate hours worked weighed against the work done. In reviewing awards for appellate work, courts have reduced fee awards to figures that "reflect not only our view that some specific reductions in attorney charges had to be made... but also a more general sense that a higher award in these circumstances would not be 'reasonable.'" See Ackerly Communications of Massachusetts Inc., v. City of Somerville, 901 F.2d 170, 171-172 (1st Cir. 1990) ("we think it is more appropriate here to focus not on 'the number of hours logged, but [on] what was done,"' finding that 570 hours for a complex appeal by a corporate plaintiff in a civil rights case was excessive and unjustified on its face); Planned Parenthood of Central New Jersey v. Attorney General of State of the State of New Jersey, 297 F.3d 253, 270 (3d Cir. 2002) (564 hours for researching and writing an answer brief was ***30** unreasonable; 25.5 hours for moot court preparation unreasonable); Mid-

Continent Casualty Co. v. Chevron Pipe Line Co., 205 F.3d 222, 234 (5th Cir. 2000) ($127, 892 in fees and $27, 821 in costs for appeal were unreasonable); Michigan v. U.S. Environmental Protection Agency, 254 F.3d 1087, 1093 (D.C. 2001) (90 hours for initial brief was excessive and reduced by half); Spell v. McDaniel, 852 F.2d 762, 767 (4th Cir, 1988) (1, 400 hours spent on appeal by six attorneys were unreasonable; 420 hours were adequate).

In this case, the plaintiffs claimed 311.5 hours on the merits appeal, R550 exhibit C, including up to 173.85 hours just researching and drafting the answer brief. Appendix 8; R492, line-by-line objections to appellate time. This amounts to 7.8 weeks' full-time work by a single attorney on the merits appeal as a whole and 4.3 weeks' work for researching and drafting a single answer brief. This is plainly excessive.

Like the panels cited above, this court can exercise its inherent understanding of the appellate process and realize that this amount of appellate time is excessive and unreasonable. Consequently, the court should order a substantial reduction.

***31 B. The trial court improperly awarded fees for unexplained duplicative time in drafting the answer brief and preparing for oral argument**.

Two lawyers worked 173.85 hours on researching and drafting the answer brief. Appendix 8. Weinger claimed 96.4 hours and Tetzeli claimed 77.45 hours.

Together, both lawyers claimed 56 hours preparing for and attending oral argument: Weinger 35.2, Tetzeli 20.8. Appendix 9.

There is nothing inherently wrong with staffing a case with more than one lawyer. American Civil Liberties Union v. Barnes, 168 F.3d 423, 432 (11th Cir. 1999). But the billing lawyers must show that the time spent by each billing attorney reflects his or her distinct contribution to the case, so it is apparent to the reviewing court that the lawyers are not unreasonably doing the same work. Id.; Norman v. Housing Authority of the City of Montgomery, 836 F.2d 1292, 1302 (11th Cir. 1988).

It was the plaintiffs' burden to make that showing, id., but they have not done so. Rather, the plaintiffs' time records abound with duplicative entries that do nothing to distinguish the contribution of one lawyer from that of another. Here is a short example:

03/18/97	HT[FN7]	Research on brief	2.50
03/20/97	HT	Research for brief	2.00
03/21/97	HT	Research and drafting brief	4.20
03/23/97	HT	Research and drafting brief	2. 00
03/25/97	HT	Continue work on brief	2.60
03/27/97	HT	Continue work on brief	3.00
03/28/97	HT	Continued work on brief	2.90
03/31/97	HT	Research, drafting of brief	8.50
03/17/97	SWM	Continue draft and re-	2.90

		search re: brief	
03/18/97	SMW	Continue work on brief; review files and exhibits	8.20
03/19/97	SMW	Drafting brief	5.20
03/19/97	SMW	Continue drafting brief	6.70
03/20/97	SMW	Continue drafting brief	2.50
03/23/97	SMW	Continue work on brief	5.50
03/24/97	SMW	Continue work on brief	2.90
03/26/97	SMW	Continue work on brief	3.00
03/27/97	SMW	Continued research and drafting brief; telephone call with Charlie McCoy, Esq.	4.90

FN7. HT stands for Tetzeli. SWM stands for Weinger.

***32** Appendix 8.

The same failure appears in the plaintiffs' time records dealing with oral argument preparation. Appendix 9.

Because the plaintiffs failed to say what unique contribution each lawyer made to these tasks, they failed to justify a large portion of their appellate fee claim. A substantial reduction is in order.

***33 V. The plaintiffs failed to meet their burden of proving their costs**.

The court should disallow the plaintiffs' request for costs. The request is inadequately documented, provides no receipts or backup to justify the expense, and fails to demonstrate how these costs were reasonable and necessary. In the absence of such justifications for these costs, they must be treated as noncompensable overhead. In re Mullins, 84 F.3d 459, 469 (D.C. Cir. 1996).

As prevailing parties, the plaintiffs are entitled to recover their reasonable and necessary expenses "'that are normally itemized and billed in addition to the hourly rate"' if these expenses are "'reasonable in amount"' and of the type ordinarily billed to a private client. Bee v. Greaves, 910 F.2d 686, 690 (10th Cir. 1990); Halderman v. Pennhurst State Hospital and School, 855 F.Supp. 733, 743-744 (E.D. Pa. 1994) (excessive copying charges disallowed). See also Dowdell v. City of Apopka, Fla., 638 F.2d 1181, 1191-1192 (11th Cir. 1983) ("with the exception of routine office overhead, all reasonable expenses incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case may be taxed as costs under section 1988.").

Costs must not only be reasonable in amount but necessary for the maintenance of the action. Desisto College v. Town of Howey-in-the-Hills. 718 F.Supp. 906, 913-914 (M.D. Fla. 1989). ***34** The Desisto College Court held that the cost of photocopies, which were for counsel's convenience, were not compensable. Id. at 913-914. Because counsel did not individually account for photocopies necessary for the case and for counsel's convenience, the court denied reimbursement for the cost of all copies sought. Id.

The fee applicant bears the burden of properly documenting all costs sought to be recovered. A petition for costs must be

supported by receipts, bills, invoices or other competent *evidentiary proof*. Each expense must be supported by a description or information sufficient to permit the court to determine the reasonableness of the expense. A bare listing or summary of costs is insufficient legally. See e.g. Trimper v. City of Norfolk. 58 F.3d 68, 77 (4th Cir. 1995) (affirming disallowance of undocumented expenses because the movant's "only record of these expenses, however, was an unverified Chart of Expenses, with no receipts or bills attached...the law is clear that litigation costs should not be awarded in the absence of adequate documentation"); League of United Latin American Citizens v. Roscoe, 119 F.3d 1228, 1233 (5th Cir. 1997) ("research and review cases" was too vague to support fee award); Contractors Ass'n of Eastern Pennsylvania v. City of Philadelphia. 1996 WL 355341, *12 (E.D. Pa. June 20, 1996) (denying all costs for lack of documentation because "summary" ***35** showing total expenses by category was insufficient to meet the standard the Court is bound by in deciding reasonableness; noting "(t)he Court is simply deprived of the means to approve such fees as "reasonable" when it has no way of knowing who spent the money or why the money was spent"). See also, Orson v. Miramax Film Corp., 14 F.Supp.2d 721, 728 (E.D. Pa. 1998) (noting that the fee applicant has the burden of adequately documenting the costs requested, and disallowing $8, 666 in costs due to lack of adequate documentation); Loewen v. Turnipseed, 505 F.Supp. 512 (N.D. Miss. 1980) (disallowing undocumented costs for "research").

The plaintiffs' have not met their threshold burden to demonstrate entitlement to costs. The plaintiffs' costs are largely undocumented; the plaintiffs present no receipts, invoices, bills, canceled checks or any competent proof in support of their claim.

The plaintiffs' fax and copying charges, for instance, do not delineate which are for counsel's convenience and which are necessary for the case. Lacking an explanation, they must be considered noncompensable overhead.

In the same way, the plaintiffs also fail to document how research, phone and postage charges are reasonable and necessary or whether they are simply for counsels' convenience.

***36** Further, certain categories of costs generally are not compensable because they are unreasonable, unnecessary and/or non-compensable law firm overhead or attorney convenience charges. Plaintiffs' charges for express mail and courier services fall into this category. See e.g. Cuban Museum of Arts and Culture v. City of Miami, 771 F.Supp. 1190 (S.D. Fla. 1991) (disallowing expenditures for messengers and Federal Express, except for messenger charge for filing complaint and temporary injunction motion); Loewen v. Turnipseed, 505 F.Supp. at 517-19 (disallowing postage and private express mail expenses because such costs are non-compensable law firm overhead). See also Tang How v. Edward J. Gerrits, Inc., 756 F.Supp. 1540, 1545 (S.D. Fla. 1991) (disallowing courier, express mail and facsimile charges not shown to be necessary); Halderman v. Pennhurst State School and Hospital. 855 F. Supp. 733 (E.D. Pa. 1994)(disallowing excessive and unnecessary copying charges).

The plaintiffs' failure to demonstrate need and to itemize each claim for reimbursement with supporting evidence means they have failed to meet their burden of showing the necessity for these costs. That is, they have failed to explain how each individual expense is related to the issues in the case. Therefore, these charges should be denied. See e.g., Case v. Unified School District No. 233. 157 F.3d 1243, 1258 (10th Cir. 1998) (disallowing claims for faxes, research and copying).

***37** In fact, it appears the plaintiffs' lawyers expense invoices contain bills for costs in other cases. For instance, the following expense concerns v. Chiles Southern District case number 96-6619-CIV-FERGUSON:

01/30/98	Disbursement to Federal Express Federal Express/Marvin Gutter, Esq.	$ 18.00

R545, plaintiffs' expense exhibit. Mr. Gutter is not an attorney in this case. He is one of the plaintiffs' lawyers in Cramer. The plaintiffs may not even be seeking fees for this time. But we have no way of knowing, since they failed to indicate which hours they were claiming and which they were not (which could be true of any single item).

The plaintiffs also claim enormous costs when there was no activity in the case. For example, the plaintiffs claimed (and the court paid):

03/23/98	Disbursement to Federal Express: Fedex charges	$ 13.75
03/23/98	Miscellaneous charge. Fax Charges	$1, 009, 00
03/23/98	Photocopy charge	$ 916.65

Id.
However, the trial court docket reflects no record activity during March 1998 nor any significant activity in the months immediately before and after. This court's docket in the merits appeal indicates that the plaintiffs filed their motion for attorneys' fees on March 12, 1998. But preparing and filing that ***38** document does not justify $1, 009 in fax and $916 in photocopy charges. The trial court ordered these and other expenses paid without discussion of our objections. R550, R627.

In addition, the plaintiffs have not carried their burden of proof to show that these expenses are reasonable in amount and of the type normally billed to a private client. They gave no explanation for any cost billing.

In the contempt appeal, the court faced a cost request like this one from these plaintiffs: just a bare listing without backup or explanations for any expenditures. This court denied the request. Appendix 7.

The court should deny this cost request as well.

VI. The plaintiffs are not entitled to a multiplier.

The trial court awarded a 2x fee multiplier because the plaintiffs got excellent results in the case. R627 p. 4-5.

Although they got good relief, it does not justify the award of a 2x multiplier. Multipliers are disfavored. They are only permitted when the lodestar calculation does not yield a reasonable fee.

In a series of cases, the U.S. Supreme Court has sharply limited the application of enhancements or multipliers in statutory fee shifting cases. See Hensley v. Eckerhart, 103 S.Ct. 1933 (1983) (many of the Johnson factors are subsumed in the initial lodestar calculation); ***39**Stenson, 465 U.S. 886, 898-900, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) (novelty of issues, special skill and experience of counsel, quality of representation and results obtained are presumably fully reflected in lodestar amount and cannot serve as independent bases for increasing basic award); Pennsylvania v. Delaware Valley Citizens' Council, 478 U.S. 546, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986) (superior quality of representation should not be used to adjust the lodestar); Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed.2 d. 585 (1987) (discussing propriety of enhancing lodestar for risk of non-payment due to contingency fee arrangement); City of Burlington v. Dague, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992) (enhancement above lodestar to compensate for risk of contingent fee arrangement not permitted under federal fee-shifting statutes)[FN8]. N.A.A.C.P. v. City of Evergreen, 812 F.2d 1332 (11th Cir. 1987).

FN8. See also Eirhart v. Libbey-Owens-Ford Co., 996 F.2d 837 (7th Cir. 1993); Davis v. City and County of San Francisco. 976 F.2d 1536 (9th Cir. 1992)(same); Hendrickson v. Branstad, 934 F.2d 158 (8th Cir. 1991) (reversing application of lodestar multiplier due to highly contingent and speculative nature of case of first impression because considerations relating to novelty are reflected in lodestar and cannot be used again to increase the fee).

The lodestar approach presumptively includes and subsumes the factors enumerated in Johnson v. Georgia Highway Express. ***40** Inc.[FN9], and therefore, such factors usually do not provide an independent basis for increasing the base lodestar. See NAACP v. City of Evergreen, id., 812 F.2d at 1337. The basic lodestar calculation - the product of hours reasonably expended times a reasonable rate - properly calculated, by definition represents the reasonable worth of the services rendered in vindication of a plaintiff's civil rights claim. Blanchard v. Berqerson, 489 U.S. 87, 96, 109 S.Ct. 939, 103 L.Ed.2d 67, 77 (1989). A plaintiff seeking a multiplier to the lodestar must demonstrate that the multiplier is necessary for a reasonable fee, Blum, 465 U.S. at 898, 104 S.Ct. at 1548, and must present specific evidence demonstrating that any factor relied upon is not already subsumed within the basic lodestar. Accordingly, upward adjustments to fee requests in statutory shifting cases are only proper in certain "rare" and "exceptional" cases, and then only when supported by both specific evidence on the record and detailed findings by the court. Delaware Valley, 106 S.Ct. at 3099. The superior quality of the work done and results achieved do not justify a fee enhancement. Id. The only time an enhancement is justified is if the lodestar does not result in a reasonable fee. Id.

FN9. 488 F.2d 714 (5th Cir. 1974).

This makes sense because "The ultimate touchstone of fee awards under s. 1988 is reasonableness." ***41**American Civil Liberties Union v. Barnes, 168 F.3d 423, 437 (11th Cir. 1999). Use of a multiplier that results in a windfall, as it would in this case, is unreasonable. See Blum v. Stenson, 104 S.Ct. at 1548 (attorneys fees awards should not constitute a windfall).

Here, there was no finding that the lodestar would not result in a reasonable fee. Thus, awarding an enhancement was an abuse of discretion.

SUGGESTED RESOLUTION

The three fee petitions - initial, supplement and appellate - are poster children for how not to submit fee claims. One would think that the plaintiffs had learned their lesson from the reduction of their fee claim for work and costs on the contempt appeal. They could have amended their current petitions to fix the obvious, identical problems. They chose not to.

With these three fee petitions, the plaintiffs have failed to meet their burden of proof on a sweeping scale:
• The plaintiffs failed to identify which lawyer did what work on all of the tasks in the initial petition and many in the supplement;
• The petitions lack sufficient detail to determine whether a multitude of tasks were reasonable and necessary;
***42** • The plaintiffs failed to designate which of the 183 hours they claimed out of time records in the supplemental petition that numbered more than 240 hours;
• The plaintiffs failed to eliminate duplicative attorney hours or to explain how each lawyer's work contributed distinctly to a given task such as brief writing;
• They claimed an unreasonable, excessive number of hours for work on the appeal;
• The plaintiffs failed on their contempt motion because it addressed matters outside the scope of the case;
• The plaintiffs lumped together many tasks into large single blocks of time;

• The plaintiffs failed to justify their costs;
• The trial court inexplicably awarded two different hourly rates for each attorney without any justification.

The plaintiffs' failure to meet their burden of proof justifies denial of a fee altogether. It certainly warrants denial of costs. See Appendix 7, where this court denied the plaintiffs' similarly defective cost request.

If the court decides the award of some fee is in order, it has two practical choices. Both involve this court determining the fee, because to do otherwise converts this fee dispute into a ***43** "second major litigation," a prospect the appellate courts have deplored and sought to avoid. McKenzie v. Cooper, 990 F.3d 1183, 1184 (11th Cir. 1993); Divane v. Krull Elec. Co., 319 F.3d 307, 314 (7th Cir. 2003).

The court could theoretically recalculate the lodestar, reducing the objectionable hours claimed by the billing attorneys. However, that approach is impossible because the plaintiffs failed to identify who billed what in the initial fee request, R453. They compounded this problem by failing to designate which time entries they claimed were the 183 hours for which they sought compensation in the supplemental request, R545, and by failing to identify the billing attorney for many of those entries. So the court cannot know who performed deducted time. Since the court cannot determine that fact, it cannot know how much money to subtract from the lodestar.

The court could instead make an across the board percentage reduction. While not ideal, it would address all the problems in one stroke, and still result in a reasonable fee for the work done. One could start with the total lodestar determined by the trial court before application of the modifier: $367,587. The court should then make a 50 percent reduction for the problems related to hourly rates and the failure to provide the evidence necessary to establish how many hours each attorney worked. Then the court should make a second 50 percent reduction to address ***44** the remaining defects in these petitions, for a final figure of $91,896.75.

This court followed this procedure in ruling on the motion for appellate fees in the contempt appeal. Appendix 7. It reached a fair result there, and would do so again here.

CONCLUSION

Therefore, the court should deny a fee and cost recovery for the plaintiffs' multiple failures to meet their burden of proving their entitlement.

However, if the court decides a fee is in order, it should award the fee of $91,896.75.

Appendix not available.

John/Jane DOES 1-13, Plaintiffs/appellees, v. Jeb BUSH, et al., Defendants/appellants.
2003 WL 23469606 (C.A.11) (Appellate Brief)

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