2003 WL 23469679 (C.A.11) (Appellate Brief)
United States Court of Appeals,
Eleventh Circuit.

John/Jane DOES 1-13, Plaintiffs/appellees,
v.
Jeb BUSH, et al., Defendants/appellants.

No. 03-12117.
October 14, 2003.

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

# Appellants' Reply Brief

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## *1 STATEMENT OF THE FACTS

There are no findings that the defendants have failed to comply with the final judgment (apart from those reversed on appeal). Does 1-13 v. Bush, 261 F.3d 1037 (11th Cir. 2001). The plaintiffs' claims to the contrary are flat wrong. There are also no findings that the defendants have been responsible for the deaths of any of the plaintiff class, the plaintiffs' claims to the contrary.

## ARGUMENT

### I. This is not an appropriate case for a lodestar-enhancing modifier.

Neither the trial court's grounds nor those argued by the plaintiffs support the award of a 2x fee multiplier in this case. All of the grounds asserted have been foreclosed, subsumed by the lodestar.

The trial court found a multiplier warranted because the case was rare and exceptional. R627 at 4. The court cited these factors which made it rare and exceptional:
• The plaintiffs' exceptional success.

• The case was precedent setting and ground breaking.

• The issues were novel and complex.

• The litigation was lengthy.

***2** • The expert witnesses were outstanding in their preparation and displayed substantive knowledge.[1]

• Few attorneys desire to represent the types of plaintiffs in the case, individuals with developmental disabilities.

Id.

The plaintiffs argue the multiplier is warranted for these reasons:
• The case had broad impact, captured national attention, and achieved extraordinary results.

• Litigation required extraordinary skills from plaintiffs' counsel, particularly in the face of a vigorous defense.

• No one else was willing to take the case.

Answer brief at 46-48.

In contrast, the "Johnson" factors, which may still justify a lodestar multiplier are:
(1) The time and labor required for the litigation.

(2) The novelty and complexity of the issues.

(3) The skill required to litigate the issues.

(4) Whether the attorney hadto refuse other work to litigate the case.

(5) The attorney's customary fee.

(6) Whether the fee is fixed or contingent.

(7) Whether the client or case circumstances imposed any time constraints.

(8) The amount involved and the results obtained.

(9) The experience, reputation, and ability of the attorneys.

(10) Whether the case was desirable.

(11) The type of attorney-client relationship and whether the relationship was long-standing.

(12) Awards made in similar cases.

***3** Johnson v. Georgia Highway Express Inc., 488 F.2d 714, 717-719 (5th Cir. 1974).

The trial court's and the plaintiffs' justifications for the multiplier fall under Johnson factors 1, 2, 3, 8, 9, and 10.

In this circuit, all but the factors dealing with results and contingency are expressly foreclosed, for they are presumptively

subsumed by the lodestar. Norman v. Housing Authority of the City of Atlanta, 836 F.2d 1292, 1299 (11th Cir.1988); Dillard v. City of Greensboro, 213 F.3d 1347, 1354 (11th Cir. 2000). This is sensible because the time and effort expended would be reflected in the reasonable hours billed; and the desirability of the case, and the novelty and complexity and the reputation, experience and litigation skill of counsel are accounted for in the hourly rate. See Shipes v. Trinity Industries, 987 F.2d 311, 321 (5th Cir. 1993).

Since Norman, other courts have concluded that factor 8, results obtained, is also subsumed by the lodestar. ***4** Transamerican Natural Gas Corp. v. Zapata Partnership, 12 F.3d 480, 488 (5th Cir. 1994) ("Since Johnson factors 2, 3, 8, and 9 were already accounted for in the lodestar amount, the bankruptcy court abused its discretion in using those factors to justify its substantial upward departure from the lodestar.").[2]

This makes sense because awarding the plaintiffs a fee bonus because this court's merits opinion[3] received nationwide attention or was frequently cited in other cases is not based on an attorney's reasonable and necessary effort. In other words, it is a windfall, which is prohibited. Blum v. Stenson, 465 U.S. 886 (1984). In that instance, the lodestar subsumes the result.

When the issue is the acquisition of injunctive relief, the lodestar also subsumes the result. Awarding a bonus above the lodestar for winning in injunction constitutes a windfall. An opinion the plaintiffs rely on, Guam Society of Obstetricians v. Ada, 100 F.3d 691 (9th Cir. 1996), appears to be an a special case. There the court awarded a 2x multiplier because, it said, "Such an enhancement is clearly necessary to a reasonable fee where the district court finds that the case is of the type that attorneys are unwilling to take for fear of ostracization and out ***5** of concern for their personal safety. Such a consideration is not ordinarily reflected in the lodestar, and we find that it was not reflected in the lodestar in this particular instance." Id. at 697. These two extraordinary factors are not present in this case.

Generally, only when plaintiff victories result in damages awards have the courts been willing to consider "result" as a factor possibly warranting an upward adjustment of the lodestar. In Shipes v. Trinity Industries, 987 F.2d 311 (5th Cir. 1993), the court said that ordinarily the results obtained "are presumably fully reflected in the lodestar." Id. at 320.[4] However, the court said there may be times when results may warrant a lodestar enhancement. In that case, the plaintiffs obtained a substantial damage award and injunctive relief. Id. at 322. Based on these facts, the court thought that a fee enhancement should be considered, but it is impossible to tell from the court's discussion how heavily the damage award factored into its decision. Even so, the court said that an enhancement for results would only be appropriate if "it is customary in the area for attorneys to charge an additional fee above their hourly ***6** rate for an exceptional result after lengthy and protracted litigation." Id.

In Roberts v. Texaco Inc., 979 F.Supp. 185 (S.D. N.Y. 1997), the court awarded a 5.5x multiplier, but this was also a damages case in which a settlement generated a $115 million common fund. Id. at 198. Moreover, the fee award in that case was unconventional, even odd. The trial court awarded future fees for oversight of the settlement, part of the reason for application of a multiplier. Id. at 197.

Perhaps the reason these courts have been willing to consider an enhancement in damage and common fund cases arises from lawyers' acceptance of tort contingency fee agreements. As a consequence, some courts seem willing uncritically to import the practice to statutory fee shifting cases without regard to whether doing so is consistent with the lodestar concept. Given the presumption that the lodestar results in a reasonable attorneys' fee, the objective of an hourly-rate/market driven fee setting process, enhancements even for good results in a damages action is questionable.

Since the reasons relied on by the trial court and argued by the plaintiffs in support of an enhancement are necessarily subsumed by the lodestar, awarding a fee multiplier was error.

***7 II. Use of a multiplier to compensate for a delay in payment is improper.**

The plaintiffs suggest that the court use an enhancement or multiplier should it set the fee itself because of the plaintiffs' many documentation failures. Use of a multiplier (except adding modest interest) is not an approved way of calculating fees.

Use of current rates is the approved method for calculating the loadstar, even if there was a long delay in payment. LeBlanc-Sternberg v. Fletcher, 143 F.3d 748, 763 (2d Cir. 1998). If the court uses current rates, it should not enhance the fee for the

delay. Walker v. U.S. Department of Housing and Urban ?? 99 F.3d 761, 773 (5th Cir. 1996). However, the court may instead use historic rates plus interest. Barjon v. Dalton, 132 F.3d 496, 502 (9th Cir. 1997). The addition of interest constitutes a kind of enhancement, but it is a small one, which should reflect historic interest rates applied to an historic lodestar reached by applying an historic hourly rate.

Moreover, this fee matter is not about time delays in payment. It was a lawsuit that stretched over many years. Long after final judgment, the court awarded fees at what it determined were current rates. An award at current rates automatically compensated the plaintiffs for any delay in payment. The problem lies in the fact the plaintiffs' lapses in documentation failed to support the award.

***8 III. Whether the defendants' objections to plaintiffs' expenses were untimely is irrelevant.**

Whether the defendants' objections to the plaintiffs' failure to document their expenses was untimely is irrelevant. The trial court considered the objections and erroneously rejected them. R627 at 7. See ACLU v. Barnes, 168 F.3d 423, 428 (11th Cir. 1999) (when specific objections are made, the district court's order should consist of more than conclusory statements and respond to the objections). The objections are properly before the court and should not be ignored.

Moreover, even when apprised of the defendants' detailed objections the plaintiffs did nothing to cure the defects in their submission, which is their burden. The "fee applicant has the burden of showing that [a matter is justified], and where there is an objection raising the point, it is not a make-believe • burden." Id. at 432; see also at 433 (failure to supplement the records after receiving objections).

**IV. This court has rejected the lumping of attorney time records.**

The plaintiffs contend that lumping of time records is a permitted practice. However, this court in ACLU v. Barnes, 168 F.3d at 429, disapproved of the practice.

***9 V. Use of the plaintiffs' claimed hourly rates would be an error.**

The plaintiffs suggest falling back on their claimed hourly rates, which were higher than those awarded by the court, if this court decides to set a reasonable fee itself.

This would be a mistake. First, the trial court rejected these initial rates as unreasonably high (except, inexplicably as to work on the merits appeal). The plaintiffs did not appeal this decision. Resetting these rates at higher levels would effectively give the plaintiffs relief that is outside the scope of this appeal and not properly before the court.

Second, reliance on any hourly rate is impossible if this court decides to set a reasonable fee. For a substantial portion of the plaintiffs' fee request, no attorney is identified as having done a particular task. R452 attached time records. One cannot tell who did what work for a substantial portion of the time claimed. Because of this lapse in documentation, the court will be unable to calculate the number of hours worked by each the billing lawyers. Without knowing the total number of hours worked by each lawyer, the court cannot properly apply each lawyers hourly rate to obtain a sub-lodestar fee for each billing lawyer. In the equation HOURLY RATE x REASONABLE HOURS = LODESTAR, one of the variables is blank. The only thing the court can do is make a percentage reduction to take into account the numerous documentation and other defects.

***10 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.

Footnotes

[1] It is difficult to see why this would be a relevant fees consideration. It is not one of the Johnson factors. Also, the court entered summary judgment. There was no trial. R439, 449.

[2] See also Solutia Inc. v. Forsberg, 221 F.Supp.2d 1280, 1295 (N.D. Fla. 2002), holding that this circuit has rejected reliance on whether the case was a contingency or not. The plaintiffs wrongly cite this case for the proposition that the court awarded a 2x multiplier. In fact, it denied the application of an enhancement. Id. at 1295.

[3] Does 1-13 v. Chiles, 136 F.3d 709 (11th Cir. 1998).

[4] The court said in full, “Four of the Johnson factors - the novelty and complexity of the issues, the special skill and experience of counsel, the quality of representation, and the results obtained from the litigation - are presumably fully reflected in the lodestar amount.”

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