2003 WL 21755913
Only the Westlaw citation is currently available.
United States District Court,
N.D. Texas, Dallas Division.

Oscar D. WILLIAMS, Jr., et al., Plaintiffs,
v.
KAUFMAN COUNTY and Kaufman County Sheriff Robert Harris, Defendants.

No. Civ.A. 397CV0875L. | July 30, 2003.

Plaintiffs, who were "prevailing parties" on illegal search claims, sought an award of attorney fees and costs. The District Court, Lindsay, J., held that: (1) plaintiffs were entitled to recover attorney fees incurred in the prosecution of identical claims of the settling parties; (2) plaintiffs were not entitled to attorney fees for the prosecution of those unsuccessful claims which did not involve common facts or derive from related legal theories of successfully prosecuted claims; (3) reduction of 15 percent to the lodestar for partial or limited success constituted a reasonable attorney fee under section 1988; and (4) it was appropriate to impose joint and several liability for attorney fees on county.

Application granted in part and denied in part.

Opinion, 2003 WL 21500401, vacated and superceded.

Opinion

AMENDED MEMORANDUM OPINION AND ORDER

LINDSAY, J.

***1** This Amended Memorandum Opinion and Order is issued pursuant to the court's order of July 30, 2003 and for the reasons therein stated, namely, to correct a typographical error in the court's Memorandum Opinion and Order issued on April 9, 2003, and clear up any confusion that might result from the error if it remains uncorrected. The substance of this opinion is the same as the one issued on April 9, 2003. Accordingly, the court vacates the Memorandum Opinion and Order issued April 9, 2003, and substitutes the following Amended Memorandum Opinion and Order in its place.

Before the court are the following matters:

1. Plaintiffs' Application for Attorneys' Fees and Related Expenses, filed April 12, 2002 ("Pl.App.");[1]

[1] The court will address Plaintiffs' Supplemental Application for Attorney's Fees and Related Expenses, filed April 21, 2003, by separate order.

2. Joint Status Report Concerning Attorneys Fees Issues, filed August 5 and 9, 2002 ("JSR");[2]

[2] Contrary to the court's May 23, 2002 Order, Defendants filed their own Joint Status Report on August 5, 2002, signed only by Defendants' counsel, and Plaintiffs filed their own Joint Status Report on August 9, 2002, signed only by Plaintiffs' counsel; nevertheless, because they are identical, the court will refer to them as one.

3. Defendant Robert Harris' Memorandum of Law Regarding Attorney's Fees, filed August 5, 2002 ("RH Mem.");

4. Defendant Kaufman County's Memorandum in Opposition to Plaintiffs' Application for Attorney's Fees and Related Expenses, filed August 6, 2002 ("KC Mem. Opp.");

5. Plaintiffs' Memorandum of Law Concerning Attorney's Fees Issues, filed August 9, 2002 ("Pl.Mem.");

6. Plaintiffs' Transcript of Evidence in Support of Plaintiffs' Application of Attorneys' Fees, filed August 9, 2002;

7. Plaintiffs' Response to Defendants' August 5, 2002 Objections to Plaintiffs' Counsel's Time Records, filed September 27, 2002 ("Pl.Resp.");

8. Plaintiffs' Supplemental Transcript of Evidence in Support of Plaintiffs' Application for Attorney's Fees, Volumes I and II, filed September 27, 2002 ("Pl. Supp. Tr. Vol. I or II"); and

9. Plaintiffs' Response and Supplemental Memorandum of Law Concerning Attorneys's Fees Issues, filed October 10, 2002 ("Pl. Resp. & Supp. Mem.").

After careful consideration of these documents, the relevant evidence, and the applicable authority, the court grants in part and denies in part, Plaintiffs' Application for Attorneys' Fees and Related Expenses.

I. ***Factual and Procedural Background***

This lawsuit arises from the execution of a search warrant by Defendant Kaufman County Sheriff Robert Harris ("Sheriff Harris") at the Classic Club (the "Club"), also known as the Sugar Shack, in Terrell, Texas, on April 21, 1995. *Williams v. Kaufman County,* 2002 WL 519814, *1 (N.D.Tex. Mar.29, 2002). The warrant authorized law enforcement officers to search the Club and "all other buildings, structures, and vehicles on said premises" for cocaine and to arrest five named individuals. *Id.* at 1–2. The warrant did not authorize the search of anyone other than those specifically identified in the warrant and did not authorize strip searches. *Id* at 2.

On the night in question, law enforcement officials secured a perimeter around the outside of the Club. *Id.* The search area encompassed all persons and property located within the perimeter, an entire city block. *Id.* Pursuant to policies enacted by Sheriff Harris, everyone within the search area was handcuffed in a prone position, "patted down," and subjected to a strip search, even in the absence of individualized probable cause or reasonable suspicion. *Id.* Those present were required to remove all of their clothing. *Id.* The men were asked to manipulate their penises so law enforcement officers could inspect the underside of their genitalia. *Id.* Women were required to manipulate their breasts and allow law enforcement officers to inspect their vaginas. *Id.* Those in custody were further required to spread their buttocks, to allow law enforcement officers to inspect visually the area around their anus. *Id.* Approximately one hundred people were subjected to strip searches over a period of three hours. *Id.* at 3.

***2** The original Plaintiffs in this case were seventeen individuals who were detained and strip searched. *Id.* at 1. Only one of the original Plaintiffs was actually named in the warrant. *Williams v. Kaufman County, Texas,* 86 F.Supp.2d 586, 589 (N.D.Tex.2000). The original Plaintiffs sued Sheriff Harris and Kaufman County pursuant to 42 U.S.C. § 1983 for constitutional violations, including illegal search, excessive force, unlawful detention, and for state law claims, including verbal harassment, invasion of privacy, assault and battery, intentional infliction of emotional distress, and civil conspiracy. *Id.* The claims of four of the original Plaintiffs were dismissed. *Id.* at 590 n. 2. On February 7, 2000, the court granted summary judgment for Defendants on all but the illegal search claims related to the strip searches. *See id.* Subsequently, ten of the original Plaintiffs settled their claims against Sheriff Harris and Kaufman County prior to trial for the sum total of $65,400. (Pl.'s Mem. at 6.) The three remaining Plaintiffs, Thomas Gene Brown, Cecil Wayne Jackson, and L.B. Brumley (collectively, "Plaintiffs") proceeded to trial on their strip search claims, and Brown proceeded to trial on his unlawful detention claim.

The strip search claims were tried to the court from September 12–15, 2000. The court concluded that the actions of Sheriff Harris, in detaining and searching Plaintiffs without individualized probable cause, violated the Fourth Amendment. *Williams,* 2002 WL 519814, at *4–6. Finding Sheriff Harris' conduct to be patently unreasonable, the court held that he was not protected from liability by the qualified immunity doctrine. *Id.* at 7. Because Sheriff Harris had exclusive policymaking authority in Kaufman County in the area of law enforcement, and because he intentionally adopted the strip search policy, the court also held Kaufman County liable under § 1983 for violating Plaintiffs' constitutional rights. *Id.* at 8–9. Noting that Plaintiffs failed to prove their actual damages, the court awarded each Plaintiff nominal damages in the amount of $100. *Id.* at 10–11. The court noted that punitive damages were not recoverable against Kaufman County or Sheriff Harris in his official capacity as a matter of law. *Id.* at 11. The court, however, both to punish Sheriff Harris and to deter similar constitutional violations in the future, assessed punitive damages against Sheriff Harris individually in the amount of $15,000 per Plaintiff. *Id.* The court also granted declaratory judgment for Plaintiffs, declaring that the conduct of Sheriff Harris and Kaufman County violated Article I, Section 9 of the Texas Constitution. *Id.* at 12. Lastly, the court denied Plaintiffs' request for injunctive relief, finding such relief unnecessary because Plaintiffs had an adequate remedy at law, because Sheriff Harris was no longer in office, and because both the new sheriff and Kaufman County had a duty to obey and enforce the Constitution. *Id* . The court did order that copies of the court's opinion be provided to the new sheriff, the county commissioners, and the county judge. *Id.*

***3** On March 29, 2002, the court entered its judgment awarding Plaintiffs $300 in nominal damages, $45,000 in punitive damages, interest at the rate of 2.7% per annum from the date of judgment, and costs. On April 12, 2002, Plaintiffs timely filed their postjudgment application for attorney's fees, and the court is now faced with the extremely difficult and unenviable task of determining what constitutes a reasonable attorney's fee in this case.

II. ***Attorney's Fees***

In an action brought under 42 U.S.C. § 1983, the court may "allow the prevailing party ... a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. This court has already determined that Plaintiffs were prevailing parties because they obtained an enforceable judgment against Sheriff Harris and Kaufman County which materially altered the legal relationship between them. *See Williams,* 2002 WL 519814, at *12 (citing *Farrar v. Hobby,* 506 U.S. 103, 111, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992)).

A. Methodology for Calculation of Attorney's Fees

A prevailing party may recover only those fees that are reasonably expended on the litigation. *See Hensley v. Eckerhart,* 461 U.S. 424, 433–34, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); *Watkins v. Fordice,* 7 F.3d 453, 458 (5th Cir.1993). A party is not entitled to attorney's fees for the prosecution of an unsuccessful claim unless it involves common facts or derives from related legal theories of another claim that is successfully prosecuted. *See Hensley,* 461 U.S. at 434.

Plaintiffs contend that the fee request is reasonable because the amount requested represents the amount of hours reasonably expended multiplied by the reasonable hourly rates for each participating attorney and paralegal to prosecute the case. Plaintiffs further contend that because their claims are interrelated with other claims and involve a common core of facts or related legal theories, there should be no reduction for unsuccessful claims. Defendants contend that given Plaintiffs' limited recovery on only one of several causes of action, a low fee or no fee is appropriate. In the alternative, the fee should be proportional to Plaintiffs' recovery.

1. Method of Computation under the Lodestar Approach

Plaintiffs advocate use of the well-established "lodestar" approach to calculate fees. (JSR at 1–2.) Under this approach, the determination of a reasonable attorney's fee award involves a two-step process. *See Rutherford v. Harris County,* 197 F.3d 173, 192 (5th Cir.1999). In assessing the reasonableness of attorney's fees, the court must first determine the "lodestar" by multiplying the reasonable number of hours expended and the reasonable hourly rate for each participating attorney. *See Hensley,* 461 U.S. at 433; *Migis v. Pearle Vision, Inc.,* 135 F.2d 1041, 1047 (5th Cir.1998); *Louisiana Power & Light Co. v. Kellstrom,* 50 F.3d 319, 324 (5th Cir.), *cert. denied,* 516 U.S. 862, 116 S.Ct. 173, 133 L.Ed.2d 113 (1995). The fee applicant bears the burden of proof on this issue. *See Riley v. City of Jackson, Miss.,* 99 F.3d 757, 760 (5th Cir.1996); *Kellstrom,* 50 F.3d at 324; *In re Smith,* 996 F.2d 973, 978 (5th Cir.1992).

***4** In assessing the amount of attorney's fees to award a prevailing party under the lodestar method, the second step requires the court to consider the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir.1974).[3] *See Cobb v. Miller,* 818 F.2d 1227, 1232 (5th Cir.1987). While the court's analysis need not be meticulously detailed, it must articulate and clearly apply the *Johnson* criteria. *Riley,* 99 F.3d at 760; *Kellstrom,* 50 F.3d at 331. Once the lodestar is computed by multiplying the reasonable number of hours by a reasonable hourly rate, the court may adjust the lodestar upward or downward depending on its analysis of the twelve factors espoused in *Johnson. Id.* "[T]he most critical factor" in determining the reasonableness of an attorney's fee award "is the degree of success obtained." *Hensley,* 461 U.S. at 436; *Farrar,* 506 U.S. at 114; *see Migis,* 135 F.3d at 1047; *see also Giles v. General Elec. Co.,* 245 F.3d 474, 491 n. 31 (5th Cir.2001) (stating that the most important factor under the *Johnson* analysis is the result obtained).

[3] The twelve factors are: (1) the time and labor required, (2) the novelty and difficulty of the questions, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, 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. *Cobb v. Miller,* 818 F.2d 1227, 1231 n. 5 (5th Cir.1987)(citing *Johnson,* 488 F.2d at 717–19).

2. Method of Computation when a Plaintiff Achieves Limited or Partial Success

When a party achieves limited or partial success, total reliance on and use of the lodestar method may not be appropriate. In this regard, the Supreme Court observed:

> If ... a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for the plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

Hensley, 461 U.S. at 436. *See also Migis,* 135 F.3d at 1048 (applying the principle enunciated in *Hensley* and remanding an award of attorney's fees because the district court failed "to give adequate consideration to the result obtained relative to the fee award, and the result obtained

relative to the result sought"). In a case where a plaintiff has achieved only limited or partial success, once a court considers the "amount and nature of damages awarded, [it] may lawfully award low fees or no fees without reciting the 12 [*Johnson*] factors bearing on reasonableness," or without computing the lodestar. *Farrar,* 506 U.S. at 115. The fee award must be the result of a "measured exercise of discretion" on the court's part. *Id.* at 114.

Citing *Farrar,* Sheriff Harris argues that Plaintiffs should receive no fees. (RH Mem. at 1–2.) Likewise, Kaufman County argues that because Plaintiffs "utterly failed to prove any cognizable injury under § 1983 ... awarding them little or no attorneys' fees without engaging in the lodestar calculation, is completely proper." (KC Mem. Opp. at 4.)

3. Appropriate Methodology in this Case

***5** "A prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." ' *Hopwood v. State of Texas,* 236 F.3d 256, 278 (5th Cir.2000) (citing *Hensley,* 461 U.S. at 429); *cf. White v. South Park Indep. Sch. Dist.,* 693 F.2d 1163, 1169 (5th Cir.1982) (same). Even where the damages awarded are nominal, attorney's fees may be justified on the basis of the plaintiff having accomplished some goal that serves the public interest. *Farrar,* 506 U.S. at 121–22 (O'Connor, J., concurring); *see also Hopwood,* 236 F.3d at 278 (stating that "[e]ven nominal damages can support an award of attorney's fees"). It is important to note that § 1988 "is a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory." *Farroar,* 506 U.S. at 121.

Here, Plaintiffs were awarded nominal damages for the violation of their Fourth Amendment right against unreasonable searches. It appears to the court that the vindication of the constitutional right, rather than the recovery of private damages was the primary purpose in bringing suit. The complaint specifically sought an award of compensatory damages, but it did not specify an amount. Plaintiffs prevailed on a significant substantive issue—the Fourth Amendment right to be free from unreasonable searches and seizures. This is not a case of a technical victory, because Plaintiffs' success will have the effect of deterring future violations in Kaufman County. This result would not have been obtained but for Plaintiffs' efforts. Moreover, Plaintiffs also recovered $45,000 in punitive damages; thus, awarding a low fee or no fee would be inherently unfair and inconsistent with existing precedent. *See Hopwood,* 236 F.3d at 277–78 (affirming substantial award of attorney's fees to plaintiffs who obtained a finding law school admission policy was unconstitutional, but no monetary damages or other relief); *Riley,* 99 F.3d at 760 (plaintiffs achieved more than mere "technical victory" when they obtained nominal damages and most of injunctive relief they had sought); *Dodge v. Hunt Petroleum Corp.,* 174 F.Supp.2d 505, 510 (N.D.Tex.2001) (where plaintiff was a prevailing party and recovered more than nominal damages, award of low fee or no fee would be inherently unfair despite low amount of damages). Accordingly, the court applies the lodestar method and makes an appropriate reduction for degree of success in light of the holdings in *Hensley, Farrar,* and *Migis* .

B. Calculation of Lodestar

As stated above, the first step in the lodestar analysis requires the court to determine the reasonable number of hours expended by Plaintiffs' attorneys on the lawsuit, as well as the reasonable hourly rates for each of those individual attorneys. Plaintiffs offer time records and affidavits in support of their fee application. In their initial April 12, 2002 filing, Plaintiffs sought $979,746.50 in attorney's fees for 3,220.95 hours expended. (Pl.App. at 3.) The court found these fees to be exorbitant and on May 23, 2002, ordered counsel to meet face-to-face in an attempt to resolve their disputes, and to file a Joint Status Report itemizing any disputed fees. (May 23, 2002 Ord. at 1.) Prior to the meeting, Plaintiffs submitted to Defendants a reduced fee request in which Plaintiffs had eliminated 538.40 hours for unsuccessful claims and 708.30 hours in the exercise of billing judgment. (JSR at 6.) These deductions reduced the total requested fee amount by $291,839.50[4] for a balance of $687,907. Thereafter, counsel met face-to-face on June 24, 2002, and discussed the reduced fee request. *Id.* Counsel agreed on all reasonable hourly rates but did not agree to any fee award.

4 This represents a $135,706.50 reduction for unsuccessful claims and a $156,133,00 reduction in the exercise of billing judgment. (Pls. Aug. 9, 2002 Trans. Bundren Aff. at 47–48.)

***6** After the meeting, Plaintiffs deducted another 203.40 hours representing $41,167.50 in fees, for a total fee request of $646,739 .50. *Id.* at 7. After Defendants filed their objections, Plaintiffs reduced their hours by another 57.30 hours. Plaintiffs now seek $484,747.25 in fees for 1,881.25 hours expended. (Pl. Supp. Tr. Vol I at 415.)

1. Reasonable Number of Hours

The 1,881.25 hours sought by Plaintiffs in furtherance of this lawsuit are divided as follows:

Charles Bundren	1,503.20 hours
Dan Wood	145.55 hours
Anna Roberts	1.50 hours
Legal Assistants	231.00 hours

Id. Defendants raise a number of objections to these claimed hours. The court addresses these objections in turn.[5]

[5] Defendants raised additional objections in their Memorandum of Law which will not be addressed because Plaintiffs subsequently dropped their request for fees with respect to those objections.

a. Prevailing parties

[1] Defendants first argue that Plaintiffs should not recover attorney's fees incurred in prosecuting the claims of the ten settling parties pursuant to *Buckhannon Bd. and Care Home v. W. Virginia Dept' of Health and Human Resources,* 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001). (KC Mem. Opp. at 3.) Defendants cite to *Buckhannon* in support of their argument that Plaintiffs are not entitled to attorney's fees incurred in prosecuting the claims of the settling parties. In *Buckhannon,* the Supreme Court considered a case in which the plaintiff brought suit seeking declaratory and injunctive relief, claiming that a state law violated the Fair Housing Amendments Act and the Americans with Disabilities Act. While the underlying case was pending, the state legislature changed the law at issue, and that case was dismissed as moot. *Id.* at 601. The Court determined that the plaintiff was not entitled to recover attorney's fees as the "prevailing party" and held that the "catalyst theory" was not a permissible basis for the award of attorney's fees under 42 U.S.C. § 3613(c)(2) and 42 U.S.C. § 12205. *Id.* at 610. The Court found that the defendants' "voluntary change in conduct" did not cause the "alteration in the legal relationship of the parties" required for "prevailing party" status. *Id.* at 605. The Court noted that its prior decisions established that "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Id* . at 604. The Court did not resolve the issue of whether a plaintiff who enters into a private settlement agreement can be considered a prevailing party. The Court merely noted in dicta that private settlements do not entail the same judicial approval and oversight of consent decrees and that federal jurisdiction to enforce such settlements may be lacking. *Id.* at 604 n. 7.

The fee application in the instant case does not present a *Buckhannon* problem. The fee seekers are not the settling parties, but rather three of the original Plaintiffs who proceeded to obtain a judgment on the merits. This court has already found that these three Plaintiffs are prevailing parties entitled to recover attorney's fees under § 1988. Therefore, whether the settling parties are "prevailing parties" is not at issue.[6]

[6] The *Buckhannon* Court was concerned that finding settling parties to be "prevailing," would "authorize[ ] federal courts to award attorney's fees to a plaintiff who, ... fil[ed] a nonfrivolous but nonetheless potentially meritless lawsuit." *Buckhannon,* 532 U.S. at 606. This concern is not present in this case for two reasons. First, the settling parties are not seeking to recover attorney's fees. Second, the merits of the suit filed by the settling parties have been proved by the outcome of the trial of the remaining claims. The court found that the acts complained of by the prevailing Plaintiffs, which were the same acts complained of by the settling parties, were unconstitutional.

***7** Moreover, the claims of the settling parties were identical to those of Plaintiffs. As such, the legal work performed in connection with their claims is inextricably intertwined with that of Plaintiffs' claims. Even work attributable to the case of one of the settling parties, such

as attendance at depositions, inured to the benefit of Plaintiffs as the case proceeded to trial, providing Plaintiffs' attorney with necessary witness statements and evidence. Thus, Plaintiffs, as "prevailing parties," are entitled to recover attorney's fees incurred in the prosecution of their claims, including those incurred in pursuing the identical claims of the settling parties.

b. Unsuccessful Claims

[2] Defendants next argue that Plaintiffs billing records reflect work on unsuccessful claims. A party is not entitled to attorney's fees for the prosecution of an unsuccessful claim unless it involves common facts or derives from related legal theories of another claim that is successfully prosecuted. *See Hensley,* 461 U.S. at 434. The court has reviewed Plaintiffs' records and determines that some entries reflect work on unsuccessful claims.[7] Accordingly, the court reduces the hours for Charles Bundren by 70 hours, which leaves him with a balance of 1433.20 hours.

[7] For example, these entries reflect work on unsuccessful claims or unsuccessful motions: "Receipt and review of correspondence ... legal research regarding race discrimination and liberty interest," (4.20 hours) (3/13/1998). "Legal research regarding ... wrongful seizure and arrest ..." (4.20 hours) (11/17/1998); "... telephone conference ... regarding Sheriff Harris' arrest for drug trafficking," (3.50 hours) (5/18/1999).

c. Excessive, Duplicative, Unspecified Entries

[3] Defendants also argue that Plaintiffs' entries reflect excessive, duplicative, or unspecified work. Such entries may be denied in the court's discretion. *See Hensley,* 461 U.S. at 433–34. Plaintiffs' billing records demonstrate a significant number of such entries.[8] Accordingly, the court further reduces Charles Bundren's hours by 274.40, Dan Wood's hours by 9.50, and the Legal Assistants' hours by 41.00. After reductions for work related to unsuccessful claims and excessive, duplicative, and unspecified entries, this leaves a balance of 1,158.80 hours for Charles Bundren, 136.05 for Dan Wood, 1.50 hours for Anna Roberts, and 190.00 hours for the Legal Assistants.

[8] For example, these entries reflect excessive research: "Post–Trial legal research regarding search warrants ..." (2.80) (9/19/2000); "Continued legal research regarding search warrants ..." (2.40 hours) (9/20/2000); "Legal research and update recent decisions on the Fourth Amendment and 42 U.S.C. Section 1983 ..." (3.40 hours) (2/6/2002); "Legal research, update and review recent decisions on Fourth Amendment and 42 U.S.C. Section 1983." (3.80 hours) (2/8/2002).

d. Unidentified Legal Assistants

[4] Defendants object to work by the Legal Assistants because Plaintiffs have not identified each assistant or provided their qualifications. Their identities or qualifications, however, are irrelevant because all legal assistants are billed at the same agreed rate. *See, e.g., Walker v. U.S. Dept. of H.U.D.,* 99 F.3d 761, 770 (5th Cir.1996); *Arnold v. Babbit,* 2000 WL 354395, at *6 (N.D.Tex.Apr.6, 2000); *but see Dibler v. Metwest, Inc.,* 1997 WL 222910, at *7 (N.D.Tex. Apr.29, 1997) (denying fees because of no supporting documentation).

2. Reasonable Hourly Rates

Defendants agree that the reasonable hourly rates for Charles Bundren range from $240 an hour in 1995 to $340 an hour in 2002, and from $175 in 1995 to $200 in 2002 for Dan Wood. (JSR at 3–5.) Defendants further agree that $150 is a reasonable hourly rate for Anna Roberts, and that $95 is a reasonable rate for legal assistants. *Id.* The court agrees with the parties that these are reasonable rates in the Dallas legal community for legal services by attorneys with the level of ability, competence, experience, and skill of Plaintiffs' counsel in the field of civil rights. The court has considered the affidavits submitted by Plaintiffs in support of this fee application. The court further makes its determination based on its knowledge of rates charged for legal services by attorneys with the level of skill, competence and ability of Plaintiffs' counsel in the Dallas legal community, and its experience in setting attorney's fees in other cases. The court will use current hourly rates for Charles Bundren ($340) and Dan Wood ($200) to compensate for delay in payment. *See Missouri v. Jenkins,* 491 U.S. 274, 282–84, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) (finding application of current rather than historic hourly rates to be appropriate adjustment for delay in payment of attorney's fees under § 1988); *Hopwood v. State of Texas,* 236 F.3d 256, 281 n. 107 (5th Cir.2000) (approving district court's use of current rates to compensate for delay in payment where attorneys submitted current hourly rates in addition to historical rates).

3. Lodestar

***8** After consideration of Defendants' objections and making appropriate reductions to requested hours, the following court calculates the lodestar as follows:

Charles Bundren	1158.80 hours x $340	=	$393,992
Dan Wood	136.05 hours x $200	=	$ 27,210
Anna Roberts	1.50 hours x $150	=	$ 225
Legal Assistants	190.00 hours x $95	=	$ 18.050
			$439,477

The court thus finds that a reasonable number of hours times a reasonable hourly rate yields a lodestar of $439,477.

C. Adjustments to Lodestar Calculation

The court has considered each of the *Johnson* factors in determining what constitutes reasonable attorney's fees in this action and applied them as appropriate. Many of the *Johnson* factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate and should therefore not be double-counted. *Jason D.W. v. Houston Indep. Sch. Dist.,* 158 F.3d 205, 210 (5th Cir.1998) (citing *Hensley,* 461 U.S. at 434 n. 9 and *Shipes v. Trinity Indus.,* 987 F.2d 311, 320 (5th Cir.1993)). Moreover, some factors deserve more weight than others. *Id.* As noted above, the Supreme Court has held that "the most critical factor" in determining the reasonableness of an attorney's fee award "is the degree of success obtained." *Hensley,* 461 U.S. at 436; *Farrar,* 506 U.S. at 114; *Migis,* 135 F.3d at 1047.

Having reduced the lodestar to the extent possible by the deduction of non-compensable hours, the court finds that the lodestar is still not proportional to the degree of success obtained in the lawsuit. *See Migis,* 135 F.3d at 1047. The pleadings show that Plaintiffs originally sought unspecified damages for their injuries, injunctive relief, and declaratory relief under approximately eight theories of recovery. At trial, Plaintiffs were awarded nominal actual damages in the amount of $300 for only one theory of recovery, and $45,000 in punitive damages. Plaintiffs also received a declaration that the actions of Defendants violated the Texas Constitution. Injunctive relief was denied because Plaintiffs had an adequate remedy at law and the court believed such relief to be unnecessary in light of Defendants' duty to follow the law.

Defendants' contention that Plaintiffs prevailed on only one count and were awarded only nominal actual damages is correct; however, Plaintiffs are not seeking attorney's fees for time spent in prosecution of the unsuccessful claims, and although only nominal actual damages were awarded, Plaintiffs did prove that Defendants' conduct was *unconstitutional* and *outrageous.* Plaintiffs prevailed on the illegal strip search claim, which was their "big-ticket" item, that is, the primary claim for which they sought most of their damages. Plaintiffs were awarded relatively substantial punitive damages and declaratory relief. Although not all the relief Plaintiffs sought, this is still a recognizable verdict in a civil rights case in this district, and certainly is nothing to "sneeze at" because law enforcement entities and officers, many more times than not, prevail on these types of claims .[9] By the same token, taking the scope of the litigation as a whole and considering the Plaintiffs' limited recovery, it would be fundamentally unfair to Defendants for the court to award Plaintiffs a fully compensatory fee.

9 The court notes that this case has been overlitigated by both sides, causing multiplication of attorney's fees. It would be patently unjust to deny Plaintiffs recovery of any attorney's fees, considering that Defendants vigorously contested this action and fought at every turn, which is within their rights, necessitating repeated court action. The strategy one pursues, however, can magnify fees and costs in the long run. Additionally, Defendants could have availed themselves of the provisions of Fed.R.Civ.P. 68 (offer of judgment) and drastically reduced the costs and attorney's fees award.

***9** The question thus becomes by what amount should the fee request be reduced considering Plaintiffs' limited success. As the Supreme Court has stated:

> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified.

Hensley, 461 U.S. at 436–37.

[5] The court rejects a purely mathematical approach or *per se* proportionality requirement in setting fees when a plaintiff has achieved partial or limited success. *See Branch–Hines v. Hebert,* 939 F.2d 1311, 1322 (5th Cir.1991); *Hernandez v. Hill Country Tel. Coop., Inc.,* 849 F.2d 139, 144 (5th Cir.1988). Plaintiffs contend the lodestar should only be reduced by 15 percent, citing to *Hopwood.* (Pl. Resp. at 9–10.) This, Plaintiffs contend, is the proper reduction in the lodestar for lack of financial success in a lawsuit. *Id.*

[6] As stated above, the fee award must reflect a "measured exercise of discretion by the district court." In this case, Plaintiffs recovered nominal damages as well as $45,000 in punitive damages. After carefully considering the record in this case and the result obtained, the court determines that a reduction of 15 percent to the lodestar constitutes a reasonable attorney's fee.[10] The court makes this determination based on its knowledge of what took place in this case, its earlier rulings, and its experience in setting attorney's fees in other civil rights cases. In this case, fifteen percent of $439,477.00 is $65,921.55. Subtracting this amount from the lodestar yields attorney's fees of $373,555.45.[11] Accordingly, the court awards Plaintiffs attorney's fees in the amount of $373,555.45.

10 Although Plaintiffs state in their Response that the fee request had been reduced by 15 percent, in calculating the lodestar, the court has considered the pre-reduction hours and fee amount.

11 The rationale of *Farrar* does not apply in this case where Plaintiffs recovered punitive damages and a declaration that the strip search policy was unconstitutional in addition to nominal damages. The court notes, however, that even under the "no lodestar" approach advocated by defendants, the amount awarded by the court would still be fair and reasonable. The court initially estimated that a reasonable fee would be in the $300,000—$400,000 range. Based on the limited success of Plaintiff, the court could exercise its "measured discretion" and award attorney's fees in this range based on experience in setting fees, its observation of this lengthy and hotly contested litigation, the overlapping issues based on the same core facts, and the important constitutional right vindicated in this suit. *See Hopwood v. State of Texas,* 999 F.Supp. 872, 919–20 (W.D.Tex.1998) (awarding fees, through end of trial, in excess of $466,000 to plaintiffs who recovered nominal damages and declaration that law school admissions policy was unconstitutional), *rev'd in part and aff'd in part,* 236 F.3d at 277–278 (affirming fee award). In this case, however, the court believes the "lodestar" approach with a reasonable adjustment yields a more fair and reasonable fee. Moreover, the $373,555.45 is approximately three and one third times the total amount recovered by the plaintiffs as a result of the constitutional violations at issue in this suit ($45,000 punitive damages + $300 nominal damages + $65,400 settlement = $110,700). This ratio is not unreasonable under the *Migis* standard.

D. Joint and Several Liability for Fees

[7] Kaufman County argues that it would be "grossly unfair" to impose joint and several liability for attorney's fees because it was only found liable for nominal damages in the amount of $300. (KC Mem. Opp. at 14.) The Fifth Circuit has previously rejected the disparate fault approach to apportionment of attorney's fees. *See Walker v. U.S. Dep't of Hous. and Urban Dev.,* 99 F.3d 761, 772–773 (5th Cir.1996). In *Walker,* the district court found joint and several liability for fees to be appropriate because there was a single indivisible injury and each party played a substantial role in the litigation. The Fifth Circuit rejected one party's argument that another party should pay a far greater share of the fees, stating:

> This contention well may be true, but it is irrelevant. We know of no case suggesting that joint and several liability is inappropriate in a case of disparate fault. The standard American rule is that a plaintiff may recover against any joint wrongdoer and that the wrongdoers then can file contribution actions against their co-wrongdoers and allocate fault among themselves.

***10** *Id.* (citing *Coats v. Penrod Drilling Corp.,* 61 F.3d 1113, 1121–22 (5th Cir.1995); *cf. Jackson v. Galan,* 868 F.2d 165, 167–69 (5th Cir.1989)(reversing imposition of joint and several liability for attorney's fees on defendant against whom plaintiff did not prevail); *Nash v. Chandler,* 848 F.2d 567, 573–74 (5th Cir.1988)(finding abuse of discretion where district court imposed joint and several liability for fees on State of Texas where it could not be held liable on the merits, and remanding for consideration of appropriate division of fees based upon extent that State's presence increased costs of litigation).

In this case, the court has already held that Plaintiffs prevailed against Kaufman County. *Williams,* 2002 WL 519814, at *12. As in *Walker,* Plaintiffs' successful claims against both Sheriff Harris and Kaufman County arose out of the same illegal search. While it is true that Kaufman County was only held liable for $300 in nominal damages, it is undisputed that it has played a substantial role in this litigation. In fact, Kaufman County played a substantial role in the pre-trial $65,400 settlement with the ten settling plaintiffs. This amount is greater than the $45,000 assessed solely against Sheriff Harris. Further, the court found that Sheriff Harris was an official policymaker of Kaufman County. Accordingly, joint and several liability for fees is appropriate in this case.

E. Fees for Preparation and Litigation of Fee Application

The court notes that it is the normal procedure to include a request for fees incurred during the preparation of the fee application as part of the initial fee request. Further, when a prevailing party files a reply to the opposition to the initial fee request, the party typically includes a supplemental fee request for the additional hours expended to date. The court is amazed that despite the overwhelming briefing by Plaintiffs in support of their fee application, Plaintiffs have not included such a request, stating instead:

> The Plaintiffs' counsel's current request for attorneys' fees does not include time for litigating the recovery of the fees owed by the Defendants. Fifth Circuit case law clearly provides that Plaintiffs' counsel is entitled to fees for litigating the fee recovery. Plaintiffs' counsel ... will submit a supplemental application for fees after the total amount of time and expense in pursuing the recovery of fees is known, which it is not at this time. Time spent by Plaintiffs' attorneys' fees counsel ... and by me in prosecuting this fee application have not been included in this affidavit or in the current fee application because they are not currently known. Plaintiffs reserve the right to supplement their fee application for ... any additional time which Plaintiffs' counsel incurs in the collection of the attorneys' fee award after May 31, 2002.

(Pl. Supp. Tr. Vol. I, Bundren Aff. at 44–45, ¶ 49.) Plaintiffs have had more than ample time to supplement their fee request, but have not done so. Accordingly, the court does not address or include any award for supplemental fees.

III. *Costs*

***11** [8] Pursuant to § 1988, Plaintiffs request $31,946.99 in out-of-pocket costs and expenses as part of their attorney's fees. (JSR at 15.) Defendants argue that Plaintiffs' costs and expenses are not compensable under 28 U.S.C. § 1920. Section 1988, not § 1920, governs the award of attorney's fees for civil rights actions under § 1983. *Strain v. Kaufman County Dist. Attorney's Office,* 23 F.Supp.2d 698, 700 (N.D.Tex. June 8, 1998) ("In any action or proceeding to enforce [42 U.S.C. § 1983], the district court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.") (citing § 1988). Moreover, it is well settled that "[a]ll reasonable out-of-pocket expenses, including charges for photocopying, paralegal assistance, travel, and telephone, are plainly recoverable in section 1988 fee awards because they are part of the costs normally charged to a fee-paying client." *Associated Builders & Contractors of Louisiana, Inc. v. Orleans Parish Sch. Bd.,* 919 F.2d 374,379 (5th Cir.1990). Thus, Plaintiffs may recover their reasonable out-of-pocket costs[12] and expenses as a component of their attorney's fees. *Id.*

12 The court notes that the Fifth Circuit recently disallowed mediation costs in *Mota v. University of Texas Houston Health Sci. Ctr.,* 261 F.3d 512,530 (5th Cir.2001); however, the *Mota* court specifically found that "mediation costs do not fall within the limited category of expenses taxable under Title VII." The court did not address the recoverability of mediation costs under § 1988 in the context of a § 1983 action. Moreover, these costs are traditionally charged to fee-paying clients. The court therefore will not deduct mediation costs from Plaintiffs' total costs and expenses.

Plaintiffs have submitted itemized lists of their requested out-of-pocket costs and expenses. (Pls. Supp. Trans. Vol. I at 365–414.) According to Charles Bundren's July 30, 2002 affidavit, those costs and expenses are customary, reasonable, and are normally billed to clients by attorneys in this market. (Aug. 9, 2002 Trans. Aff. at 33–34.) Plaintiffs have not been reimbursed for these costs and expenses. *Id.* Thus, pursuant to § 1988 and controlling precedent, Plaintiffs shall recover $31,946.99 in out-of-pocket costs and expenses.

IV. *Conclusion*

For the reasons stated herein, Plaintiff's Application for Attorneys' Fees and Related Expenses is granted in part and denied in part. Accordingly, Plaintiffs shall recover the amount of $373,555.45 as reasonable attorney's fees. The amount awarded as costs is $31,946.99. The total awarded for attorney's fees and costs on Plaintiffs' initial Application for Attorney's Fees and Related Expenses is $405,502.44.