CV-15-988

In the Arkansas Supreme Court

Nathaniel Smith, M.D., MPH, Director of the Arkansas Department Of Health, in His Official Capacity, and His Successors in Office — **Appellant**

v.

Marisa N. Pavan and Terrah D. Pavan, Individually and as Parents, Next Friends, and Guardians of T.R.P., a Minor Child, et al. — **Appellees**

On Appeal from the Circuit Court of Pulaski County, Sixth Division, the Honorable Timothy Fox, Circuit Judge

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Appellees' Motion for Clarification

(Electronically Filed Nov. 2, 2017)

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On October 19, 2017, this Court "reverse[d] the circuit court's order, and . . . remand[ed] for entry of a final judgment consistent with the mandate of the Supreme Court of the United States." *Smith v. Pavan*,

2017 Ark. 284, 2017 WL 4683761, at *1 (2017).[1] Appellees file this motion to clarify that, as part of this remand, the circuit court should consider in the first instance any award of attorney's fees and expenses incurred on appeal.

After prevailing at the circuit court, appellees filed a motion for attorney's fees. *Pavan v. Smith*, No. 60CV-15-3153, Plaintiffs' Motion for Attorneys' Fees and Costs (filed Dec. 21, 2015). The circuit court has not yet ruled on that motion, which Plaintiffs intend to renew and supplement. In his response to that motion, however, appellant argued that the circuit court could not award fees and costs for appellate work – even if appellees prevail on appeal – because "any fees and costs awarded to a prevailing party on appeal must come from the appellate court." *Pavan v. Smith*, No. 60CV-15-3153, Defendant's Response to Plaintiffs' Motion for Attorney's Fees and Costs (filed Jan. 5, 2016) (citing *Race v. Nat'l Cashflow Systems, Inc.*, 34 Ark. App. 261, 264, 810 S.W.2d 46, 48, *affirmed* 307 Ark. 131, 817 S.W.2d 876 (1991)).

Appellees disagree. Where, as in this case, the appellate mandate remands for further proceedings and entry of a new final judgment, the circuit court should consider awarding appellate fees and costs after entry of that judgment. *Jones v. Flowers*, 373 Ark. 213, 218, 283 S.W.3d 551, 555 (2008) (holding, after remand to circuit court for further proceedings consistent with

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[1] Barring a petition for rehearing, the Court's mandate will issue on November 6, 2017. *See* Ark. Sup. Ct. R. 2-3, 5-3.

U.S. Supreme Court decision, that motion for attorney's fees was properly filed in circuit court after that court entered final judgment); *Lewis v. Lewis*, 255 Ark. 583, 593, 502 S.W.2d 505, 512 (1973) ("In view of our remand of the case presently on appeal, it seems that the better procedure would be for the chancery court to consider the appropriate amount to be allowed appellant for attorney's fees for services in that court and *this one* when further proceedings are concluded" (emphasis added)).[2]

This approach accords with that of the U.S. Supreme Court, which directs that motions for U.S. Supreme Court fees and costs be heard first by the trial court. *See Perkins v. Standard Oil Co.*, 399 U.S. 222, 223 (1970) ("The amount of the award for such services should, as a general rule, be fixed in the first instance by the District Court, after hearing evidence as to the extent and nature of the services rendered.").

Moreover, it does not make sense for the parties to incur additional, unnecessary attorney's fees litigating which court has jurisdiction over appellate fees. Nor does it make sense, as appellant appears to suggest, for appellees to file *two* simultaneous motions for fees: one

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[2] Appellant's cited case is inapposite since it involved a situation whereby the appellate court remanded the case solely for *enforcement of the trial court's preexisting judgment. See Nat'l Cashflow Systems*, 307 Ark. at pp. 133-34, 817 S.W.2d at p. 877 (noting that first appellate mandate "left nothing open for the Trial Court except execution on the supersedeas bond"). In contrast, this Court reversed the Circuit Court's decision and remanded the case for entry of a new final judgment consistent with the U.S. Supreme Court's mandate.

in the circuit court and one in this Court. Accordingly, appellees respectfully request that this Court clarify when issuing its mandate that the circuit court may consider on remand, in the first instance, all appellate fees and expenses. This result is consistent with legal precedent and will ensure judicial efficiency. And if any party chooses to appeal any fee order, this clarification will preserve this Court's appellate role. *See, e.g.*, *Harrill v. Sutter, P.L.L.C. v. Kosin*, 2012 Ark. 385, at 9-13, 424 S.W.3d 272, 277-279 (2012) (reviewing circuit court fee award entered after remand from this Court).

Respectfully submitted,

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November 2, 2017

[Certificates Omitted]

CV-15-988

In the Arkansas Supreme Court

Nathaniel Smith, M.D., MPH, Director of the Arkansas Department Of Health, in His Official Capacity, and His Successors in Office **Appellant**

v.

Marisa N. Pavan and Terrah D. Pavan, Individually and as Parents, Next Friends, and Guardians of T.R.P., a Minor Child, et al. **Appellees**

On Appeal from the Circuit Court of Pulaski County, Sixth Division, the Honorable Timothy Fox, Circuit Judge

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Appellees' Protective Motion for Appellate Attorney's Fees and Expenses

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(Electronically Filed Nov. 21, 2017)

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As the prevailing parties in this litigation, appellees hereby move for an award of attorney's fees and expenses pursuant to 42 U.S.C. § 1988. This motion is made as a protective matter pursuant to Arkansas Rule of Civil Procedure 54(e)(2), which provides that a motion for attorney's fees must be filed no later than 14 days after entry of judgment. On November 7, 2017, this Court issued its mandate, which remanded the case to the circuit court for entry of final judgment consistent with the mandate of the U.S. Supreme Court. Although the Arkansas Supreme Court does not have a rule requiring fee motions within a particular time and although no final judgment has yet been entered, appellees file this motion out of an abundance of caution.

Appellees respectfully request an award of appellate attorney's fees in the approximate amount of $220,000, and reimbursement for approximately $6,000 in appellate expenses. Appellees will also request reasonable attorney's fees and expenses incurred in litigating attorney's fees issues (commonly known as fees-on-fees) in an amount to be determined, if such fees are incurred.

Appellees file with this motion a separate Motion to Transfer Attorney's Fees and Expenses to the circuit court. Transfer is appropriate for the reasons set forth in that motion. If, however, this Court denies the motion to transfer, appellees request that the Court set a schedule for briefing and submission of evidence. *See* Addition to Reporter's Notes to Rule 54, 1997 Amendment.

Respectfully submitted,

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CV-15-988

In the Arkansas Supreme Court

Nathaniel Smith, M.D., MPH, Director of the Arkansas Department Of Health, in His Official Capacity, and His Successors in Office — **Appellant**

v.

Marisa N. Pavan and Terrah D. Pavan, Individually and as Parents, Next Friends, and Guardians of T.R.P., a Minor Child, et al. — **Appellees**

On Appeal from the Circuit Court of Pulaski County, Sixth Division, the Honorable Timothy Fox, Circuit Judge

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Appellees' Conditional Reply to Appellant's Opposition to Appellees' Fee Motions

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Appellant has sought leave to file a belated opposition to Appellees' Protective Motion for Appellate Attorney's Fees and Expenses and Motion to Transfer. Appellees have filed a separate opposition to that request. In the event that the Court grants Appellant's motion for leave, however, Appellees conditionally file this reply to Appellant's opposition.

Appellant argues that this Court should deny Appellees' protective fee motion for three reasons. Opposition at 4. None of the reasons Appellant offers withstands the barest scrutiny.

First, Appellant argues that Appellees are not the prevailing party on appeal because, Appellant asserts, "Appellant was actually the prevailing party in two of the three appellate orders in this matter." Opposition

at 4. It is well established under the applicable fee shifting provision (42 U.S.C. § 1988), however, that "status as a prevailing party is determined on the outcome of *the case as a whole*, rather than by piecemeal assessment of how a party fares on each motion along the way." *Jenkins v. Missouri*, 127 F.3d 709, 714 (8th Cir. 1997) (emphasis added).[1]

That Plaintiffs/Appellees are the prevailing party could not be any more plain. For purposes of section 1988, a plaintiff prevails "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff" *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992). There is no question that Appellees' suit "materially alter[ed] the legal relationship between the parties" in a way beneficial to Appellees. Prior to this lawsuit, Defendant unconstitutionally denied birth certificates to same-sex couples under Arkansas Code § 20-18-401(f)(1). As a result of this litigation, Appellant is required to "ensure that same-sex spouses are afforded the same right as opposite-sex spouses to be listed on a child's birth certificate in Arkansas" – that is, Appellant is required to issue Appellees and other same-sex couples birth certificates that list the names of both spouses. *Smith v. Pavan*, 2017 Ark 284, at 2. Indeed, this is not even a case in which Plaintiffs prevailed on some, but not all

[1] Appellant's reliance on *Skokos v. Skokos*, 333 Ark. 396, 968 S.W.2d 26 (1998) is misplaced. Opposition at 4. *Skokos* was a divorce case, not a section 1983 civil rights case like *Jenkins* and this action. *Id.* at 399-400.

of their claims. Plaintiffs prevailed on all of their claims and achieved all of the relief they sought.

Second, Appellant complains that Appellees' fee request is unsupported. Opposition at 4. That complaint is premature regardless of how this Court decides to proceed with respect to fees. As an initial matter, this proceeding should be transferred to the circuit court for a decision as explained in Appellees' Motion to Transfer Attorney's Fees and Expenses.

Moreover, as Appellees have previously explained, it is unclear whether Arkansas Rule of Civil Procedure 54 applies to Appellees' motion for appellate fees and expenses in this Court. *See* Appellees' Protective Motion for Appellate Attorney's Fees and Expenses at 1. Out of an abundance of caution, Appellees nevertheless filed their protective motion in compliance with Rule 54.

In the event Rule 54 does apply, Appellees' motion is sufficient because it "alert[s] the adversary and the court that there is a claim for fees and the amount of such fees or a fair estimate." *See* Addition to Reporter's Notes to Rule 54, 1997 Amendment. Rule 54 provides that Appellees' fee motion need only "state the amount or provide a fair estimate of the amount sought." Ark. R. Civ. Pro. 54(e). As the Reporter's Notes to Rule 54 contemplate, the rule "*does not require that the motion for attorneys' fees be supported at the time of filing with the evidentiary material bearing on the fees.*" Addition to Reporter's Notes to Rule 54, 1997 Amendment (emphasis added). Instead, Rule 54 requires the moving

party to submit such evidentiary material in "due course, according to such schedule as the court may direct in light of the circumstances of the case." *Id.* Appellees pointed this out in their protective motion for appellate fees and expenses. Appellees' Protective Motion for Appellate Attorney's Fees and Expenses at 1.[2]

If, however, Rule 54 does not apply, the time has not run for a fees motion because there is no governing procedure, and this Court should instruct the parties how to address appellate fee issues (if it does not transfer the matter). Appellees will prepare a complete motion for appellate fees and expenses along with supporting evidentiary materials upon such schedule as the Court orders. But the Court should reject Appellant's attempt to impose evidentiary requirements on Appellees' protective fee motion where there is no rule that does so and the motion complies with Rule 54, which was the reason for bringing the motion in the first place. That Appellees filed their fee motion in compliance with the only Rule that even arguably applies cannot be the basis to foreclose Appellees' ability to seek appellate fees and expenses, should the Court find that the Rule does not in fact apply.

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[2] *Skokos*, 333 Ark. at 396, 968 S.W.2d at 26, on which Appellant relies, is not to the contrary. *See* Opposition at 4-5. *Skokos* does not consider, or even cite, Rule 54. Instead, the Court evaluated the fee motion under its pre-Rule 54 jurisprudence, which arose from the Court's "inherent authority" to consider attorney's fees issues. *Skokos*, 333 Ark. at 399, 968 S.W.2d at 41 (citing *Jones v. Jones*, 327 Ark. 195, 938 S.W.2d 228 (1997)).

Third, Appellant argues that Appellees' request for $220,000 in appellate attorney's fees is "excessive and unreasonable." Opposition at 5. It is uncontested that Appellant has not seen Appellees' detailed time sheets for work performed on appeal. Indeed, in the absence of that information, Appellant's conclusions about reasonableness are wholly unsupported conjectures. Accordingly, it would be improper for the Court to consider this issue without allowing Appellees to file evidentiary materials and a full-blown fee motion. For example, an attorney's lodestar calculation yields a presumptively reasonable fee under 42 U.S.C. § 1988, the fee shifting statute at issue here. *See Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). This Court cannot possibly consider whether the fees Appellees request are reasonable without considering their attorneys' lodestar amounts, which Appellees will provide at the appropriate time. The Court should therefore disregard Appellant's reasonableness argument until it is ripe for review.

In any case, Appellant's argument that the issues on appeal in this case were not "novel or complex" misses the mark. Opposition at 5. This case required two rounds of briefing at the Arkansas Supreme Court and a petition for certiorari before the U.S. Supreme Court. Because Appellant chose to file a brief opposing that petition, Appellees were forced to file a reply. On remand from the U.S. Supreme Court, it was *Appellant* who requested supplemental briefing, over Appellees' opposition. *See* June 27, 2017 Letter from Lee Rudofsky, Solicitor General to Stacey Pectol; June 28,

2017 Letter from Cheryl K. Maples to Stacey Pectol. In short, Appellant vigorously litigated this case at every level, as he was entitled to do. But those litigation decisions have consequences and Appellant cannot now complain that this case could have been tried more efficiently. *See Henson v. Columbus Bank & Trust Co.*, 770 F.2d 1566, 1575 (11th Cir. 1985) (A defendant that contests its opponent's claims "cannot then complain that the fees award should be less than claimed because the case could have been tried with less resources and with fewer hours expended.").

Finally, Appellant opposes Appellees' motion to transfer appellate fees and expenses to the circuit court. Notably, Appellant does not contest the reason why transfer is appropriate in this case: it "does not make sense for this Court – and the parties – to perform the duplicative work of determining attorney's fees in two courts." Motion to Transfer at 1. Instead, Appellant argues that only this Court can award appellate fees and expenses. Opposition at 7-8. Not so.

Where, as in this case, the appellate mandate remands for further proceedings and entry of a new final judgment, the circuit court should award appellate fees after entry of that judgment. *Jones v. Flowers*, 373 Ark. 213, 218, 283 S.W.3d 551, 555 (2008) (holding, after remand to circuit court for further proceedings consistent with U.S. Supreme Court decision, that motion for attorney's fees was properly filed in circuit court after that court entered final judgment); *Lewis v. Lewis*, 255 Ark. 583, 593, 502 S.W.2d 505, 512 (1973) ("In view of our remand of the case presently on appeal, it seems

that the better procedure would be for the chancery court to consider the appropriate amount to be allowed appellant for attorney's fees for services in that court and *this one* when further proceedings are concluded" (emphasis added)).

The case on which Appellant relies – *Race v. National Cashflow Systems, Inc.*, 34 Ark. App. 261, 264, 810 S.W.2d 46, 48, *affirmed* 307 Ark. 131, 817 S.W.2d 876 (1991) – is inapposite. There, the appellate court remanded the case solely for *enforcement of the trial court's pre-existing judgment. See Nat'l Cashflow Systems*, 307 Ark. at 133-34, 817 S.W.2d at p. 877 (noting that first appellate mandate "left nothing open for the Trial Court except execution on the supersedeas bond"). In contrast, this Court remanded the case for entry of a new final judgment consistent with the U.S. Supreme Court's mandate. *Smith*, 2017 Ark 284, at 2. The rule in *Jones* therefore applies.

Even were *Race* to apply, Appellant's argument would still fail. Even where the appellate mandate remands solely for enforcement of a pre-existing judgment, "the appellate court can direct the trial court upon remand to award an additional amount for the services of the appellant's attorney in the appellate court." *Race*, 34 Ark. App. at 263, 810 S.W.2d at 47. Granting Appellees' motion to transfer would, consistent with *Race*, serve as authorization for the circuit court to consider appellate fees and expenses.

Nor does it matter that this Court's rules address costs. Ark. Sup. Ct. R. 6-7. Appellant filed a motion for fees, and did not seek statutory costs.

Accordingly, this Court should reject the arguments in Appellant's belated opposition to Appellees' fee motions. Instead, the Court should grant Appellees' Motion to Transfer Appellate Fees and Expenses, for the reasons set forth in that motion. If the Court does not grant Appellees' Motion to Transfer, Appellees respectfully request guidance as to how the parties should address appellate fees and expenses, including a briefing schedule from this Court.

Respectfully submitted,

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Special Fees Counsel for Appellees

December 8, 2017

[Certificates Omitted]

IN THE CIRCUIT COURT OF PULASKI COUNTY,
ARKANSAS SIXTH DIVISION

MARISA N. PAVAN and TERRAH D. PAVAN, individually and as parents, next friends, and guardians of T.R.P., a minor child — PLAINTIFFS

LEIGH D.W. JACOBS and JANA S. JACOBS, individually, and as parents, next friends, and guardians of F.D.J., a minor child

COURTNEY M. KASSEL and KELLY L. SCOTT, individually, and as parents, next friends, and guardians of A.G.S., a minor child

VS. CASE NO. 60CV-15-3153

NATHANIEL SMITH, MD, MPH Director of the Arkansas Department of Health, in his official capacity, and his successors in office — DEFENDANT

MEMORANDUM OPINION CONCERNING AWARD OF PLAINTIFFS' ATTORNEY'S FEES AND COSTS

(Electronically Filed Feb. 16, 2018)

On the 16 day of February, 2018 came on for consideration the plaintiffs' *Motion for Attorney's Fees and Costs* filed on December 21, 2015, the plaintiffs' *Supplemental Motion for Attorney's Fees and Costs* filed on January 8, 2018, together with the attachments to both motions, the defendant's *Response to Plaintiffs' Motion*

for Attorney's Fees filed on January 5, 2016, the defendant's *Response in Opposition to Plaintiffs' Supplemental Motion for Attorney's Fees and Costs* filed on January 25, 2018, as well as the briefs of the parties, and the court doth find as follows:

The Arkansas Supreme Court has on numerous occasions enumerated the eight factors that courts are to consider in determining the award of a reasonable attorney's fee, *See*, *Chrisco v. Sun Indus.*, 304 Ark. 227, 800 S.W.2d 717 (1990) and *South Beach Beverage Company, Inc. v. Harris Brands, Inc.*, 355 Ark. 347, 138 S.W.3d 102 (2003). As stated in *South Beach Beverage Company*, the factors are:

> (1) the experience and ability of counsel; (2) the time and labor required to perform the legal service properly; (3) the amount of time involved in the case and the results obtained; (4) the novelty and difficulty of the issues involved; (5) the fee customarily charged in the locality for similar services; (6) whether the fee is fixed or contingent; (7) the time limitations imposed upon the client or by the circumstances; and (8) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

On December 21, 2015, the plaintiffs filed a *Motion for Attorney's Fees and Costs* and on January 8, 2018, the plaintiffs filed a *Supplemental Motion for Attorney's Fees and Costs.* The defendant filed responses to both pleadings. The applicability of the eight factors

are addressed in the affidavits of plaintiffs' counsel attached to the motions. The averments for the most part remain unrebutted by the defendant, with the exception of factors (2) and (3).[1]

Both the original *Motion* and the *Supplemental Motion,* together with the supporting documentation, can be fairly characterized as reflecting inferior craftsmanship. If the two motions were analyzed on a classic grading scale, they would receive a C- or a D+. There are no supporting affidavits from practicing local counsel as to plaintiffs' counsel's experience or as to the reasonableness of the requested hourly rate. All of the time entries—although they do appear to have been kept contemporaneously, as required by the Arkansas Supreme Court if time expended is going to be a major component of the fee decision—are materially deficient with respect to descriptions of the work performed. The actions of plaintiffs' counsel indicate that she is totally unfamiliar with the Rules of Civil Procedure and the Rules of Appellate Procedure relating to procedural matters involving the award of attorney's fees and costs.

The defendant's initial responsive pleading, *Defendant's Response to Plaintiffs' Motion for Attorney's Fees and Costs*, filed on January 5, 2016, was well written and, in several instances, provided helpful insight

[1] In the response to the *Supplemental Motion,* counsel for the defendants also makes completely unsupported objections to an hourly rate of $250.00 to $300.00 for an attorney who has engaged in the practice of law in the Central Arkansas area for more than three decades.

for the court concerning resolution of the relevant issues.[2] The defendant's most recent filing, *Defendant's Response in Opposition to Plaintiffs' Supplemental Motion for Attorney's Fees and Costs*, filed on January 25, 2018, falls well short of even the minimum levels of competency.[3]

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[2] The court notes the *Response* to the original fee motion was filed by Colin Jorgensen. Mr. Jorgensen has practiced law in Arkansas for quite a number of years and has a well-earned reputation throughout the entire State for his cogent, intellectual arguments premised on the Rule of Law and for his sense of professionalism. Although the court disagrees with a number of the conclusions he urged the court to adopt, his *Response* is an example of the high caliber of advocacy that was once exhibited by attorneys in the Civil Division of the Attorney General's office. As an example, the initial *Response* correctly points out that sovereign immunity prevents the award of any attorney's fees or costs against the State of Arkansas under the Arkansas Civil Rights Act.

[3] The Complaint alleged two causes of action: (i) violation of the Arkansas Civil Rights Act, and (ii) violation of 42 U.S.C. § 1983. The defendant's initial *Response* argued that the State has sovereign immunity with respect to the award of attorney's fees pursuant to the Arkansas Civil Rights Act. Sovereign immunity was not raised under the then status of Arkansas case law with respect to the plaintiffs' claim for the award of attorney's fees and costs pursuant to 42 U.S.C. § 1988.

The defendant's *Response* to the *Supplemental Motion* was filed on January 25, 2018, one week after the Arkansas Supreme Court issued its decision in *Board of Trustees of the University of Arkansas v. Andrews*, 2018 Ark. 12 (January 18, 2018). The Arkansas Supreme Court has not yet had a chance to fully define the parameters of sovereign immunity *post-Andrews.* Defendant's counsel didn't even raise sovereign immunity as a threshold bar to the award of any attorney's fees and costs under 42 U.S.C. § 1988. In fact, except for incorporating the original *Response* by reference, the *Response* to the *Supplemental Motion* contains no

mention of sovereign immunity. The Arkansas Supreme Court has recently restated its position, albeit in criminal cases, that the Court will not consider arguments, even constitutional ones, that are raised for the first time on appeal, *Green v. State*, 330 Ark. 458, 956 S.W.2d 849 (1997). The Court has also stated that a party's failure to obtain a ruling on an issue, even a constitutional issue, at the trial court level, will preclude appellate review of such issue, *Huddleston v. State*, 347 Ark. 226, 61 S.W.3d 163 (2001). The pleadings have closed in this matter and it is now too late to raise a threshold issue that should have been the defendant's first point in his *Response.*

Counsel for defendant makes a truly ridiculous statement in asserting that the plaintiffs shouldn't be awarded any attorney's fees prior to the Arkansas Supreme Court's first decision because the plaintiffs were not the "prevailing party" as a result of the initial reversal by the Arkansas Supreme Court (footnote 4, page 9, *Defendant's Response In Opposition To Plaintiffs' Supplemental Motion For Attorneys' Fees And Costs And Incorporated Brief* filed on January 25, 2018.) Such statement is not only incorrect, both factually and legally, it is contrary to the first sentence of defendant's initial responsive pleading (*ADH concedes that the Plaintiffs are prevailing parties under this Court's Order and Memorandum Opinion entered December 1, 2015.*) It was counsel for the defendant that advanced a constitutionally unsupportable legal argument that led a majority of the Arkansas Supreme Court into error in issuing its first opinion. That decision was summarily reversed by the United States Supreme Court. Summary reversals are relatively rare occurrences, reserved only for the most patently egregious errors of law.

Additionally, counsel for defendant evidences a complete lack of professionalism, as well as common sense, with the suggestion that any fees awarded since the remand shouldn't exceed $2,500.00. (page 2, *Defendant's Response In Opposition To Plaintiffs' Supplemental Motion For Attorneys' Fees And Costs And Incorporated Brief* filed on January 25, 2018.) The court notes, anecdotally and not as a factor in the present fee determination, that the Arkansas Democrat-Gazette has recently reported that members of the Arkansas Supreme Court have requested the award of attorney's fees in excess of $150,000.00 for fees in a

ANALYSIS OF *MOTION* AND *SUPPLEMENTAL MOTION*

Motion for Attorney's Fees and Costs

The plaintiffs' original *Motion for Attorney's Fees and Costs* was filed on December 21, 2015. That filing was prior to the conclusion of this matter, at either the trial or appellate level. At that time this case was far from being completed, and as pointed out by Colin Jorgensen, defendant's counsel at the time, the plaintiff's *Motion* was premature as there had not been a final determination as to the prevailing party in this action. As noted above, counsel for the plaintiffs has made a number of procedural errors concerning the award of attorney's fees and costs. The net result of those errors is two-fold. The plaintiffs are now ineligible to request the award of a large amount of attorney's fees and costs that were legitimately incurred while this case was on appeal to the Arkansas Supreme Court and the United States Supreme Court. The flip side is that the taxpayers of the State of Arkansas will enjoy a large savings windfall. If plaintiffs' counsel had understood and followed the proper procedures for requesting the award of attorney's fees and costs, the taxpayers might have had to pay a substantially larger amount to plaintiffs.

The original *Response* correctly pointed out that the doctrine of sovereign immunity prevented the award of any fees or costs to the plaintiffs pursuant to

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pending case in which there hasn't even been a single hearing conducted as of the present date. Presumably they consider such fees reasonable as they are requesting that the fees be paid.

their claim under the Arkansas Civil Rights Act. As the plaintiffs had also requested relief under 42 U.S.C. §§ 1983 and 1988, the *Response* then addressed perceived infirmities in the substance of the fee request.

The court agrees with the defendant's *Response* in two respects. First, the amount of fees requested for communication back and forth with clients is substantially outside out of the reasonable customary and normal percentage of attorney time devoted to a case. The court acknowledges that the plaintiffs are three different couples and that the factual scenario was different for each of those three sets of plaintiffs. The communications with the various clients are evidenced by "CL#" entries. Regardless, the amount claimed, both in quantity and as a percentage of total time is unreasonable. The request is for 17.7 hours of billable time for communications before the filing of the litigation. That request will be reduced by fifty percent (50%) from 17.7 hours to 8.85 hours. This yields a reduction of $2,212.50 at the initial claimed hourly rate of $250.00 per hour. Second, the amount of time billed on November 23, 2015, is excessive. There are over sixty time slip entries for that date, totaling more than twenty billable hours in one day. The claimed amount is going to be reduced to twelve billable hours for November 23, 2015, resulting in a decrease in the claimed fee of $2,137.50 at the then claimed hourly rate of $250.00 per hour. After reducing the fees claimed in the original *Motion,* the court finds that the reasonable attorney's fees reflected in the original *Motion* are $42,662.50. The plaintiff requests reimbursement of

filing and service fees, and other appropriate costs in the amount of $515.00. The court finds such costs to have been reasonably incurred.

Supplemental Motion for Attorney's Fees and Costs

The plaintiffs filed their *Supplemental Motion for Attorney's Fees and Costs* on January 8, 2018. The *Supplemental Motion* incorporates the original *Motion* and states that during the pendency of this case the plaintiffs' counsel's hourly rate has increased to $300.00 an hour. There is no claim for any of the attorney's fees or costs incurred by plaintiff during any of the appellate proceedings.[5]

After reviewing the time entries, the court has determined that the requested fees should be reduced in four areas. First, plaintiffs request that their counsel's new rate of $300.00 be applied retroactively to all time incurred prior to the hourly increase is denied. The

[5] In Paragraph 5 of the *Supplemental Motion*, plaintiffs' counsel states that there were pleadings requesting the award of appellate fees and costs filed with the Arkansas Supreme Court, that such requests were either denied or disposed of in some other manner, and attempts to "expressly reserve the right to seek those fees." In the event the Arkansas Supreme Court desires to address that issue in the event of any appeal from this decision it has the authority to do so. It facially appears that the plaintiffs' request at the appellate level was denied because it was procedurally improper, that all of the requested fees and costs should have been submitted to this court for a factual determination, and that under the Arkansas Rules of Civil and Appellate Procedure that the plaintiffs have forfeited their ability to request the award of any additional fees or costs by not properly and timely submitting them to this court for adjudication.

court acknowledges that there is case precedent in 42 U.S.C. § 1988 fee awards to gross up all time to the most recent, highest billable rate. Even though this case was appealed all the way to the United States Supreme Court, it was managed at the trial court level in such a manner that the entire litigation process took less than three years. So, the time accrued while counsel's rate was $250.00 an hour will be recompensed at that level.

Second, the December 6, 2017 entry for 3.25 hours in the amount of $975.00 to "amend timesheets" is not reasonable. One of the considerations for justifying minimum time block billing for certain activities is that such time includes the time it takes the attorney to enter a time record in their billing software.

Third, there are 36 separate time entries for December 8, 2017, such entries totaling 14.0 hours of billable time. The time requested for such date will be reduced by 4.0 hours, representing a reduction of $1,200.00.

Fourth, there is an entry on January 5, 2018, for 6.25 hours, to "update time sheets for filing." As previously stated there should not have been any time incurred to update contemporaneously made time records. The time sheets reflect sufficient time for preparing and finalizing the *Supplemental Motion* and supporting affidavit. Removal of such 6.25 hours constitutes a further reduction in the amount of $1,875.00.

The aggregate fee requested by the plaintiffs is $88,440.00. The court declines to utilize a multiplier. After making the deductions set forth above, the approved amount for attorney's fees is $70,637.50. The *Supplemental Motion* requests the award of additional costs in the amount of $61.50. The court finds the additional requested costs to be reasonable. The total costs awarded are $576.50.

This *Memorandum Opinion* is being filed in conjunction with the court's *Order* concerning the award of attorney's fees and costs. It is incorporated by reference into such *Order*.

/s/ [signature]
TIMOTHY DAVIS FOX
CIRCUIT JUDGE

2/16/18
DATE

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS SIXTH DIVISION

MARISA N. PAVAN and TERRAH D. PAVAN, Individually, and Marisa N. Pavan and Terrah D. Pavan, as parents, next friends and guardians of T.R.P., a minor child

LEIGH D. W. JACOBS and JANA S. JACOBS, Individually, and Leigh D. W. Jacobs and Jana S. Jacobs, as parents, next friends and guardians of F.D.J., a minor child

COURTNEY M. KASSEL and KELLY L. SCOTT, Individually, and Courtney M. Kassel and Kelly L. Scott, as parents, next friends and guardians of A.G.S., a minor child PLAINTIFFS

VS. CASE NO. 60CV-15-3153

NATHANIEL SMITH, MD, MPH, Director of the Arkansas Department of Health, in his official capacity, and his successors in office DEFENDANT

PLAINTIFFS' MOTION FOR PARTIAL RECONSIDERATION

(Electronically Filed Mar. 6, 2018)

Pursuant to Arkansas Rule of Civil Procedure 60(a), Plaintiffs respectfully move for partial reconsideration of this Court's February 16, 2018 Memorandum Opinion Concerning Award of Plaintiffs' Attorney's Fees and Costs. Plaintiffs do not seek

reconsideration of the amount of attorney's fees and costs awarded by this Court, which have now been paid in full by Defendant. Instead, Plaintiffs request only that the Court modify its discussion of Plaintiffs' right to attorneys' fees and costs incurred on appeal—an issue that is not currently pending, and was never pending, before this Court. Such a modification is warranted in light of the additional information provided herein that was never filed on this Court's docket. In particular, Plaintiffs provide information regarding their extensive efforts to transfer the issue of appellate fees to this Court and to preserve their entitlement to appellate fees. Given these additional facts, and in order to avoid any prejudice or confusion in subsequent proceedings regarding those appellate fees and costs, Plaintiffs respectfully request that the Court modify the discussion of appellate attorneys' fees in its February 16 memorandum opinion by deleting the last nine lines (beginning with "As noted above, . . . ") of the first paragraph on page 4, as well as footnote 5 on page 6.

Under Rule 60(a), this Court may modify an order or decree within 90 days of its having been filed with the clerk. Ark. R. Civ. P. 60(a). The provision grants this Court "broad authority" to do so in the interests of justice. *Lord v. Mazzanti*, 339 Ark. 25, 29-30, 2 SW.2d 76, 79 (1999). This Court should exercise that authority in this case to prevent its February 16 memorandum opinion from creating any confusion or prejudice to Plaintiffs regarding the procedural circumstances

surrounding Plaintiffs' attempts to recover appellate attorneys' fees.

As explained in the attached Declaration of Cheryl Maples, Plaintiffs were careful and conscientious in pursuing an award of attorneys' fees and costs incurred on appeal in this matter. Following the original entry of judgment by this Court, Plaintiffs' counsel filed a motion for fees within the deadlines established by Arkansas Rule of Civil Procedure 54(e). Maples Decl. ¶¶ 3-4 and Ex. A.[1] In its opposition to that motion, Defendant argued to this Court that even if Plaintiffs prevailed on appeal, this Court could not award any fees and costs incurred on appeal, because "any fees and costs awarded to a prevailing party on appeal must come from the appellate court." Maples Decl. Ex. B. at 8 (citing *Race v. Nat'l Cashflow Systems, Inc.*, 34 Ark. App. 261, 264, 810 S.W.2d 46, 48, *affirmed* 307 Ark. 131, 817 S.W.2d 876 (1991)). As Defendant had already appealed this Court's underlying order, there was no further activity related to the fee motion.

After the Arkansas Supreme Court reversed this Court's decision, Plaintiffs sought certiorari with the United States Supreme Court, which summarily reversed the Arkansas Supreme Court's decision. Given Defendant's prior contention that this Court lacked jurisdiction to award any appellate fees, however, and

[1] In filing that initial fee motion prior to the resolution of any appeal from that judgment, Plaintiffs' counsel followed the guidance provided by the Reporter's Notes to Rule 54(e), which state that the deadline for filing such a motion is not tolled by the filing of a notice of appeal.

out of an abundance of caution, Plaintiffs took extensive steps to protect their entitlement to appellate attorneys' fees (and supplemental fees incurred before this Court).

First, on November 2, 2017, Plaintiffs filed a Motion for Clarification with the Arkansas Supreme Court asking the Court to clarify in its mandate that *this* Court could and should award appellate attorneys' fees on remand. Maples Decl. Ex. C at 3. The Arkansas Supreme Court issued the mandate on November 7 without ruling on Plaintiffs motion.[2] Maples Decl. Ex. D.

On November 21, 2017, Plaintiffs then filed with the Arkansas Supreme Court a Protective Motion for Appellate Attorney's Fees and Expenses and a Motion to Transfer Attorney's Fees and Expenses to this Court. Plaintiffs filed those motions in compliance with the 14 day deadline to file fee motions contained in Rule 54(e). Maples Decl. ¶ 9. The motion to transfer asked the Arkansas Supreme Court to permit this Court to consider Plaintiffs' motion for appellate attorneys' fees and costs in the first instance. Maples Decl. Ex. G. at 1. In the alternative, and because Plaintiff was unsure when the Arkansas Supreme Court would rule on that motion, Plaintiffs also filed their appellate fee motion and requested, in accordance with applicable rules, that the Supreme Court set a briefing

[2] On November 30—after Plaintiffs had already filed their protective fee motion and motion to transfer (which are discussed below)—the state Supreme Court denied the motion for clarification without explanation. Maples Decl. Ex. E.

schedule for submission of evidence and full briefing in support of that award. Maples Decl. Ex. F at 2.

Defendant tendered a response to Plaintiffs' motions, offering three merits-related reasons why the Arkansas Supreme Court should deny the protective fee motion. Maples Decl. Ex. H at 4-7. Defendant also opposed the motion to transfer, arguing again that the only court with jurisdiction to award appellate fees was the court in which those fees were incurred. *Id.* at 6-7. Plaintiffs tendered a conditional reply, which responded to the Defendant's merits arguments. Maples Decl. Ex. I at 1-5. Plaintiffs also responded to Defendant's opposition to the motion to transfer. *Id* at 6-7.

On January 4, 2018, the Arkansas Supreme Court summarily denied the motion to transfer *and* the protective motion for appellate attorneys' fees without explanation.[3] Maples Decl. Ex. J. Because the Arkansas Supreme Court denied both Plaintiffs' motion to transfer and motion for appellate fees, Plaintiffs excluded appellate time from their supplemental fee motion filed before this Court. *See* Supp. Fee Mot. at 2-3 (Jan. 10, 2018). That supplemental fee motion expressly preserved Plaintiffs' right to continue pursuing appellate fees.

Because none of these proceedings regarding appellate fees and expenses took place in this Court, this Court had no reason to be aware of those proceedings when issuing its Memorandum Opinion. In light of

[3] The Court did so over the dissent of Justice Wynne, who would have set a schedule for briefing and submission of evidence. Maples Decl. Ex. J.

these additional facts, however, and because the Court's discussion of Plaintiffs' entitlement to appellate fees and expenses was unnecessary to its determination of the amount of fees and expenses Plaintiffs should be awarded for work performed in this Court, Plaintiffs respectfully request that the Court modify the Memorandum Opinion by eliminating the discussion of Plaintiffs' entitlement to appellate attorneys' fees on page 4 and in footnote 5. Such a modification will help the parties and any reviewing courts avoid confusion regarding the prior fees proceedings that occurred in this Court and in the Arkansas Supreme Court.

WHEREFORE, Plaintiffs respectfully request that this Court modify the discussion of appellate attorneys' fees in its February 16 memorandum opinion by removing the last nine lines (beginning with "As noted above, . . . ") of the first paragraph on page 4 and footnote 5 on page 6.

Dated: March 6, 2018

Respectfully submitted,

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[Certificates Omitted]