

No. 14-1891

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOSEPH M. BECK, et al

APPELLANTS

v.

No. 14-1891

LOUIS JERRY EDWARDS, et al

APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

THE HONORABLE SUSAN WEBBER WRIGHT
UNITED STATES DISTRICT COURT JUDGE

APPELLANTS' RESPONSE TO
MOTION FOR APPELLEES' ATTORNEYS' FEES ON APPEAL

Respectfully submitted,

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ARGUMENT

I. INTRODUCTION

Appellees request an order awarding \$48,555.00 in attorneys' fees and \$2,442.44 in expenses for this appeal. The requested amount is excessive because it reflects attendance at oral argument by multiple attorneys on behalf of Appellees and fees related to *amici* filings in this case. Appellants also contend that the number of attorneys used by Appellees in this appeal is unnecessarily excessive and duplicative, and therefore unreasonable.¹ Appellants request that the Court reduce Appellees' requested fee and expense award as specifically outlined below.

II. ARGUMENT

Appellees contend that “[t]he number of hours expended by each attorney on each task was [] reasonable, as was the contribution of each, given the importance of this case in Arkansas, the likelihood that this Court’s decision would have ramifications beyond Arkansas, and the possibility of the losing parties seeking a writ of certiorari to the United States Supreme Court.” Motion for Appellees’ Attorneys’ Fees on Appeal (“Appellees’ Motion”), p. 4/67.² While this

¹ Appellants do not object to Appellees’ requested hourly rate of \$300.00. Though this hourly rate is high for a local attorney in the local market, Appellants concede that Appellees’ counsel possesses the experience and skill that occasionally warrants this rate in Arkansas cases.

² Appellees’ individual filings in support of their motion for fees and costs are all marked with the same Entry ID Number, 4283835. Accordingly, Appellants

observation supports Appellees' view that this case presents questions of exceptional importance that warrant *en banc* review, it does not mean that this case called for numerous attorneys and an inefficient utilization of resources.

A. Multiple Attendees At Oral Argument

At the outset, Appellees should only be awarded fees for attendance at oral argument by the attorney who participated in oral argument on behalf of Appellees. As the district court noted, it was not necessary in this case to have more than one attorney present at any hearing:

In a school desegregation case, the Eighth Circuit held that given the complexity and magnitude of the litigation, it was not unreasonable for a defendant school district to send *two* attorneys to attend oral argument and that an attending attorney's charges for travel and attendance were reasonable even though he did not participate in oral argument. Here, the issues and arguments presented at the preliminary injunction hearing were straightforward and concerned well-settled law. *See Little Rock School Dist. v. Arkansas*, 674 F.3d 990, 995 (8th Cir. 2012). The Court finds that it was not necessary to have Camp and Toti in attendance at the hearing and will therefore reduce the fee award by \$10,980.

Dckt. Entry 68, p. 5-6 (emphasis in original). The oral argument before this Court concerned the same issues as the preliminary injunction hearing before the district court. This Court should also conclude that Appellees are entitled to compensation only for the fees of the attorney who participated in the oral argument, Susan

will identify specific portions of Appellees' filings by reference to the consecutive pagination assigned by the Clerk for the collective 67-page filing.

Talcott Camp. The Court should deduct Stephanie Toti's expenses of \$1,066.69 for her admission to this Court and her travel expenses for attendance at the oral argument. *See* Appellees' Motion, p. 49/67. The Court should also deduct the 10.75 hours claimed by Ms. Toti on January 12 and 13, 2015 for her attendance at the oral argument in which she did not participate. *See id.*, p. 47/67. The expenses award should be reduced by \$1,066.69, and the fee award should be reduced by \$3,225, accordingly.

B. Amicus Activity

Appellees are also not entitled to recover from Appellants for the work of Appellees' counsel related to amicus briefs submitted in this case. *See, e.g., Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 470 F.3d 363, 373 (D.C. Cir. 2006) (discussing and relying upon "authority for the proposition that an award of attorney's fees against the government is not appropriate for those phases of litigation in which the plaintiff is opposed solely by third parties."); *Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) ("The district court should not award plaintiffs any attorney's fees or expenses for work done in connection with supporting amicus briefs."); *Sportsmen's League v. Marsh*, 786 F.2d 631, 632 & 636 (5th Cir. 1986) (attorney's fees are only appropriate for portions of the litigation made necessary by government opposition to legitimate claims of the party seeking the award; an award is not appropriate for a phase of the litigation in

which the party seeking an award was opposed only by other, non-governmental parties); *Stromans, Inc. v. Selecky*, 906 F.Supp.2d 1093, 1103 (W.D. Wash. 2012) (“Hoisting the cost of active amici-type litigants onto the State, when the State’s action did not necessitate their presence, is an impermissible fee-shifting measure under § 1988”).

The Court should deduct the following hours from Appellees’ fee request for the work of Appellees’ counsel related to amicus briefs in the case: 1.6 hours by Bettina Brownstein on June 18, 2014 for “Review amicus briefs” (Appellees’ Motion, p. 11/67); 1.5 hours by Susan Talcott Camp on January 5, 2015 for “Read amicus briefs and summaries” (*id.*, p. 16/67); 1.0 hours by Stephanie Toti on May 19, 2014 for “Met with N. Rosenbloom & E. Smock to discuss amicus strategy” (*id.*, p. 47/67); 1.5 hours for Stephanie Toti on June 4, 2014 for “Reviewed amicus briefs submitted in support of Appellants and discussed same with co-counsel” (*id.*); 0.75 hours by Stephanie Toti on July 18, 2014 for “Reviewed amicus briefs in support of Appellees” (*id.*); and .1 hours on April 22, 2014, .1 hours on May 23, 2014, .2 hours on June 4, 2014, .1 hours on June 6, 2014, and .4 hours on July 16, 2014 by Holly Dickson for review of amicus briefs (*id.*, p. 62/67). Appellees’ counsel requests compensation for a total of 7.25 hours for work related to amicus briefs. The fee award should be reduced by \$2,175, accordingly.

C. Excessive Number Of Appellate Lawyers

Appellees seek attorneys' fees for the work of five attorneys on this appeal. Appellees offer no explanation for why they found it necessary to deploy a battalion of five attorneys to represent Appellees in this appeal. Appellants have utilized a single attorney throughout this case. Undersigned counsel experienced no difficulty handling the briefing in this case, and the court appearances, including oral argument before this Court's panel, with no assistance from additional lawyers. The Appellees' fee request of \$48,555 should be reduced by a substantial percentage for the unnecessary and unreasonably duplicative work of five attorneys for the Appellees on this case. *See, e.g., A.J. By L.B. v. Kierst*, 56 F.3d 849, 864 (8th Cir. 1995) ("A court may reduce attorney hours, and consequently fees, for inefficiency or duplication of services in cases where more than one attorney is used.") (citing *Johnson v. University College*, 706 F.2d 1205, 1208 (11th Cir.), *cert. denied*, 464 U.S. 994 (1983)). *See also, Schlacher v. Law Offices of Philip J. Rotche & Assoc.*, 574 F.3d 852, 854 (7th Cir. 2009) (affirming 50% reduction in attorneys' fees sought based on district court's conclusion that there was "unnecessary use of multiple attorneys").

D. A Proposed Methodology To Ascertain A Reasonable Fee

The Court has wide discretion to fashion an appropriate way to reduce the Appellees' fee award due to the unnecessary and unreasonably duplicative work of

multiple attorneys. Appellants submit that it would be reasonable to allow Appellees to recover the full amount requested by Appellees' lead counsel, Susan Talcott Camp (minus \$450.00 for 1.5 hours for amici work as discussed above), for a total fee award of \$26,610. Notably, this is more than half of the total fee award requested by Appellees for the combined work of five attorneys. If the Court adopts this reasoning, there is no need to further reduce the award for the attendance of multiple attorneys at oral argument and the work related to amicus briefs as argued above.

III. CONCLUSION

Appellees' request for attorneys' fees is excessive and unreasonable. For the reasons explained above, Appellees should be permitted to recover \$1,375.75 in expenses and \$26,610 in attorneys' fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Colin R. Jorgensen, Assistant Attorney General, do hereby certify that on June 16th, 2015, I electronically submitted for filing the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit via the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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