

FILED

2022 JUL 11 AM 10:43

**IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE**

DAVIDSON CO. CHANCERY CT.

**TENNESSEANS FOR SENSIBLE ELECTION LAWS,**

**Plaintiff,**

**vs.**

**TENNESSEE BUREAU OF ETHICS and CAMPAIGN  
FINANCE, REGISTRY OF ELECTION FINANCE,**

**Defendants.**

LN D.C. 1111

No. 18-0821-III

**ORDER AWARDING ATTORNEY FEES and EXPENSES**

This action is before the Court on “Plaintiff’s Application for Attorney’s Fees and Costs Arising From: (1) Prevailing on Plaintiff’s Contempt Petition; and (2) Maintaining its Prevailing Party Status Regarding Defendant’s Motion for Relief.” When this Court found the Bureau to be in contempt for its actions in enforcing Tenn. Code Ann. §2-10-121 in willful violation of this Court’s previous injunction, it also invited plaintiff to submit a request for attorney’s fees for prosecuting the petition for contempt. Attorney fees in a case such as this are properly awarded as damages for contemptuous conduct under Tenn. Code Ann. §29-9-105. The Bureau does not dispute plaintiff’s entitlement to an award under the contempt statute. In fact, in an amazing display of reasonableness, the Bureau does not dispute plaintiff’s entitlement to the actual fees and expenses requested. Accordingly, there is no need for the Court to undertake the extensive analysis generally required for the determination of a reasonable attorney’s fee under Tenn. Supp. Ct. R.8, RPC 1.5.

The only dispute remaining is plaintiff’s request for a 50% increase in this reasonable attorney fee. Plaintiff contends that this case represents one of the “rare and exceptional cases” in

which an attorney fee award should be enhanced. *Purdue v. Kenny A.*, 559 U.S. 542, 543 (2010).

In support of its request for an enhancement plaintiff cites three reasons: 1. That the plaintiff achieved exceptional success in this case. 2. That the case involved extraordinary governmental misbehavior. 3. That the litigation was of extensive duration and volume.

### **Application of Section 1988**

As an initial matter, defendant contends that an enhanced award of attorney fees is not permitted under the contempt statute, Tenn. Code Ann. §29-9-105. Defendant is correct.

However, plaintiff is also correct that they are entitled to an award of an attorney fee under 42 USC §1988(b), as well. The Court FINDS that plaintiff is entitled to the §1988 award of an attorney fee, because it had to “defend” its previous win in this lawsuit in connection with the Bureau’s Motion for Relief from Judgment, and in prosecuting the Petition for Contempt.

Plaintiff’s legal representation on these two post-trial, post-appeal matters is inextricably related to their representation on the original claims and appeal.

An enhanced attorney fee is available under §1988 in exceptional cases. However, for the reasons set forth hereafter, the undersigned CONCLUDES that this is not a rare or exceptional case meriting enhancement of the fees claimed by plaintiff.

### **Request for Enhanced Attorney Fee**

First, Plaintiff claims that this is a case of exceptional success because their “victory did not merely benefit the plaintiff; it additionally benefited 640 separate nonparties . . . .” Plaintiff’s Application for Attorney’s Fees, etc. filed May 3, 2022 at p. 42. While this is undoubtedly true, it is not extraordinary. Every successful civil rights plaintiff vindicates the rights of the public in general, and usually benefits myriad nonparties who would also be affected by a constitutionally infirm statute.

The second reason plaintiff argues they are entitled to an enhanced attorney fee award is because the case “involves extraordinary governmental misbehavior . . . .” Plaintiff’s Application for Attorney’s Fees, etc. at p. 43. In considering the entire course of this litigation, defendant’s counsel has misstepped on more than one occasion. However, the Court does not view the defendant’s conduct in connection with its contemptuous enforcement of the statute, and motion for relief from the injunction, as representing a repeated effort to circumvent this Court’s ruling. The defendant’s arguments, defenses and justifications have not been completely baseless.<sup>1</sup> The Bureau does have an obligation to enforce duly passed legislation affecting it and the State does have an obligation to defend legislation against constitutional attack. The Statute at issue was materially changed by the amendment even though this Court found that it was not a “substantial change” that would merit relief from the injunction. Once the Motion for Relief was denied, defendant stopped enforcement prior to the contempt trial. Had the Bureau voluntarily disgorged the improperly received PAC fees it may indeed have rendered the issue of civil contempt moot.<sup>2</sup>

This Court has found the defendant’s decision to enforce the amended statute without first obtaining relief from the injunction to have been unwise and indeed in contempt of this Court. However, this Court’s Order finding defendant in contempt, and this Order awarding

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<sup>1</sup> Defendant’s allegation that the amended statute applied to all PACs was without merit as discussed in this Court’s Order on Defendant’s Motion for Relief from Judgment, however that was not the sole basis for arguing that defendant was entitled to relief from the injunction. Defendant’s primary argument for relief was that the amended statute had never been declared unconstitutional, that legislative acts are presumed constitutional, and that defendant had a statutory obligation to apply/enforce duly enacted legislation rather than judging its constitutionality. Memorandum in Support of Motion for Relief from Judgment, filed January 25, 2021 at p. 2-4.

<sup>2</sup> It is also notable that the Bureau promptly complied with this Court’s Order finding the Bureau in contempt and requiring that it refund the improperly received PAC fees.

plaintiff attorney fees and expenses, are an appropriate response to the contemptuous conduct.<sup>3</sup>

An enhancement of Plaintiff's attorney fee is not merited by the Bureau's hard fought defense of its contemptuous conduct.

Finally, plaintiff asserts that the "extended duration and volume of this litigation" merits the fee enhancement. Plaintiff's Application for Attorney's Fees, etc. at p. 45. It is true that this post-trial, post-appeal litigation has extended over a lengthy period of time. It is also true that a significant portion of that time resulted from the recusals of previously assigned judges. The matter has actually only been assigned to this judge for approximately 9 months, during which the undersigned has issued four opinions, counting this one, and conducted a trial on the contempt petition. Defendant has raised every conceivable defense, but that is their right and perhaps their duty. While this Court has not found merit in any of these defenses, as noted above, they are not completely baseless. And, plaintiff typically had the last word on every issue, as they did in the case of their application for attorney's fees. *See*, Plaintiff's Reply to Defendant's Response to Plaintiff's Application, etc., filed May 20, 2022.

Plaintiff fought at least as hard as the defendants. The result is that the defendants are now faced with an attorney fee and expenses of approximately \$80,000.00. The attorney fee approved for successfully prosecuting the original matter through trial was only approximately \$25,000.00. Perhaps this post-trial, post-appeal litigation has been more voluminous than it should have been, but plaintiff is being compensated for the work required to be undertaken by the "voluminous" nature of the litigation. Accordingly, the duration and the extent of the

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<sup>3</sup> Previous missteps by counsel in this litigation also resulted in appropriate sanctions or response from the Court *See*, Memorandum and Order, etc., entered in this case and filed October 11, 2018. (Defendant precluded from introducing any evidence in defense of the constitutionality of the challenged statutes, because of its inexplicable failure to comply with previous scheduling Order.)

litigation does not provide a basis for enhancing the reasonable attorney fee and expenses of approximately \$80,000.00.

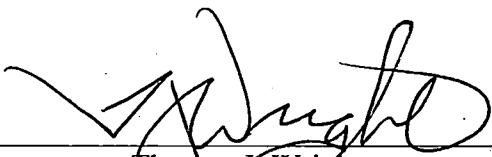
In sum, the Court does not find this case to be so extraordinary as to merit an enhancement of the attorney's fees awarded.

### **Conclusion**

The Court FINDS that the lodestar fee would be sufficient to attract competent counsel. Therefore, it should not be enhanced. *Perdue*, supra at 543. For the reasons set forth in Plaintiff's Application for Attorney's Fees and Costs, etc., and as agreed to by the Bureau, the Court FINDS the requested attorney's fees to be reasonable and, it is hereby

ORDERED that plaintiffs are awarded a Judgment for their attorney fees in the amount of \$77,425.00 plus expenses in the modified amount of \$2,705.65, for a total award of \$80,130.65. Costs are taxed to the defendant for which execution may issue if necessary.

Enter:

  
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Thomas J. Wright  
Senior Judge

CERTIFICATE OF SERVICE

A true and exact copy of the foregoing Order has been served upon the following persons via email at the email addresses listed:

Daniel A. Horwitz, Esq.  
4016 Westlawn Drive  
Nashville, TN 37209  
Daniel.a.horwitz@gmail.com

Jamie R. Hollin, Esq.  
511 Rosebank Avenue  
Nashville, TN 37206  
j.hollin@me.com

Janet M. Kleinfelter, Deputy Attorney General  
Kelly Groover, Assistant Attorney General  
Matthew F. Jones, Assistant Attorney General  
Alexander S. Rieger, Assistant Attorney General  
Office of the Tennessee Attorney General  
P. O. Box 20207  
Nashville, TN 37202-0207

Janet.kleinfelter@ag.tn.gov  
Kelley.groover@ag.tn.gov  
Matt.jones@ag.tn.gov  
Alex.rieger@ag.tn.gov

**RULE 58 CERTIFICATION**

**A Copy of this order has been served by U. S. Mail  
upon all parties or their counsel named above.**

W. H. Neal  
Deputy Clerk and Master  
Chancery Court

July 11, 2022  
Date

On this the 6<sup>th</sup> day of July, 2022.

Schery Collins  
Schery Collins, Judicial Assistant  
to Senior Judge Thomas J. Wright

CERTIFICATE OF SERVICE

I, hereby certify that a true and exact copy of the foregoing was mailed or personally delivered to  
the names + addresses listed above.

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via U. S. Mail, postage prepaid, this the 11<sup>th</sup> day of July, 2022 .

Lionel A. Deal.  
Deputy Clerk & Master