

In his carefully considered report, the special master divided the fee demand into five (5) phases.

Phase One (Start of Case in the District Court Through Dismissal) involved 136.4² hours from which the master recommended a \$9,598.75 reduction, with which the court agrees.

Phase Two (Dismissal Through Discovery) involved 123.7 hours of work from which the master recommended a \$2,362.50 reduction, with which the court agrees.

The special master also recommended a total of \$22,084.11 be deducted relative to the representation of Robert Marmon, with which the court agrees.

The deductions referred to above total \$34,045.36 from what the Neighbors sought.

The special master next considered the remaining three (3) phases.

According to his report, they are as follows:

Phase 3	421.9	Fee Petitions, etc. in District Court				
	407.4	Time directly related to fee issue				
	109.3	Weinstein	\$475./hr.	=	\$51,917.50	
	295.1	Munoz	\$220/hr.	=	\$64,922.00	
	3	Kitchenoff	\$375/hr.	=	\$1,125.00	
					<u>\$117,964.50</u>	
Phase 4	302.3	Total amount litigating Fee Petition in Court of Appeals				
	235.4	Hours spent researching and drafting, preparing fee argument and "moot court" (but omitting time spent re: mediation and logistical tasks in Court of Appeals, appendix, etc.)				
	133.4	Weinstein	\$475/hr.	=	\$63,365.00	
	93.8	Allen	\$300/hr.	=	\$28,140.00	
	8.2	Kitchenoff	\$375/hr.	=	\$3,075.00	
					<u>\$94,580.00</u>	

2. For this figure, see bottom of page 8 of Second Recommended Decision of Special Master.

Phase 5	159.1	Litigating fee petitions in District Court				
	32.7	Of that amount, time spent on bad faith & discovery				
	126.4	Hours spent researching and drafting (omitting time spent re: mediation)				
	59.9	Weinstein	\$475/hr.	=	\$28,452.50	
	65.7	Allen	\$300/hr.	=	\$19,710.00	
	0.8	Rapone				
					\$48,162.50	
Total:	868.8	(407.4 + 302.3 + 32.7 + 126.4)	Total	=	\$260,707.00	

In summation, the special master’s report concludes that a total of 868.8 hours were spent in all aspects of litigation regarding the fee petition, compared to 260.1 hours on substantive defense efforts or merits litigation.

As suggested by earlier comments in this memorandum, the court is fully satisfied with the master’s Report and Recommendation, except with regard to (1) reconciling the disparity between hours spent on the merits litigation with those spent on the fee petition; and (2) the effect of failed settlement efforts.

With regard to the former, a “request for attorney’s fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee.” Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

But in this case, that which should not have resulted, resulted. And, it “resulted” despite the efforts of some of the very best mediators in this circuit. In any other case, the failure of those experienced mediators would have been remarkable, but in this contentious, notorious litigation, it, unfortunately, seemed to be the norm.

Thus, the attorney’s fee issue spawned litigation which, in hours spent, was over three times as long as the merits litigation. To remedy what he thought were

unreasonable expenditures (*See* p. 16, et seq. of Report and Recommendation), the special master opined that a 1/3 reduction, or \$86,033.31 was in order.

The special master did not address the case decided by Judge Norma L. Shapiro of this court. In Whiteland Woods, L.P. v. Township of West Whiteland, 2001 WL 936490 (E.D. Pa.) cited by Barnes in its objections, Judge Shapiro decided that the defendants were entitled only to fees incurred in the merits litigation. Interestingly in that case, the “merit” fees awarded were \$39,544.00. The additional fees and costs incurred in seeking attorney’s fees were \$9,677.55 and were denied.

The rationale of Whiteland Woods could be applied here where the procedural background is similar. The plaintiff in Whiteland Woods had its case dismissed by the District Court and that dismissal affirmed by the Court of Appeals, just as in this case. Thereafter, the Court of Appeals, as in the present case, remanded to the District Court for calculation of the attorney’s fees that should be allowed to defendants.

There is at least one substantial difference, however, in that in Whiteland Woods, the defendants had applied for fees to the Court of Appeals under LAR Misc. 108, and that court thereafter remanded the application to the District Court. Here, Neighbors successfully appealed a decision denying them fees and the case was remanded to determine the amount.

As Judge Shapiro points out in Whiteland Woods,

Defendants do not cite any decision in which a prevailing *defendant* in a civil rights action was awarded “fees on fees.” The rationale for

awarding such fees to prevailing plaintiffs does not apply. *See Chistiansburg*, 434 U.S. at 418-19 (two equitable considerations weighing in a favor of a “fees on fees” award to a prevailing plaintiff do not apply to prevailing defendants: prevailing plaintiffs in Section 1983 actions are vindicating Congressional policy, and fee awards to prevailing plaintiffs are awarded against a violator of federal law); *Bagby v. Beal*, 606 F.2d 411, 416 (3d Cir. 1979)([t]he court should ... evaluate the fee to be awarded in light of the substantive purposes of the civil rights statute relied upon....”).

To give meaning to the admonition of the Supreme Court that attorney’s fees should not result in a second major litigation, and in consideration of Whiteland Woods, I will award reasonable attorney’s fees for the merits litigation as recommended by the master, but substantially reduce fees incurred by attorneys in litigating their fee in this particular case. Even where fees on fees are permitted as in the cases cited by Judge Shapiro, such fees may be awarded if and to the extent that the time spent was reasonably necessary to obtaining a reasonable fee award.

Hours are spent unreasonably in seeking fees if they occurred after unreasonably failed settlement attempts. This case could have been settled as early as late June of 1999 when the parties agreed on an amount but not on other settlement terms. And then, in June of 2001, an agreement was reached on the amount but Neighbors refused to accept certain terms requested by Barnes as part of the settlement. Reasonable people can be of a different mind as to reasonableness of those terms requested by Barnes, but as I view the litigation on the several fronts in this case (including the state litigation), the acceptance of the Barnes proposal had a good practical chance at ending

the litigation once and for all. On balance, I believe the reasonable offer should have been accepted. The refusal increased the second major litigation.

The question remains what fees on fees, if any, should be awarded. In the first instance, it must be noted that all the defendant is entitled to is fees attributable to its defense on the merits. To recover those fees, which I have determined in this case to be \$137,641.64³, it seems as if only a contingency fee of some sort would be reasonable, for it is patently excessive to incur \$260,707.00 in fees to recover \$137,641.64. As I have cited previously in this opinion, the Supreme Court stated that attorney's fees should not result in a second major litigation, and a United States District Court has ruled that no fees on fees should be awarded to defendants. It is the substantial difference between this case and Whiteland Woods (referred to on page 4 of this opinion) that I believe warrants the award of some fees on fees.

One-quarter of the recovery obtained, namely, \$34,410.41, would be a reasonable fee. It would give appropriate deference to the Supreme Court admonishment regarding second major litigation, and in that fraction, rather than 1/3 for example, would

3. Figure computed as follows:

Total fee requested		\$432,394.00
Reductions (see page 2)	\$ 34,045.36	
Fees on fees (see page 3)	\$260,707.00	
		<u>\$294,752.36</u>
Merits Fee		\$137,641.64

take into account the impact of failed settlement negotiations as I viewed them (see pp. 5-6).

Based upon the foregoing, the Report and Recommendation of the special master is accepted in every respect except for his recommendation for fees directly related to the fee issue.

An order follows.

