

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT B. SKLAROFF, M.D. : CIVIL ACTION
Plaintiff :
 :
v. :
 :
ALLEGHENY HEALTH EDUCATION : NO. 95-4748
RESEARCH FOUNDATION, et al., :
Defendants :

MEMORANDUM AND ORDER

J. M. KELLY, J.

February 2, 1998

Defendants' Petition for Costs and Attorneys' Fees Incurred In Connection With Plaintiff's First Appeal and Plaintiff's Motion For Relief From Judgment is presently before the Court. The Defendants seek \$34,914.07 in fees and costs. The Plaintiff filed a response and both parties presented evidence at a hearing. For the reasons stated below, I will grant the petition in part and award the Defendants \$31,311.85 as reasonable attorneys' fees and costs.

BACKGROUND

Plaintiff Robert B. Sklaroff, M.D., ("Sklaroff") brought this suit against Defendants Allegheny Health Education Research Foundation, Medical College Hospitals and fifteen individuals. Sklaroff claimed that the Defendants violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, by abusing their peer review system and wrongfully suspending his hospital admitting privileges.

The factual background of this case is set forth in detail in my July 8, 1996 Memorandum and Order. In that Order, I granted Defendants' motion for summary judgment. I found that the Defendants were immune from liability under the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C. § 11111. I also found that the Plaintiff did not produce evidence from which a reasonable jury could find that the Defendants engaged in a pattern of racketeering activity.

The Defendants then sought an award of attorneys' fees and costs under § 11113 of HCQIA. After reviewing the Report and Recommendation of Magistrate Judge Thomas J. Rueter, I awarded \$146,393.24 in attorneys' fees and costs.

Sklaroff appealed the summary judgment order to the United States Court of Appeals for the Third Circuit. The Court of Appeals affirmed by way of a judgment order. Sklaroff subsequently filed a "Motion for Relief from Judgment Under Fed. R. Civ. P. 60(b)." That motion was denied. The Defendants now seek \$33,282.22 for attorneys' fees and costs incurred in defending against Sklaroff's first appeal and Rule 60(b) motion.

DISCUSSION

I. Entitlement to Fees

The Defendants seek reimbursement of their attorneys' fees and costs under the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C. § 11113, and Rule 54(d) of the Federal Rules of Civil Procedure. The HCQIA was enacted to encourage peer

review in the medical profession. 42 U.S.C. § 11101(a). Consistent with that goal, § 11113 provides for payment of attorneys' fees to parties forced to defend against frivolous claims.¹ To recover under § 11113, "defendants must establish (1) that they are among the persons covered by § 11111; (2) that the standards set forth in § 11112(a) were followed; (3) that they substantially prevailed; and (4) that [plaintiff's] claims or conduct during the litigation were frivolous, unreasonable, without foundation or in bad faith." Matthews v. Lancaster Gen. Hosp., 87 F.3d 624, 642 (3d Cir. 1996) (quoting Wei v. Bodner, 1992 WL 165860, at *2 (D.N.J. April 8, 1992), aff'd without op., 983 F.3d 1054 (3d Cir. 1992)).

Sklaroff could not reasonably dispute the first three elements. He argues that the Defendants are not entitled to an award of fees because his appeal and Rule 60(b) motion were not "frivolous, unreasonable, without foundation or in bad faith."

¹ The HCQIA provides:

§ 11113 Payment of reasonable attorneys' fees and costs in defense of suit

In any suit brought against a defendant, to the extent that a defendant has met the standards set forth under section 11112(a) of this title and the defendant substantially prevails, the court shall, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith.

The Defendants are entitled to recover all of the reasonable expenses that they incurred defending against Sklaroff's claim. When a party is forced to defend against a baseless claim arising out of a peer review action, § 11113 instructs courts to "award the cost of the suit attributable to such claim." As stated in my previous order awarding fees, Sklaroff's claim was baseless. The expense of defending against the appeal and Rule 60(b) motion are costs attributable to Sklaroff's baseless claim.

In addition, the appeal and Rule 60(b) motion were frivolous. The appeal did not raise any significant issues. The Rule 60(b) motion demonstrates that the Plaintiff knew that there were no grounds for overturning the judgment in this case. The motion was motivated by concern that the Defendants would use the Court's immunity ruling offensively in a collateral state court proceeding. Sklaroff did not, however, have a reasonable basis for challenging the conclusion that there was insufficient evidence to support a RICO claim. Sklaroff did not claim that he was entitled to relief from judgment, instead he sought a revision of the grounds for the decision. Thus, there was no basis for the Rule 60(b) motion.

Sklaroff also contends that the district court does not have jurisdiction to award fees for a frivolous appeal. Federal Rule of Appellate Procedure 38 authorizes the Court of Appeals to award damages and costs for a frivolous appeal. Sklaroff argues

that Rule 38 forecloses the district court from awarding fees for a frivolous appeal.

In general, when a statute authorizes the district court to award costs and attorneys' fees, the court is also authorized to award costs and fees incurred on appeal. Suzuki v. Yuen, 678 F.2d 761, 762 (9th Cir. 1982) (district court may award fees for appellate work after hearing evidence on value of services); Souza v. Southworth, 564 F.2d 609, 613-14 (1st Cir. 1977); cf. Yaron v. Township of Northampton, 963 F.2d 33, 37 (3d Cir. 1992) (district court may award fees for appellate work provided Court of Appeals did not expressly reject fee request).

In addition, HCQIA specifically instructs the court to "award the cost of the suit attributable" to frivolous claims. The award of all of a defendants' reasonable expenses, including the costs of an appeal, is consistent with the goal of protecting professionals who participate in peer review from improper litigation expenses. The Defendants are entitled to recover all of their reasonable attorneys' fees and costs incurred in defending against Sklaroff's appeal and motion for relief from judgment.

II. Reasonable Attorneys' Fees and Costs

A. Attorneys' Fees

"The party seeking attorneys' fees has the burden to prove that its request . . . is reasonable." Rode v. Dellaciprete, 892 F.2d 1177, 1183 (3d Cir. 1990). The opposing party must challenge the requested fee with specificity. Bell v. United Princeton Properties, 884 F.2d 713, 719-20 (3d Cir. 1989). The court may not reduce the fee amount sua sponte. Id. Once the party opposing the fee request objects, however, the court "has a great deal of discretion to adjust the fee award in light of those objections." Rode, 892 F.2d at 1183. (citing Bell, 884 F.2d at 721).

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley, 461 U.S. at 433. The result, known as the "lodestar," is presumed to represent a reasonable award of attorney's fees. Id.

The Defendants claim the following:

	<u>Rate</u>	<u>Hours</u>	<u>Total Fee</u>
D. Bruton	\$325	34.9	\$11,342.50
L. Nathanson	\$200	97.3	\$19,460.00
K. Packel	\$85	6.7	\$569.50
			\$31,372.00

1. Hourly Rates

"[A] reasonable hourly rate is calculated according to the prevailing market rates in the community." Smith v. Philadelphia Hous. Auth., 107 F.3d 223, 225 (3d Cir. 1997). Defendants' counsel submitted affidavits in which they and a non-party attorney attested that the rates submitted are consistent with market rates in the Philadelphia area. The Plaintiff did not object to the claimed hourly rates. Therefore, Defendants' counsel's hourly billing rates are approved.

2. Hours Expended

A party is entitled to compensation for work that is "useful and of a type ordinarily necessary to secure the final result obtained." Pennsylvania v. Delaware Valley Citizens' Council, 478 U.S. 546, 561 (1986). "Hours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

Sklaroff's first objection to the Defendants' hours is that more than half of the time billed for the appeal was spent responding to Sklaroff's motions. Sklaroff's objection is difficult to understand. He filed an improper appendix, and several motions to supplement the appendix.² The Defendants were obliged to respond. The Defendants are entitled to reimbursement

² Sklaroff was represented by counsel until shortly before his first appeal. He pursued his appeal pro se. Sometime after the appeal, Sklaroff retained new counsel.

for the time that their attorneys spent responding to Sklaroff's motions.

Sklaroff also objects, in general, to having to pay for two lawyers to write and edit an appellate brief. Again, Sklaroff's objection is difficult to understand. The practice of having a junior attorney draft a brief, under the supervision of a senior attorney, is a reasonable and well accepted way to practice law.

Sklaroff also objects to the total number of hours billed for drafting Defendants' appellate brief, because significant portions were copied from Defendants' summary judgment briefs. After this objection was raised at the hearing, the parties stipulated that approximately 18 pages of the appellees brief were copied from their summary judgment briefs. There is certainly nothing wrong with a lawyer building on prior work product. Such prior experience should, however, reduce the number of hours billed.

Defendants' counsel billed 52.3 hours for preparation of their appellate brief. Mr. Bruton billed 13.9 hours at \$325 per hour and Mr. Nathanson billed 38.4 hours at \$200 per hour. The total bill for the brief was \$12,197.50. Considering the fact that Defendants were previously compensated for preparing their summary judgment briefs, and out of an abundance of caution, I will deduct \$4,025.00 (33% of the cost of the appellate brief) from Defendants' fee award.

Considering the above, the lodestar is \$27,347.00. Neither party presented a persuasive reason for adjusting the lodestar. The Defendants are awarded \$27,347.00 as reasonable attorneys' fees.

B. Costs

Defendants seek to recover \$2,666.35 in costs. Sklaroff objected claiming the costs were not properly substantiated. The Defendants subsequently submitted an affidavit which included itemized costs. The Defendants seek compensation for duplicating, delivery, computer research and postage costs.

The Defendants claim \$279 for duplicating, delivery and computer research charges incurred from February through May of 1997. According to the records submitted, however, defense counsel did not bill any attorney time during this period. This inconsistency is troubling. I find that these costs were not properly substantiated. The remaining expenses, totaling \$2387.35 are reasonable and are approved.

III. Fee Petition

The Defendants request \$1,577.50 for attorneys' fees incurred to prepare this fee petition.³ Reasonable attorney time

³ Defendants claim they are entitled to \$1,631.85 for attorneys' fees and costs. Their supporting affidavit only details \$1,577.50 in attorneys' fees.

spent preparing a fee petition is compensable. In re Fine Paper Antitrust Litigation, 751 F.2d 562, 595 n. 26 (3d Cir. 1984).

The time entries submitted are reasonable. Defendants are awarded an additional \$1,577.50.

CONCLUSION

The Defendants are entitled to compensation for reasonable attorneys' fees and costs incurred in defending against Dr. Sklaroff's claim. Dr. Sklaroff's appeal and Rule 60(b) motion are part of these expenses. The Defendants are entitled to \$27,347.00 for attorneys' fees; \$2387.35 for costs; and \$1,577.50 for attorneys fees incurred preparing this fee petition, for a total award of \$31,311.85.

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ALLEGHENY HEALTH EDUCATION	:	NO. 95-4748
RESEARCH FOUNDATION, et al.,	:	
Defendants	:	

ORDER

And NOW, this Day of February, 1998, upon consideration of Defendants' Petition for Costs and Attorneys' Fees Incurred In Connection With Plaintiff's First Appeal and Plaintiff's Motion For Relief From Judgment, and all responses thereto, it is hereby ORDERED that Defendants' motion is granted and Judgment is entered in favor of Defendants and against Plaintiff Robert B. Sklaroff, M.D. in the amount of \$31,311.85.

BY THE COURT:

JAMES MCGIRR KELLY, J.