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Small verdict, large attorney fee award: A look at prevailing attorney fees in federal civil rights cases

By Michael D. Bersani, Hervas, Condon & Bersani, P.C., Itasca, Illinois

As municipal lawyers know, prevailing plaintiffs in federal civil rights actions brought under 42 U.S.C. § 1983 are entitled to seek reasonable attorney fees pursuant to 42 U.S.C. § 1988. What is reasonable is often fiercely litigated following an adverse verdict. A recent Seventh Circuit decision exemplifies how even a small verdict can result in a relatively large attorney fee award.

In *Montanez v. Simon*, 755 F.3d 547 (7th Cir. 2014), the plaintiff Andy Montanez was arrested for drinking alcohol on a public way by City of Chicago Officers Vincent Fico and James Simon. While being transported to the police station, Montanez got into a verbal altercation with the officers. Officer Fico allegedly punched Montanez in the face in the squad car. Plaintiff subsequently sued Fico for excessive use of force and Officer Simon for failure to intervene. A federal jury returned a verdict in favor of the plaintiff against Fico but against plaintiff in favor of Simon. The jury awarded plaintiff $1,000 in compensatory damages and $1,000 in punitive damages. The plaintiff's attorney submitted a post-judgment petition for attorney fees in the amount of $426,380. The district court ultimately reduced the attorney fee award to $109,000.

The 7th Circuit affirmed the fee award. The Court began its analysis by reaffirming the wide deference given district courts in assessing fee petitions filed by prevailing parties under § 1988, particularly when the prevailing party is only

Continued on page 2

Does your park provide enough notice to you of the intended users?

By John Redlingshafer – Peoria and Chicago Offices of Heyl, Royster, Voelker & Allen, P.C.

Do you have a park district as a client? How about a municipality or school district that allows the public to use its playground equipment? If the answer is "yes" to any of these questions, be sure you and your clients are aware of a recent decision from the Illinois Appellate Court.

In *Bowman v. the Chicago Park District*, Plaintiff's 13-year-old daughter was injured while playing on a slide located at one of the Park District's playgrounds. In ruling for the Park District on its motion for summary judgment, the trial court determined the child was acting in violation of a Park District ordinance, and therefore, not the intended user of the slide. The ordinance at issue stated:

> No person the age of twelve years or older shall use playground equipment designed for persons under the age of twelve years.

In reviewing the record, the Appellate Court reversed and remanded the case to the trial court because it was not clear the Park District had taken the steps to notify the child that she was

Continued on page 3

INSIDE

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Continued from page 1

partially successful. The district court had properly used the "lodestar" method, i.e., multiplying the number of hours reasonably expended by a reasonably hourly rate. The district court had "meticulously scrutinized" the fee petition line-by-line and struck entries that were unnecessary, duplicative, excessive or improperly documented. The district court ultimately reduced the total number of hours billed from 1,021 to 869. The district court also reduced the requested hourly billing rates. Partners with 9 to 13 years experience sought rates from $400 to $450 per hour. The district court found that these rates were not justified when compared to qualified lawyers practicing § 1983 litigation in the Chicago market. The district court found that $385 per hour for the two lead attorneys and $175 per hour for second and third year associates were more reasonable. Thus, the district court adjusted the lodestar fee to $217,110.50.

While the lodestar amount is "presumptively reasonable," a district court may adjust the fee according to factors announced in *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). The most important factor is the degree of success achieved by the prevailing party. A plaintiff who achieves excellent results should receive the entire lodestar amount, but for one who only partially succeeds, the lodestar amount may be excessive. When the court cannot distinguish between work performed on successful versus unsuccessful claims, an "across the board" reduction is sanctioned. Finding that the plaintiff had lost 4 of his 6 claims and was awarded only $2,000 by the jury, the Seventh Circuit in *Montanez* affirmed the district court's reduction of the lodestar fee by 50%. The final amount awarded was $108,350.87.

At first blush, the approval of a six-figure attorney fee award based on a $2,000 jury verdict appears outrageous. Is this an outlier because of the how the case was litigated; or, is it the norm? After all, the United States Supreme Court held in *Farrar v. Hobby*, 506 U.S. 103 (1992), held that a $1 nominal damages award should result in no fee at all. *See, also, Frizell v. Szabo*, 647 F.3d 698, 702 (7th Cir. 2011) ($1 nominal damages award resulted in no fee); *Aponte v. City of Chicago*, 728 F.3d 724 (7th Cir. 2013) (award of $100 against one of four police defendants resulted in zero fees). However, earlier this year in *Richardson v. City of Chicago*, 740 F.3d 1099 (7th Cir. 2014), the Seventh Circuit approved an 80% reduction to a lodestar fee where a plaintiff was awarded $1 nominal compensatory damages and $3,000 in punitive damages. The plaintiff in *Richardson* had asked the jury for $300,000 and submitted a fee petition for $675,000. After applying the 80% reduction, the Court still approved a fee award in the amount of $123,000.

The end results in *Montanez* and *Richardson* are really not surprising. A large fee award vis a vis a small verdict reflects the accepted notion in the Seventh Circuit that there is no strict proportionality rule when it comes to the application of fee shifting statutes. *See Anderson v. AB Painting & Sandblasting, Inc.*, 578 F.3d 542, 545 (7th Cir. 2009). The intent of such statutes (such as § 1988) is to punish violations of certain statutes – and not just large violations. *Id.* The purpose is to encourage the filing of meritorious claims that might not otherwise be brought because lawyers under the "American Rule" (i.e., 1/3 contingency agreement) might not find them financially worthy. *Id.* As stated by the Seventh Circuit in *Anderson* "fee-shifting helps to discourage petty tyranny." *Id.* Thus, the court's inquiry in analyzing a fee petition is not whether "a small claim was 'worth' pursuing at great cost." *Id.* at 546. "If a party prevails, and the damages are not nominal, then Congress has already determined that the claim was worth bringing. The court must then assume the absolute necessity of achieving that particular result and limit itself to determining whether the hours spent were a reasonable means to that necessary end." *Id.*

The lack of private restraint in litigating a relatively straightforward case obviously impacted the decision in *Montanez*. But, that door swung both ways. The defense reportedly did little to mitigate the potential for a large fee award, engaging in what the Seventh Circuit described as a "scorched earth defense strategy." As commented by the Court, "[t]his simple civil rights claim, overlitigated by both sides, took on all the protracted complexity of high stakes commercial litigation, replete with hard fought discovery battles and a mock trial." The Court also admonished trial judges to "make judicious use of [their] case management authority during the litigation [which] can also help check overlawyering." ■

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Continued from page 1

not the intended user. Instead, it felt the determinative issues were whether the slide's deteriorating condition was open and obvious and whether the Park District's failure to repair the slide after learning of its condition amounted to willful and wanton conduct.

Plaintiff's daughter testified that she was at the park with her brother and friends, most of whom were younger than 13. She went up the slide while playing tag and when she descended, her foot got caught in a hole, causing a fractured ankle that required surgery.

Numerous witnesses offered testimony as to condition of the slide and their communications with the Park District. For example, a resident who leaved near the park offered testimony that he observed the damaged slide for roughly a year and half. He noted it was "cracked really bad" and was directed to contact the Park District to report the slide's condition.

On appeal, the Park District reiterated its argument that the girl was not the intended user of the slide and was therefore protected by the Illinois Local Governmental and Governmental Employees Tort Immunity Act. To support its position, the Park District cited two different decisions where the Appellate Court previously ruled a public body was not liable when adults suffered injuries on thoroughfares not designed for their use.

In response, the *Bowman* Court determined that the Park District did not "cite a case where a *child* was charged with the responsibility of knowing municipal ordinances, without a sign or other notice." ¶55 (emphasis added). The Court extended that belief to that fact that nothing in the record actually showed *adults* could have known the Park District had designed this particular park for a particular age group. ¶56 (emphasis added). The Court acknowledged the language of the Park District's ordinance prohibited people over the age of 12 from playing on playgrounds "designed" for children under 12, but nothing in its Code stated "*this particular park* was designated for children under age 12 or that this slide was designed for children under age 12" or any description the Park District's website made any mention of an appropriate age range. *Id* (emphasis added).

The Court also noted that no signs were present on the playground nor were there any other indications this park was meant for children under 12 years old. All of these facts taken together led the Court to conclude that the Park District did not take the appropriate measures to prevent children age 12 and older from using the park equipment. In its most poignant quote of the opinion, the Court stated:

> Playgrounds are designed for children. What would prompt a 13-year-old-child to observe a slide and think, "am I really the intended user of this slide?"

Using the *Bowman* opinion's conclusions, the practitioner should talk with its clients about what steps it has taken to inform the public about the intended users of its park equipment. Specifically:

- Do you have any ordinances governing the use of your park and/or playgrounds?
- Do they clearly state who are the intended user(s) of your park?
- Do you have ordinances with respect to each park (if you have more than one)?
- Were the ordinances published and/or made available to the public (perhaps on a Web site)?
- Are there signs posted at the park about intended users?
- If so, what do those signs say about the intended users?
- Do you have an inspection program in place?
- How often does an inspection of equipment and grounds take place?
- How is the governing board notified of any defects or problems with the equipment?
- Is your contact information made available to the public (perhaps on a sign) so they can reach you to report any problems with equipment, etc.?
- What sort of insurance coverage do you currently have on your park? Is it sufficient to cover the injuries that happened in this case?

The case of *Artenia Bowman v. the Chicago Park District*, is found at 2014 IL App (1st) 132122. ■

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Office
Illinois Bar Center
424 S. Second Street
Springfield, IL 62701
Phones: 217-525-1760 OR 800-252-8908
www.isba.org

Editor
John H. Brechin
619 S. Addison Rd.
Addison, IL 60101-4655

Managing Editor/ Production
Katie Underwood
kunderwood@isba.org

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Illinois Bar Center
Springfield, Illinois 62701-1779

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