IN THE SUPREME COURT OF OHIO

CLEVELAND CONSTRUCTION, INC.,	:	CASE NO. 2007-0114
	:	
Plaintiff-Appellee,	:	
	:	On Appeal from the
vs.	:	Hamilton County Court Of Appeals
	:	First Appellate District
	:	
CITY OF CINCINNATI,	:	Appeal No. C050749
	:	Appeal No. C050779
Defendant-Appellant.	:	Appeal No. C050888
	:	(Consolidated)

MEMORANDUM OF APPELLEE CLEVELAND CONSTRUCTION INC. IN RESPONSE TO CITY'S MOTION TO STAY LOWER COURT'S DECISIONS

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SUPREME COURT OF OHIO

MEMORANDUM OF APPELLEE CLEVELAND CONSTRUCTION INC.
IN RESPONSE TO CITY'S MOTION TO STAY LOWER COURT'S DECISIONS

While Cleveland Construction, Inc. understands that, under Ohio law, the City is entitled to a stay of the lower courts' decisions in this case, Cleveland finds it necessary to respond to the mischaracterizations of the lower courts' decisions concerning the award of Cleveland's attorney fees under 42 U.S.C. Section 1988, an issue the City did not attempt to appeal to this Court.

The City quotes from the trial court's entry dated July 13, 2005 as follows: "The court further finds that Cleveland is the prevailing party on its Section 1983 due process claim and on its reasonable attorney's fee under 42 USC Section 1988."[1] The City then quotes from the Court of Appeals' decision saying that "Cleveland successfully challenged the unconstitutional race- and gender- based provisions of the City's SBE program."[2] Therefore, according to the City, "the Court of Appeals concluded that Cleveland Construction was the prevailing party for an award of fees for a different reason than the trial court."[3]

The City's position grossly mischaracterizes the full basis on which the trial court awarded fees pursuant to 42 U.S.C. Section 1988. On page 18 of its July 13, 2005 Entry,[4] the trial court's heading for the third section of its decision stated, in relevant part:

> III. Having prevailed on its abuse of discretion/due process Section 1983 claims ***and*** on its claim that specific portions of the City's SBE Rules and Guidelines are unconstitutional on their face, Cleveland is entitled to its reasonable attorney's fees under 42 USC Section 1988. ...

In that third section, the trial court stated that Cleveland was entitled to a declaration as to the meaning and application of the City's Municipal Code section 321-37(c),[5] and a declaration

[1] City's Motion to Stay, p. 1, emphasis in City's motion.
[2] *Id.*, emphasis in City's Motion.
[3] *Id.*
[4] Entry, July 13, 2005, attached to City's Motion to Stay (emphasis added).
[5] *Id.*, p. 18.

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that "Cleveland is further entitled to a declaration that the conduct of the City in ignoring the cost cap deprived Cleveland of a property interest without due process of law."[6] The trial court then held that Cleveland was entitled to a "declaration that the City's SBE Rules and Guidelines in their current form contain certain race and sex based classifications" which "violate the equal protection clause of the U.S. Constitution."[7] The trial court then enjoined the City from applying the specified SBE Rules and Guidelines in the future.[8]

Likewise, the Court of Appeals found that "the city's failure to follow the directive of its own ordinance constituted an abuse of discretion that resulted in a deprivation of Cleveland's property interest in the contract award"[9] and that the SBE Program provisions were facially unconstitutional under the equal protection clause.[10] The Court recognized that the trial court "entered judgment in favor of Cleveland as the prevailing party, and against the city, for Cleveland's reasonable attorney fees and costs pursuant to Section 1988, Title 42, U.S. Code."[11] The Court analyzed the City's contention "that Cleveland was not entitled to the award because it was not a prevailing party"[12] and determined that "the trial court did not abuse its discretion in ordering attorney fees."[13] The Court only analyzed Cleveland's prevailing party status based on Cleveland's equal protection claim because Cleveland's judgment on that claim "had a distinct effect on the city's behavior."[14] At that point, there was no requirement to discuss Cleveland's additional basis for receiving an award of fees under 42 U.S.C. Section 1988. However, it is

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[6] *Id.*, p. 19.
[7] *Id.*
[8] *Id.*
[9] *Cleveland Constr. Inc. v. Cincinnati*, 169 Ohio App.3d 627, 640, 864 N.E.2d 116, 2006-Ohio-6452 ¶38.
[10] *Id.*, 2006-Ohio-6452 ¶49.
[11] *Id.*, 2006-Ohio-6452 ¶19.
[12] *Id.*, 2006-Ohio-6452 ¶50.
[13] *Id.*, 2006-Ohio-6452 ¶53.
[14] *Id.*

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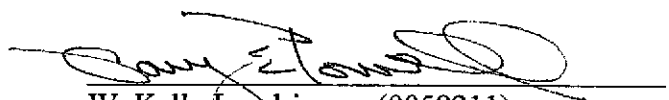
abundantly clear from any reading of the two lower court decisions that Cleveland prevailed on both its due process and equal protection claims, thereby establishing the bases for the award of attorney fees under 42 U.S.C. Section 1988.

Respectfully submitted,



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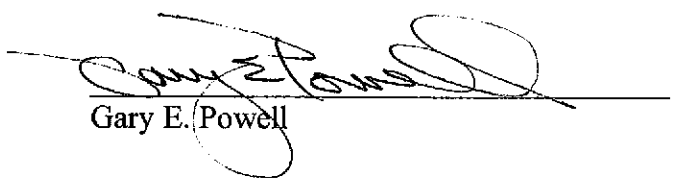
CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served via hand-delivery this 13th of June 2007 to the individuals listed below.



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