

IN THE SUPREME COURT OF OHIO

Kenneth D. McFadden,
Appellant,

vs.

Cleveland State University,
Appellee.

Case No. 2007-0705

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

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SUPREME COURT OF OHIO

APPELLANT'S MOTION FOR ATTORNEY'S FEES

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APPELLANT'S MOTION FOR ATTORNEY'S FEES

NOW COMES Appellant, Kenneth D. McFadden, by and through his undersigned counsel and hereby moves this Honorable Court for an award of attorney's fees pursuant to R.C. 2335.39(B)(1) in connection with this Court's decision in *McFadden v. Cleveland State Univ.*, Slip Opinion No. 2008-Ohio-4914, decided on October 2, 2008. This motion is filed timely as it is being filed within thirty days of this Court's entry of judgment in the appeal.

Revised Code Section 2335.39, Ohio's version of the Federal Equal Access to Justice Act, serves to allow impecunious private parties, like Appellant Kenneth D. McFadden here, to litigate against governmental entities to effectuate a change in the law by relieving those parties of concern about incurring substantial legal fees to do so. *Haghighi v. Moody*, 152 Ohio App.3d 600, 2003-Ohio-2203, at ¶10; *Collyer v. Broadview Dev. Ctr.* (1992), 81 Ohio App.3d 445, 448. Revised Code Section 2335.39(B)(1) provides, in pertinent part, that in an "appeal of a judgment in a civil action, to which the state is a party, * * * the prevailing eligible party is entitled, upon filing a motion in accordance with this division, to compensation for fees incurred by that party in connection with the action or appeal." (Emphasis added).

Here, Appellant Kenneth D. McFadden "is entitled" to an award of attorney's fees in connection with the successful prosecution of the appeal in this matter, which established that en banc proceedings are constitutional.¹ A party is considered to be a prevailing party in an appeal

¹ McFadden's successful pursuit of this appeal resulted in a clear public benefit – upholding en banc review so appellate courts can resolve intra-district conflicts which provides clarity and stability to the law for the bench, bar and public in general so that, as this Court noted in its opinion, legal disputes can be resolved justly. *McFadden*, supra, at ¶15. Such circumstances make an award of attorney's fees to the prevailing party appropriate. Compare, *Billington v. Cotner* (1974), 37 Ohio St. 17, paragraph one of the syllabus.

by application of R.C. 2335.39 even if that party does not “achieve total victory” in his or her case. *Korn v. Ohio State Medical Bd.* (1991), 71 Ohio App.3d 483, 487-488. Revised Code Section 2335.39 contemplates that the State will be liable for an award of attorney’s fees even if the legal proceedings, here the appeal, had to be initiated because of the State’s conduct that gave rise to the need for litigation. *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St.3d 1, 2002-Ohio-6716, at ¶67.

This motion should be granted for the following reasons:

In accordance with R.C. 2335.39(B)(1)(a), Appellant Kenneth D. McFadden is identified as the party requesting the award of attorney’s fees.

In accordance with R.C. 2335.39(B)(1)(b), Appellant Kenneth D. McFadden is the “prevailing eligible party” as defined by R.C. 2335.39(A)(2) and (5) since he is an individual whose net worth did not exceed one million dollars at the time this action or appeal was filed, and he is a party to this appeal which involves the State of Ohio, by and through Appellee Cleveland State University.² In the absence of an exclusion specified in R.C. 2335.39(A)(2), Appellant Kenneth D. McFadden qualifies as a “prevailing eligible party.” *Cincinnati City School Dist. Bd. of Edn. v. State Bd. of Edn. of Ohio*, 176 Ohio App.3d 678, 2008-Ohio-2845, at ¶12.

In accordance with R.C. 2335.39(B)(1)(c), the State’s position and conduct in this appeal was not “substantially justified.” Despite conceding on the opening page of its Answer Brief (and again at oral argument) that “the Ohio Constitution permits en banc review,” CSU’s brief proceeded to make baseless arguments by outlining what it simply called “countervailing

² See, R.C. 2743.01(A) defining “State” as including all “institutions, and other instrumentalities” of the State of Ohio. See also, R.C. Chapter 3344; *McInstosh v. Univ. of Cincinnati* (1985), 24 Ohio App.3d 116, 118.

arguments” against en banc review. However, adoption of any one of these “countervailing arguments” could not be accomplished without an overruling of this Court’s decision in *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484. Advancing the so-called “countervailing arguments,” CSU knew full well that the standard for overruling precedent could not be met here (and, blatantly, made absolutely no effort to address much less meet this standard). See, *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849. CSU’s other arguments against a reversal and remand (i.e., ultra vires, futility, distinguish *In re J.J.*) were likewise baseless and not substantially justified leading this Court to reject them. *McFadden*, supra, at ¶21.

Bad faith or malice need not be found in order for the Court to determine that the State’s position was not “substantially justified.” *Collyer*, supra, 81 Ohio App.3d at 449. Ultimately, the State has the burden of establishing that its position in the legal proceedings was substantially justified, a burden CSU cannot meet in this case. *State ex rel. R.T.G., Inc.*, supra, at ¶69.

In accordance with R.C. 2335.39(B)(1)(d), the amount of attorney’s fees being sought as an award in this motion is \$43,925.00.

In accordance with R.C. 2335.39(B)(1)(e), undersigned counsel, who is and has been counsel of record for Appellant Kenneth D. McFadden throughout this appeal to this Court, is submitting the attached affidavit with accompanying itemization of all fees being sought as an award in this matter.

WHEREFORE, Appellant Kenneth D. McFadden respectfully requests that this motion be granted and that this Honorable Court award the attorney's fees sought herein pursuant to R.C. 2335.39(B)(1)

Respectfully submitted,



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*Counsel for Appellant, Kenneth D.
McFadden*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Appellant's Motion for Attorney's Fees* was sent by regular U.S. Mail postage pre-paid this 31st day of October, 2008 to the following:

Benjamin C. Mizer, Esq.
Solicitor General
Randall P. Knutti, Esq.
Assistant Attorney General
30 E. Broad Street, 17th Floor
Columbus, OH 43215

Counsel for Appellee, Cleveland State University



Timothy J. Fitzgerald (0042734)

STATE OF OHIO

)

)

SS. AFFIDAVIT

COUNTY OF CUYAHOGA

)

I, TIMOTHY J. FITZGERALD, having been first duly sworn, on oath, according to law, depose and say upon my oath as follows:

1. Affiant is an attorney admitted to the practice of law in the State of Ohio who is the lead attorney representing Appellant Kenneth D. McFadden in the appeal before the Supreme Court of Ohio in the case *Kenneth D. McFadden v. Cleveland State University*, Case No. 2007-0705. I am personally familiar with the factual and legal issues that surround the dispute that is being litigated in these proceedings.

2. I am submitting this affidavit in support of the motion seeking an award of attorney's fees in the above-referenced matter. The itemization detailing the legal services rendered in connection with my handling of the appeal of this matter before the Supreme Court of Ohio is attached hereto as Exhibit "A." The hours reflected on the itemization have been reduced significantly from the hours actually spent researching and preparing the briefs and presenting oral argument of the case to the Supreme Court of Ohio.

3. I have been practicing law for 19 years, and I am rated "AV" by Martindale-Hubbell. I am certified by the Ohio State Bar Association as a specialist in Appellate Law. I am a partner in charge of the Appellate Practice Group at the law firm of Gallagher Sharp, where I spend

approximately 70% of my professional time handling appeals. My \$250.00 hourly rate is on the low end of what is customarily charged by lawyers in Cuyahoga County who have similar skills and experience practicing appellate law.

4. I have considered each of the factors described in Rule 1.5(a) of the Ohio Rules of Professional Conduct in my review and submittal of the attached itemization, and I am of the professional opinion that the hours spent and hourly rate are reasonable and that the work performed was necessary to achieve a successful outcome in this appeal. In view of the results obtained and the circumstances of these efforts as laid out in more detail in the accompanying motion, I submit that the amount of the attorney's fees reflected on the attached is reasonable and should be paid by Appellee Cleveland State University.

FURTHER AFFIANT SAYETH NAUGHT.


TIMOTHY J. FITZGERALD

SWORN TO BEFORE ME and subscribed in my presence this 31st day of October, 2008.


Notary Public

RICHARD C.O. REZIE
Notary Public, State Of Ohio
My Commission Has No Expiration Date
Section 147.01, B.C.

Oct. 30, 2008

Orig. Atty.: TJF

CLIENT NUMBER - 97078

MATTER NUMBER - 116211

FOR PROFESSIONAL SERVICES RENDERED
 THROUGH OCTOBER 31, 2008

KENNETH D. McFADDEN V. CLEVELAND STATE UNIVERSITY

DATE	TMKR	TMKR RATE	HOURS	AMOUNT	DESCRIPTION OF SERVICES RENDERED
4/14/07	TJF	\$250.00	8.00	\$2,400.00	BEGIN WORK ON APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION FOR FILING IN THE OHIO SUPREME COURT AND REVIEW OPINIONS, BRIEFING AND PLEADINGS FROM UNDERLYING APPEAL.
4/16/07	TJF	\$250.00	6.50	\$1,625.00	REFINE ARGUMENTS IN SUPPORT OF APPELLANT'S APPEAL TO THE OHIO SUPREME COURT AND WORK ON MEMORANDUM IN SUPPORT OF JURISDICTION FOR FILING IN THE OHIO SUPREME COURT.
4/17/07	TJF	\$250.00	9.00	\$2,250.00	FURTHER LEGAL RESEARCH REGARDING CONSTITUTIONALITY OF THE EN BANC APPEAL PROCESS AND REVIEW OF LAW JOURNAL ARTICLES REGARDING SAME.
4/18/07	TJF	\$250.00	7.00	\$1,750.00	FURTHER ATTENTION TO RESEARCH REGARDING CONSTITUTIONALITY OF THE EN BANC PROCESS AND THE SUPREME COURT'S IN RE JJ OPINION; WORK ON MEMORANDUM IN SUPPORT OF JURISDICTION.
4/19/07	TJF	\$250.00	6.50	\$1,625.00	FINAL ATTENTION TO MEMORANDUM IN SUPPORT OF JURISDICTION FOR FILING IN THE OHIO SUPREME COURT.
5/8/07	TJF	\$250.00	4.50	\$1,125.00	WORK ON REFINING LEGAL ARGUMENTS REGARDING CONSTITUTIONALITY OF EN BANC PROCESS.
5/14/07	TJF	\$250.00	0.50	\$125.00	REVIEW OF ATTORNEY GENERAL'S WAIVER FILED IN THE SUPREME COURT OF OHIO AND CONSULT WITH CO-COUNSEL [D. NIEMANN] REGARDING SAME.

<u>DATE</u>	<u>TMKR</u>	<u>TMKR RATE</u>	<u>HOURS</u>	<u>AMOUNT</u>	<u>DESCRIPTION OF SERVICES RENDERED</u>
6/20/07	TJF	\$250.00	0.40	\$100.00	ATTENTION TO STATUS OF THE APPEAL TO THE OHIO SUPREME COURT.
8/29/07	TJF	\$250.00	0.80	\$200.00	REVIEW OF SUPREME COURT OF OHIO'S ANNOUNCEMENT REGARDING DENIAL OF JURISDICTION; CORRESPONDENCE TO CO-COUNSEL [D. NIERMANN] REGARDING SAME AND TELEPHONE CONFERENCE WITH MR. NIERMANN REGARDING FILING OF MOTION FOR RECONSIDERATION.
8/30/07	TJF	\$250.00	5.90	\$1,475.00	WORK ON MOTION FOR RECONSIDERATION.
8/31/07	TJF	\$250.00	4.20	\$1,050.00	FURTHER WORK ON MOTION FOR RECONSIDERATION.
9/6/07	TJF	\$250.00	3.50	\$875.00	FURTHER ATTENTION TO AND WORK ON MOTION FOR RECONSIDERATION.
9/7/07	TJF	\$250.00	4.70	\$1,175.00	FINAL ATTENTION TO MOTION FOR RECONSIDERATION.
10/26/07	TJF	\$250.00	0.10	\$25.00	RECEIPT AND REVIEW OF CORRESPONDENCE RECEIVED FROM THE SUPREME COURT REGARDING RECONSIDERATION ENTRY.
10/26/07	TJF	\$250.00	6.70	\$1,675.00	BEGIN WORK ON SUPREME COURT MERIT BRIEF.
10/29/07	TJF	\$250.00	5.00	\$1,250.00	CONTINUED WORK ON SUPREME COURT MERIT BRIEF.
11/13/07	TJF	\$250.00	0.10	\$25.00	TELEPHONE CONFERENCES WITH CLERKS OF THE OHIO SUPREME COURT AND THE TENTH APPELLATE DISTRICT REGARDING FILING OF THE RECORD.
11/15/07	TJF	\$250.00	0.20	\$50.00	ATTENTION TO NOTICE REGARDING FILING OF THE RECORD IN THE SUPREME COURT OF OHIO.
11/16/07	TJF	\$250.00	0.40	\$100.00	PREPARATION OF CORRESPONDENCE TO CLIENT REGARDING STRUCTURING OF LEGAL ARGUMENTS FOR APPEAL IN THE OHIO SUPREME COURT.
12/6/07	TJF	\$250.00	4.80	\$1,200.00	RESEARCH HISTORICAL BACKGROUND OF THE 3-JUDGE PANEL REQUIREMENT TO DECIDE APPEALS.
12/17/07	TJF	\$250.00	0.10	\$25.00	RECEIPT AND REVIEW OF CORRESPONDENCE FROM THE COURT REGARDING NOTICE OF APPEARANCE OF COUNSEL FOR DEFENDANT-APPELLEE CLEVELAND STATE UNIVERSITY.

<u>DATE</u>	<u>TMKR</u>	<u>TMKR RATE</u>	<u>HOURS</u>	<u>AMOUNT</u>	<u>DESCRIPTION OF SERVICES RENDERED</u>
12/18/07	TJF	\$250.00	0.80	\$200.00	WORK ON STIPULATION FOR EXTENSION OF TIME TO FILE MERIT BRIEF AND SUPPLEMENT; CORRESPONDENCE WITH SOLICITOR GENERAL/ATTORNEY GENERAL [B. MIZER] REGARDING SAME; ATTENTION TO FAX FILING SAME WITH THE CLERK OF THE OHIO SUPREME COURT; CORRESPONDENCE SERVING COUNSEL.
1/7/08	TJF	\$250.00	2.30	\$575.00	CONTINUED WORK ON APPELLANT'S MERIT BRIEF FOR FILING IN THE SUPREME COURT OF OHIO; ATTENTION TO LEGAL RESEARCH REGARDING RULES FOR CONSTITUTIONAL INTERPRETATION.
1/7/08	TJF	\$250.00	2.50	\$625.00	COMPILE AND PREPARE INDEX FOR SUPPLEMENT TO THE APPELLANT'S MERIT BRIEF TO BE FILED IN THE OHIO SUPREME COURT.
1/8/08	TJF	\$250.00	5.30	\$1,325.00	WORK ON OHIO SUPREME COURT MERIT BRIEF.
1/9/08	TJF	\$250.00	8.50	\$2,125.00	FURTHER WORK ON MERIT BRIEF TO BE FILED IN THE OHIO SUPREME COURT; RESEARCH HISTORICAL BACKGROUND TO ADOPTION OF SECTION 3(A), ARTICLE IV TO THE OHIO CONSTITUTION.
1/10/08	TJF	\$250.00	6.00	\$1,500.00	WORK ON MERIT BRIEF FOR FILING IN THE OHIO SUPREME COURT; RESEARCH FEDERAL CASE AUTHORITY REGARDING ALLOWING EN BANC REVIEW IN CIRCUIT COURTS OF APPEAL.
1/11/08	TJF	\$250.00	4.50	\$1,125.00	CONTINUED WORK ON MERIT BRIEF FOR FILING IN THE OHIO SUPREME COURT; PREPARE APPENDIX AND SUPPLEMENT TO MERIT BRIEF; DRAFT FACTUAL STATEMENT AND DISCUSSION OF INTRA-DISTRICT SPLIT BETWEEN SENEGAL AND McCOY CASES REGARDING STATUTE OF LIMITATIONS FOR RACE DISCRIMINATION CLAIMS; CORRESPONDENCE TO CO-COUNSEL [D. NIERMANN] FORWARDING DRAFT OF BRIEF.
1/13/08	TJF	\$250.00	6.00	\$1,500.00	FINAL ATTENTION TO OPENING MERIT BRIEF TO BE FILED IN THE OHIO SUPREME COURT.
1/14/08	TJF	\$250.00	0.70	\$175.00	ATTENTION TO SERVING MERIT BRIEF AND SUPPLEMENT TO BRIEF TO OPPOSING COUNSEL; CORRESPONDENCE WITH CLIENT FORWARDING SAME.

<u>DATE</u>	<u>TMKR</u>	<u>TMKR RATE</u>	<u>HOURS</u>	<u>AMOUNT</u>	<u>DESCRIPTION OF SERVICES RENDERED</u>
2/13/08	TJF	\$250.00	1.50	\$375.00	REVIEW AND ANALYSIS OF APPELLEE CLEVELAND STATE UNIVERSITY'S MERIT BRIEF FILED WITH THE SUPREME COURT OF OHIO.
2/26/08	TJF	\$250.00	2.60	\$650.00	CONDUCT LEGAL RESEARCH TO REBUT ARGUMENT RAISED REGARDING COURTS ACTING ULTRA VIRES IN CONDUCTING EN BANC REVIEW WITHOUT AN APPELLATE RULE BEING IN PLACE.
2/26/08	TJF	\$250.00	3.10	\$775.00	LEGAL RESEARCH REGARDING VESTED RIGHT TO CAUSE OF ACTION AND RETROACTIVELY SHORTENING THE STATUTE OF LIMITATIONS TO EXTINGUISH CLAIM.
2/26/08	TJF	\$250.00	1.50	\$375.00	LEGAL RESEARCH ISSUE OF OVERRULING SUPREME COURT PRECEDENT PER GALATIS CASE.
2/28/08	TJF	\$250.00	5.20	\$1,300.00	WORK ON REPLY BRIEF FOR FILING IN THE OHIO SUPREME COURT.
2/28/08	TJF	\$250.00	0.10	\$25.00	RECEIPT OF NOTICE REGARDING ORAL ARGUMENT IN THE OHIO SUPREME COURT SCHEDULED.
2/29/08	TJF	\$250.00	4.00	\$1,000.00	WORK ON REPLY BRIEF FOR FILING IN THE OHIO SUPREME COURT.
3/3/08	TJF	\$250.00	5.50	\$1,375.00	FURTHER WORK ON REPLY BRIEF.
3/4/08	TJF	\$250.00	6.00	\$1,500.00	FINAL ATTENTION TO REPLY BRIEF AND FILING SAME IN THE OHIO SUPREME COURT.
3/7/08	TJF	\$250.00	0.20	\$50.00	PREPARATION OF CORRESPONDENCE TO CLIENT REGARDING ORAL ARGUMENT IN THE OHIO SUPREME COURT ON 4/23/08.
4/3/08	TJF	\$250.00	4.00	\$1,000.00	BEGIN WORK ON ORAL ARGUMENT OUTLINE AND REVIEW OF MERIT BRIEFS PREPARATORY THERETO.
4/9/08	TJF	\$250.00	3.80	\$950.00	PREPARATION FOR ORAL ARGUMENT IN THE COURT OF APPEALS.
4/16/08	TJF	\$250.00	1.20	\$300.00	FURTHER WORK IN PREPARATION FOR ORAL ARGUMENT IN THE OHIO SUPREME COURT.
4/21/08	TJF	\$250.00	4.70	\$1,175.00	CONTINUED PREPARATION FOR ORAL ARGUMENT IN THE OHIO SUPREME COURT AND REVISE ORAL ARGUMENT OUTLINE.
4/22/08	TJF	\$250.00	3.30	\$825.00	FURTHER PREPARATION FOR ORAL ARGUMENT IN THE OHIO SUPREME COURT.

<u>DATE</u>	<u>TMKR</u>	<u>TMKR RATE</u>	<u>HOURS</u>	<u>AMOUNT</u>	<u>DESCRIPTION OF SERVICES RENDERED</u>
4/22/08	TJF	\$250.00	2.50	\$625.00	TRAVEL TO COLUMBUS OHIO FOR ORAL ARGUMENT IN THE OHIO SUPREME COURT.
4/23/08	TJF	\$250.00	2.60	\$650.00	FINAL PREPARATION FOR ORAL ARGUMENT IN THE OHIO SUPREME COURT.
4/23/08	TJF	\$250.00	1.40	\$350.00	IN COURT FOR PRESENTATION OF ORAL ARGUMENT TO THE OHIO SUPREME COURT. CONFER AFTERWARD WITH CO-COUNSEL [D. NIERMANN] AND CLIENT [K. McFADDEN] TO DISCUSS SAME.
4/23/08	TJF	\$250.00	2.50	\$625.00	RETURN TRAVEL FROM COLUMBUS, OHIO FOLLOWING PRESENTATION OF ORAL ARGUMENT TO THE OHIO SUPREME COURT.
10/6/08	TJF	\$250.00	2.90	\$725.00	REVIEW AND ANALYSIS OF OHIO SUPREME COURT'S MERIT OPINION UPHOLDING EN BANC REVIEW AS CONSTITUTIONAL AND REMANDING CASE TO THE COURT OF APPEALS. CONFER WITH CO-COUNSEL [D. NIERMANN] AND CLIENT [K. McFADDEN] REGARDING SAME.

TOTAL:	174.10	\$43,925.00
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