

In the
Supreme Court of Ohio

KENNETH D. McFADDEN, : Case No. 2007-0705
: :
Plaintiff-Appellant, : :
: : On Appeal from the
v. : : Franklin County
: : Court of Appeals,
CLEVELAND STATE UNIVERSITY, : Tenth Appellate District
: :
Defendant-Appellee. : Court of Appeals Case
: No. 06AP-638
:

**DEFENDANT-APPELLEE CLEVELAND STATE UNIVERSITY'S
MEMORANDUM IN OPPOSITION TO PLAINTIFF-APPELLANT'S
MOTION FOR ATTORNEY FEES**

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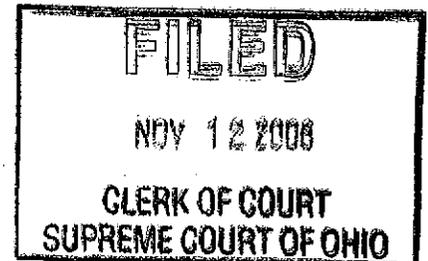


TABLE OF CONTENTS

TABLE OF CONTENTS..... i

INTRODUCTION1

ARGUMENT.....1

A. McFadden is not entitled to attorney fees under R.C. 2335.39.....1

 1. McFadden has not “prevailed” on his claims.1

 2. McFadden—not CSU—initiated the matter in controversy.2

 3. CSU’s conduct was substantially justified.3

 4. Special circumstances militate against awarding attorney fees.4

B. McFadden’s attorney-fee request is unreasonable.....6

CONCLUSION.....7

CERTIFICATE OF SERVICEunnumbered

INTRODUCTION

McFadden's motion for attorney fees should be denied for four reasons. First, McFadden has not prevailed on any of his claims. Second, McFadden—not Cleveland State University ("CSU")—initiated the controversy. Third, CSU's conduct was substantially justified. Fourth, special circumstances mitigate against awarding attorney fees here. Finally, even if R.C. 2335.39 allowed recovery, the amount of McFadden's fee request is unreasonable.

ARGUMENT

A. **McFadden is not entitled to attorney fees under R.C. 2335.39.**

Ohio follows the "American Rule" with regard to attorney fees, which states that attorney fees are generally not recoverable as a part of the costs of litigation absent statutory authorization. *State ex rel. Caspar v. Dayton* (1990), 53 Ohio St.3d 16, 20-21; *State ex rel. Murphy v. Indus. Comm'n* (1980), 61 Ohio St. 2d 312, 313. To protect Ohio citizens from unjustified state action, the General Assembly passed R.C. 2335.39 and deviated from the "American Rule" in certain limited circumstances. *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St. 3d 1, 2002-Ohio-6716, ¶ 68 ("Clearly the purpose of R.C. 2335.39 is to protect citizens from unjustified state action."). The statute permits attorney-fee recovery only if: (1) the State was not substantially justified in initiating the matter in controversy, (2) there are no special circumstances that make the award unjust, (3) the moving party is not the State but is a party to the legal action at issue, and (4) the moving party prevailed in the legal action. *Id.* at ¶ 63. Here, McFadden's attorney-fee request does not meet the statutory requirements.

1. **McFadden has not "prevailed" on his claims.**

To recover attorney fees, the moving party must have prevailed in the legal action. See R.C. 2335.39(A)(5). McFadden brought a discrimination claim against CSU, but he has not prevailed on any part of this claim. Indeed, he still must overcome a statute-of-limitations hurdle

before litigating the merits of his claim. *McFadden v. Cleveland State Univ.*, 2008-Ohio-4914, ¶ 22 (October 2, 2008) (remanding to the Tenth District to determine if there is a statute-of-limitations intra-district conflict).

The issue on which McFadden did “prevail”—the constitutionality of en banc review—CSU did not dispute. While CSU and McFadden disagreed on some procedural issues regarding en banc review, both parties agreed on the constitutional question. Moreover, the Court adopted CSU’s argument that appellate courts must have discretion in determining whether an intra-district conflict exists. *Id.* at ¶ 1. Thus, any victory McFadden achieved was de minimus and does not entitle him to recover fees. *Fenton v. Query* (1st Dist. 1992), 78 Ohio App. 3d 731, 739 (“[S]uccess must be more than de minimus” for attorney-fee recovery.) (citing *Texas State Teachers v. Garland Indep. Sch. Dist.* (1989), 489 U.S. 782, 789-91).

2. McFadden—not CSU—initiated the matter in controversy.

Under R.C. 2335.39(B)(1)(c), the State must pay attorney fees only if the State initiated the matter in controversy. The Court here has decided only issues related to en banc review, but it was McFadden who initiated this controversy.

The Tenth District applied a two-year statute of limitations to McFadden’s discrimination claim. See *McFadden v. Cleveland State Univ.* (10th Dist.), 2007 Ohio App. Lexis 244, 2007-Ohio-298, ¶ 10. Instead of filing an appeal to this Court, McFadden filed a motion for reconsideration, arguing that the Tenth District should convene en banc to resolve an alleged conflict regarding the applicable statute of limitations. The Tenth District denied reconsideration. *McFadden v. Cleveland State Univ.*, 170 Ohio App. 3d 142, 2007-Ohio-939. McFadden then asked this Court to review the constitutionality of en banc review. Thus, it was McFadden—and not CSU—who initiated the matter in controversy.

McFadden attempts to avoid this result by arguing that CSU initiated the matter in controversy by firing McFadden. See Appellant's Motion for Attorney's Fees (hereinafter "McFadden Mot."), at 2. This Court has permitted fee recovery under R.C. 2335.39 when the State's conduct gives rise to the litigation. *R.T.G., Inc.*, 2002-Ohio-6716 at ¶ 67. But interpreting the statute to permit fees here results in an absurdity. McFadden has not proved his allegations against CSU, but he wants to recover attorney fees based on those allegations. In other words, McFadden wants this Court to award attorney fees based on a discrimination claim that a trial court has not heard—and may never hear. This Court should reject this argument and recognize that McFadden's unproven allegations are not state conduct that can form a basis for attorney-fee recovery under R.C. 2335.39.

3. CSU's conduct was substantially justified.

Even if McFadden could demonstrate that he was a prevailing party under R.C. 2335.39(A)(5) and that CSU initiated the matter in controversy, this Court must deny McFadden's motion for attorney fees because CSU's position was "substantially justified." See R.C. 2335.39(B)(2)(a).

McFadden argues that he should recover attorney fees because the CSU's advocacy *during* the appeals process was not substantially justified. See McFadden Mot., 2-3. R.C. 2335.39, however, authorizes attorney fees only if the State's position of "*initiating* the matter in controversy" was not substantially justified. R.C. 2335.39(B)(2) (emphasis added). Initiating a matter "means to commence an action, not to continue a proceeding already begun." *Gilmore v. Ohio State Dental Bd.* (1st Dist.), 161 Ohio App. 3d 551, 2005-Ohio-2856, ¶ 15. Contrary to McFadden's assertion, the merits of the arguments that CSU furthered on appeal are irrelevant to whether McFadden may recover attorney fees. Under R.C. 2335.39, the only state conduct that may form a basis for recovery of attorney fees is conduct that gives rise to the litigation. *R.T.G.*,

2002-Ohio-6716 at ¶ 67. By alleging that CSU's arguments during the appeal can form the basis for recovery under R.C. 2335.39, McFadden misconstrues the plain language of the statute.

Moreover, even if CSU's arguments presented during the appeal could form a basis for an attorney-fee award under R.C. 2335.39, the State's "failure to prevail on appeal does not require a conclusion that [the State's] position was not substantially justified." *In re Jack Fish & Sons Co.* (4th Dist.), 2006 Ohio App. Lexis 1608, 2006-Ohio-1771, ¶ 10. State conduct is "substantially justified" if it is "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood* (1988), 487 U.S. 552, 565 (interpreting the federal equivalent of R.C. 2335.39); *Gilmore*, 2005-Ohio-2856, ¶ 9-10 (applying the U.S. Supreme Court's definition of "substantially justified" to R.C. 2335.39). CSU's decision to offer countervailing considerations that weighed against en banc review was entirely reasonable. *McFadden*, 2008-Ohio 4914 at ¶ 14 (acknowledging the "reasonable view of the dissent" on the issue of en banc review). CSU's conduct was not "unjustifiable" simply because a majority of the Court chose not to side with CSU's entire position. Moreover, CSU's decision to concede that en banc review was constitutional while raising the potential downsides of such review demonstrates that CSU's conduct throughout the appeal was rational and well-reasoned. CSU should not be punished for defending the lower court's decision, especially because intra-district conflict had rendered the constitutionality of en banc review uncertain. Far from acting in a substantially unjustified manner, CSU presented the full scope of arguments both in favor of and against en banc review in furtherance of the State's duty to promote orderly administration of justice in Ohio's courts.

4. Special circumstances militate against awarding attorney fees.

Finally, special circumstances militate against awarding McFadden attorney fees. See R.C. 2335.39(B)(2) (permitting denial of attorney fees where special circumstances justify that result). The "special circumstances" exception to an attorney-fee award allows this Court "to apply

traditional equitable principles in ruling upon an application for counsel fees.” *Linden Med. Pharm. v. Ohio State Bd. of Pharm.* (10th Dist.), 2005 Ohio App. Lexis 6263, 2005-Ohio-6961, ¶ 21 (quoting *Oguachuba v. Immigration and Naturalization Serv.* (2d Cir. 1983), 706 F.2d 93, 98). Two special circumstances—CSU’s interest in presenting an argument against en banc review and the fact that McFadden may ultimately lose his case—justify the denial of attorney fees.

The special circumstances exception is a “safety valve” to “insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts.” *Linden*, 2005-Ohio-6961, ¶ 21 (using federal legislative history as an aid to interpret R.C. 2335.39) (internal quotation omitted). Here, the “safety valve” of special circumstances protects CSU’s decision to advance arguments on appeal that this Court did not ultimately find persuasive. Construing R.C. 2335.39 to allow attorney-fee recovery when the State presents plausible but unsuccessful legal arguments would chill the State’s ability to advocate for its interests in court. Because the State needs the same freedom to defend its positions in court that all other parties enjoy, attorney fees should not be awarded simply because the State’s arguments are unsuccessful on appeal.

Additionally, McFadden may ultimately lose on the merits of his case, warranting denial of attorney fees. *Linden*, 2005 Ohio 6961 ¶¶ 24, 27, 32 (finding that the moving party’s “less than . . . complete victory” was a special circumstance that defeated the motion for attorney fees). Even if McFadden’s favorable decision regarding en banc review renders him a “prevailing party” within the meaning of R.C. 2335.39, he has not yet achieved a “complete victory,” a fact “relevant to a determination of special circumstances.” *Id.* at ¶ 24 (noting that special circumstances analysis is different from prevailing party analysis). In *Linden*, the court

found special circumstances sufficient to deny a prevailing party's motion for attorney fees because the state actor had, in the end, prevailed against the moving party. *Id.* at ¶¶ 26, 32. Because McFadden may lose on the merits of his claim, awarding attorney fees at this stage of the litigation would be premature and inequitable.

B. McFadden's attorney-fee request is unreasonable.

Finally, even if this Court determines that McFadden may recover attorney fees, the amount requested is unreasonable. See *Korn v. State Med. Bd.* (10th Dist. 1991), 71 Ohio App. 3d 483, 488 (attorney fees must be reasonable). First, the statute expressly limits movants to "reasonable attorney's fees, in an amount not to exceed seventy-five dollars per hour or a higher hourly fee approved by the court." R.C. 2335.39(A)(3). McFadden has requested attorney fees at the rate of \$250 per hour. See McFadden Mot., Ex. A. Because the Court has not issued prior authorization for a higher attorney fee, as required by the statute, the fees McFadden requested are per se unreasonable and should not be granted.

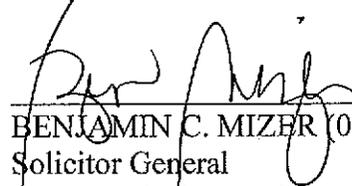
Second, any fee award must be commensurate with the small "victory" McFadden achieved. When awarding attorney fees, a court "must [] take into account all the factors involved" and "find the amount of attorney fees that were reasonably expended with respect to the matters as to which [movant] was successful on appeal." *Korn*, 71 Ohio App. 3d 483, 488-89; see also *Hensley v. Eckerhart* (1983), 461 U.S. 424, 435 (holding that a court must consider the "significance of the overall relief obtained" in relation to the "hours reasonably expended on the litigation" when assessing an attorney-fee award). As explained above, CSU and McFadden had a limited disagreement regarding en banc proceedings. CSU should not be required to pay for a "victory" on issues that CSU did not dispute.

CONCLUSION

For the foregoing reasons, this Court should deny McFadden's motion for attorney fees.

Respectfully submitted,

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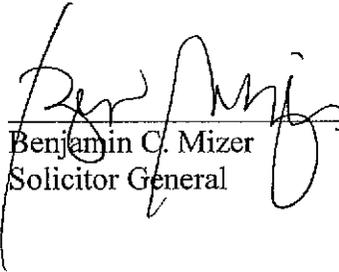
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Defendant-Appellee Cleveland State University's Memorandum in Opposition to Plaintiff-Appellant's Motion for Attorney Fees was served by U.S. mail this 12th day of November, 2008 upon the following counsel:

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