IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS

RITA AND PAM JERNIGAN and
BECCA AND TARA AUSTIN PLAINTIFFS

v. CASE NO. 4:13-CV-00410

LARRY CRANE, In His Official Capacity As Circuit And County Clerk For Pulaski County And His Successors In Interest; RICHARD WEISS, In His Official Capacity As Director Of The Arkansas Department Of Finance And Administration, And His Successors In Interest; GEORGE HOPKINS, In His Official Capacity As Executive Director Of The Arkansas Teacher Retirement System And His Successors In Interest; DUSTIN McDANIEL, In His Official Capacity As Attorney General For The State Of Arkansas And His Successors In Interest DEFENDANTS

PLAINTIFFS' SEPARATE REPLY TO STATE'S RESPONSE TO PLAINTIFFS' MOTIONS FOR ATTORNEY'S FEES

Plaintiffs, as prevailing parties in the captioned case, pursuant to 42 U.S.C. §1988, Federal Rule of Civil Procedure 54(d)(2)(A) and A.C.A. § 16-123-107 , submit this Reply to State's Response to Plaintiffs' Motions for Attorney's Fees in regard to the separate request for an award of fees and costs for separate counsel, Cheryl K. Maples, and state:

Cheryl K. Maples appeared in this matter as co-counsel for all plaintiffs and remains an attorney of record in that capacity. Cheryl K. Maples' law practice is separate and distinct from that of her co-counsel, Wagner Law Firm, P.A.

The Plaintiffs, by Wagner Law Firm, P.A., have filed their separate motion reflecting Wagner Law Firm's time and expenses incurred in representation of the Plaintiffs. The Plaintiffs, by Cheryl K. Maples, have filed a separate motion reflecting

her time and expenses incurred in her representation of the Plaintiffs. The separate motions are not competing claims, they are separate claims in Plaintiffs' quest for fees and costs for work actually done.

The Plaintiffs, by Cheryl K. Maples, initially filed a Motion for Extension of Time with accompanying brief and a Motion for Attorney Fees and Costs on December 12, 2014. The Court's decision was entered the day before the Thanksgiving Holiday and, in the reduced time due to the holiday, the unexpectedly quick decision of the Court, the resultant rush to extrapolate and redact the time records and prepare the fee petition, a clerical error was made in calendaring the due date of the fee petition. Only three days had passed before the error was noted and all documents, including the time record, were filed on that date demonstrating that the work was being conducted prior to that date. Defendants could not show any prejudice.

The Motion for Extension of Time to file the fee petition became moot when Defendants later filed an appeal of the decision. The decision in this case was not yet final. It now **is** final and Plaintiffs' separate motion for fees and costs that was filed on December 12, 2014 is timely.

Plaintiffs, through Cheryl K. Maples, reassert their Motion for Attorney Fees and Costs.

PLAINTIFFS ARE FULLY PREVAILING PARTIES AND THE REQUESTED FEES AND COSTS ARE REASONABLE

The State Defendants argue that Plaintiffs requests for attorney fees and reimbursement of costs should be decreased because Plaintiffs "failed" to convince the Court on each theory upon which the ultimate result sought was achieved. Even if the

Plaintiffs had only partial success, they would still be entitled to their full compensatory fees.

In *Hensley v. Eckerhart*, 461 U.S. 424,436 103 S. Ct. 1933 (1983) the U. S. Supreme Court found that a "Prevailing Party" is a plaintiff that succeeds on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Where suit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced because the court did not adopt each claim raised. A mathematical comparison of “issue success vs. issue raised” was rejected. The Court stated that a judge should consider whether or not the plaintiff’s unsuccessful claims were related to the claims on which he succeeded, and whether the plaintiff achieved a level of success that makes it appropriate to award attorney’s fees for hours reasonably expended on unsuccessful claims: “In [some] cases the plaintiff’s claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel’s time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.” *Id* at 436. Therefore, *Hensley* emphasized that if “a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee,” and “the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.”

Nevertheless, in this case, Plaintiffs achieved extraordinary success. The “prayer” contained in Plaintiff’s Amended Complaint (Document 16) states:

"WHEREFORE. Plaintiffs respectfully pray that this Court:

A. Enter a declaratory judgment that Amendment 83 to Arkansas's Constitution and all other Arkansas statutes that prevent same-sex couples from marrying or from having their legitimate marriages entered into in other states recognized in Arkansas violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

B. Enter a declaratory judgment that Amendment 83 to Arkansas's Constitution and all other Arkansas statutes that prevent same-sex couples from marrying or from having their legitimate marriages entered into in other states recognized in Arkansas violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

C. Enter a preliminary and permanent injunction enjoining Defendants from denying Plaintiffs and all other same-sex couples the right to marry in Arkansas and directing that Defendants recognize marriages validly entered into outside of Arkansas, including the Jernigans' valid Iowa marriage. This should include mandatory injunctive relief requiring that Defendant Dustin McDaniel and his successors, as legal representatives of all state officers, boards, and commissioners in all litigation where the interests of the state are involved, instruct all state counties and their employees and agents accordingly;

D. Issue a preliminary and permanent injunction prohibiting Richard Weiss, as Director of the Arkansas Department of Finance and Administration, and his successors, from refusing to accept joint tax returns filed by the Jernigans and other same-sex couples married under the laws of other jurisdictions where same-sex marriage is recognized;

E. Issue a preliminary and permanent injunction prohibiting George Hopkins, as Executive Director of the Arkansas Teacher Retirement System, and his successors, from withholding spousal benefits to Pam Jernigan and other same-sex spouses who are legally married under the laws of other jurisdictions that recognize same-sex marriages and preventing same-sex spouses from receiving retirement benefits upon their spouses' deaths;

F. Award costs of this suit, including reasonable attorneys' fees under 42 U.S.C. § 1988; and

G. Order all other appropriate relief which the Court deems appropriate."

THIS COURT'S DECISION OF NOVEMBER 25, 2014 GRANTED ALL DECLARATORY AND INJUNCTIVE RELIEF SOUGHT IN PLAINTIFFS' AMENDED COMPLAINT **WITHOUT EXCEPTION**. Item 'F" above, the request for attorney fees and costs, is now pending, but **the Court has already found that Plaintiffs are the prevailing party.** This is the preliminary finding the Court must make on the issue of attorney fees. On page 43 of this Court's Order (Document 40) the Court states:

> "As stated above, this Court declares that Arkansas's marriage laws violate the Fourteenth Amendment to the United States Constitution. Therefore, the Jernigans and Austins have **attained success on the merits…"**
> (Emphasis added)

Upon the finding that Plaintiffs are the prevailing party, the Court reviews the reasonableness of a fee request. The question should not be whether a party prevailed on a particular issue in gaining success on their Complaint or whether in hindsight the time expenditure was strictly necessary to obtain the relief achieved. The appropriate standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success when the work was performed. *See Wooldridge v. Marlene Industries Corp*., 898 F.2d 1169 (6th Cir. 1990).

An attorney should spend the time necessary to do a task well, without waste or duplication, but it is not easy for a Court to identify an appropriate amount of time because attorneys approach a case in different manners. What works for one lawyer will not necessarily work for another. One lawyer may spend more time researching the law while another may choose to spend his time developing in another manner. A huge expenditure of time on research may result in a similar expenditure of time saved in other areas of the same litigation.

Cheryl K. Maples' approach to the practice of law is grounded in extensive research. The time sheets submitted to the Court with the Motion for Fees and Costs reflect only the contemporaneously kept records of the time she spent and do not include any estimates of time she failed to notate. Her time records do not reflect any time monitoring the appeal and have been adjusted for anything repetitive, redundant or otherwise improper. The time records do not reflect the other clients who were denied representation due to her involvement in this case and do not reflect the experience of hostility and the fear she felt that were generated by her taking a stand that was loudly disfavored by many Arkansans.

DEFENDANTS ARE NOT "NOMINAL DEFENDANTS"

In order to avoid responsibility for attorney fees under 42 U.S.C. §1988, State Defendants claim "(a)t the outset" that they are "nominal defendants" without any "discretion and were required to follow the requirements of Arkansas's marriage laws as long as the marriage laws remained in effect. (Document 74, page 5). State Defendants, therefore, admit they were acting under color of state laws in their denial, as this Court found, of Plaintiffs' rights to due process and equal protection and in their freedom from discrimination based upon gender. 42 U.S.C. § 1983, commonly referred to as "section 1983" provides:

> **"Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress**, except

> that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."
> (Emphasis added)

The fact that defendant state officials enforced the statute in good faith or because the fee ultimately comes from the state does not constitute special circumstances to deny fee. *See Riddell v. National Democratic Party*, 624 F.2d 539 (5th Cir. 1980).

In fact, these Defendants could have declined to defend the constitutionality of these laws and, therefore, avoid the attorney fees award they now seek to avoid after much unnecessary litigation. The defendants in this case had an option. Had they exercised that option, they would not be facing any possibility of paying Plaintiffs' attorney fees and costs. The Attorneys General in several states declined to defend their individual state's unconstitutional bans against same-sex marriage. For example, Attorney General Kathleen Kane of Pennsylvania stated on July 11, 2013:

> "I cannot ethically defend the constitutionality of Pennsylvania's version of DOMA where I believe it to be wholly unconstitutional. …. It is a lawyer's ethical obligation under Pennsylvania's Rules of Professional Conduct to withdraw from the case in which the lawyer has a fundamental disagreement with the client. … I know that in this state there are people who don't believe in what we are doing, and I'm not asking them to believe in it. I'm asking them to believe in the Constitution."

Had Arkansas's Attorney General taken a similar position to that of Pennsylvania, Oregon, Nevada, etc. at any stage during the pendency of the case at bar, attorney fees and costs would have been reduced if not eliminated. Instead the Attorney General and counsel for the several county defendants chose to vigorously defend a constitutional amendment and laws that they were taught in law school would not withstand constitutional scrutiny. In fact, the Arkansas Attorney General filed an appeal of this Court's decision effectively delaying, extending and adding to the work required and the fees ultimately due Plaintiffs.

"' The government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response."' *Riverside v. Rivera*, 477 U.S. 561, 581 n.11 (1986). Additionally, the these Defendants should have considered counsel for Separate Defendant, Larry Crane, Attorney David M. Fuqua's joint article in the Federation of Defense & Corporate Counsel Quarterly/Fall 2010 article Opposing Post-Judgment Fee Petitions in Civil Rights and Discrimination Cases wherein he concludes:

> "(C)ourts generally interpret sections 1988 and 706(k) broadly to allow prevailing plaintiffs to recoup attorney's fees from defendants as often as possible in employment and civil rights litigation. Thus, it is critical for defense counsel to bear in mind the possibility of a fee award when assessing a settlement value and formulating litigation strategy. While waging a "war of attrition" that requires the plaintiff to mount a long and costly offensive may be an effective strategy in other contexts, the risk of an exorbitant fee award limits the utility of this strategy with civil rights and discrimination claims. Instead, public entities and employers are often better served by stepping back early in the litigation to review the facts, realistically assess the potential exposure in the case, including fees, and determine the approach that best serves the client's interests and goals." (*Id* at 83).

CONTRACT

State Defendants claim that attorney fees should be denied because Plaintiff's attorney has not "offered any contingency fee arrangement or other agreement with their clients as evidence to support their fee requests." (Document 74, page 7.) Pro Bono attorneys and organizations are entitled to fees under §1988 even when they never intended to charge the client a fee. In Blanchard v. Bergeron, 489 U.S. 87, 96 (1989) in a unanimous decision, the United States Supreme Court stated:

> "And Congress implemented its purpose by broadly requiring all defendants to pay a reasonable fee to all prevailing plaintiffs, if ordered to do so by the court. Thus it is that a plaintiff's recovery will not be reduced

> by what he must pay his counsel. Plaintiffs who can afford to hire their own lawyers, as well as impecunious litigants, may take advantage of this provision. **And when there are lawyers or organizations that will take a plaintiff's case without compensation, that fact does not bar the award of a reasonable fee.**"
>
> (Emphasis added)

Also, in this case, Plaintiffs did not and never intended to make a claim for an award of damages from which their counsel could recover a percentage of that recovery for attorney fees. Even if they had done so, a claim for fees under 42 U.S.C. §1988 can be awarded to be paid by Defendants in addition to a percentage of monetary damages paid by Plaintiffs. In *City of Riverside v. Rivera*, 477 U.S. 561 (1986), the United States Supreme Court allowed civil rights plaintiffs to recover attorney's fees of $245,456.25in a modest case with a total of $33,350 in compensatory and punitive damages that were awarded to the plaintiffs. Upholding the award, the Court rejected the argument that the fees were excessive merely because they greatly exceeded the damages awarded and stated, that is because a civil rights action for damages does not benefit only the individuals whose rights were violated, but may also "vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *Id* at 574. Reasonable attorney's fees under §1988, therefore, "are not conditioned upon" to an award of money damages.

CONCLUSION

As previously stated, the Court in *City of Riverside* observed, a civil rights action does not benefit only the individuals whose rights were violated, but may also "vindicate important civil and constitutional rights…" *Id* at 574. Such was the case in this matter.

Plaintiffs achieved overwhelming success. This was a complex and novel case. The attorney fees and reimbursement of costs requested herein are reasonable and justified under §1988. Plaintiffs request represents the elements considered by Congress when they enacted this statute. Political considerations were tantamount to Defendants. This caused them to litigate a matter that should have been clear to a first year law student that it should not be defended. Now, after litigating to please their constituents, they demean the work performed to protect Plaintiffs in response. This Court should award Plaintiffs their full fees and costs requested.

Respectfully submitted,

/s/ Cheryl K. Maples
Cheryl K. Maples ABA# 87109 .
P. O. Box 1504
Searcy, AR 72145
(501)912-3890
Fax (501)362-2128
Email: ckmaples@aol.com

Certificate of Service

I, the undersigned attorney, do hereby state that on this 13TH day of September, 2015 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which provides service upon CM/ECF participants.

/s/ Cheryl K. Maples