

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION**

CHRISTOPHER FAIN, et al.,
Plaintiffs,

**Civil Action No. 3:20-cv-00740
Hon. Robert C. Chambers, Judge**

v.

WILLIAM CROUCH, et al.,
Defendants.

**DEFENDANTS' RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND EXPENSES**

Now come Defendants, by counsel, Lou Ann S. Cyrus, Roberta F. Green, Caleb B. David, Kimberly M. Bandy, and Shuman McCuskey Slicer PLLC, and, for their Response to Plaintiffs' Motion for Attorneys' Fees and Expenses, state as follows:

INTRODUCTION AND PROCEDURAL HISTORY

At the start of this litigation, Plaintiffs did not set out to challenge only West Virginia Medicaid's policy. Indeed, the Plaintiffs named in the initial Class Action Complaint included Christopher Fain, Zachary Martell, and Brian McNemar, and those Plaintiffs sought relief against Ted Cheatham, in his official capacity as Director of the West Virginia Public Employees Insurance Agency, and The Health Plan of West Virginia, Inc., in addition to these Defendants. Compl. (ECF Doc. 1). The original Class Action Complaint sought to create two classes. The first class, titled the Medicaid Class, is the class eventually certified by this Court. The second class, titled the State Employee Health Plan Class, which included a subclass of individuals enrolled in The Health Plan, was never certified. The original Class Action Complaint asserted claims for deprivation of equal protection and for violation of Section 1557 of the Affordable Care Act against Cheatham and The Health Plan. In addition to Plaintiffs' claims for injunctive relief, Plaintiffs sought "[a]n award of compensatory and consequential damages to the individual Plaintiffs in an amount that would fully compensate Plaintiffs for their financial harm, emotional

distress and suffering, embarrassment, humiliation, pain and anguish, violations of their dignity, and other damages that have been caused by the conduct of Defendants BMS and The Health Plan in violation of the ACA[.]” Compl., p. 38 (ECF Doc. 1).

Nearly one year later, on October 28, 2021, Plaintiffs filed their First Amended Class Action Complaint, which included Plaintiffs Fain, Martell, and McNemar, and which added Plaintiffs Shauntae Anderson and Leanne James. Am. Compl. (ECF Doc. 140). Plaintiff Anderson joined Plaintiff Fain as a putative class representative of the Medicaid Class, asserting the same claims for deprivation of equal protection, for violation of the Affordable Care Act, and for violation of the Medicaid Act, and Plaintiff James joined Plaintiffs Martell and McNemar as a putative class representative of the State Employee Health Plan Class, asserting the same claims for deprivation of equal protection and for violation of the Affordable Care Act. In their Amended Complaint, Plaintiffs continued to seek compensatory and consequential damages. Am. Compl., p. 44 (ECF Doc. 140). On November 15, 2021, the Court entered an Order substituting Jason Haught in as Defendant in place of Cheatham; however, none of the Plaintiffs’ claims was affected by this Order. Agreed Order for Sub. of Parties (ECF Doc. 155).

On January 5, 2022, Plaintiffs Martell and McNemar and Defendant The Health Plan disclosed to the Court that a settlement agreement had been reached between those parties and stipulated to the dismissal of The Health Plan and to the removal of Plaintiffs Martell and McNemar from the style of the case. Stipulation of Dismissal (ECF Doc. 180). Thus, for the first fourteen months of litigation (and approximately eight previous months of work-up to litigation), The Health Plan was a party, and Plaintiffs were prosecuting claims against it in addition to claims against these Defendants and against Defendant Cheatham/Haught.

On January 21, 2022, Plaintiffs filed a Motion for Leave to File Second Amended Complaint, seeking to bring additional claims against another proposed Defendant, the Kanawha County Board of Education. Pls.' Mot. for Leave (ECF Doc. 187). On March 16, 2022, Defendant Haught filed a Suggestion of Death notifying the Court of Plaintiff James's tragic passing. Suggestion of Death (ECF Doc. 214). On March 25, 2022, the Court entered an Order granting Defendant Haught's Motion for Relief as a Result of Suggestion of Death and, because Plaintiff James was the only Plaintiff asserting claims against Defendant Haught, dismissing Defendant Haught. Order (ECF Doc. 225). The Court's Order also denied as moot Plaintiffs' Motion for Leave to File Second Amended Complaint. Order (ECF Doc. 225).

On April 28, 2022, the Supreme Court of the United States issued its decision in *Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 1562, 212 L. Ed. 2d 552 (2022). There, the Court found that emotional distress damages are not recoverable in actions to enforce antidiscrimination statutes such as Section 1557 of the Affordable Care Act. *See generally id.*

On May 31, 2022, Plaintiffs filed their Motion for Summary Judgment. In their accompanying Memorandum of Law, Plaintiffs stated, "Because Plaintiffs no longer pursue emotional distress damages in light of *Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 1562 (2022), this motion encompasses all relief sought." Pls.' Mem. of Law, p. 2 n.4 (ECF Doc. 251). This footnote was Plaintiffs' first indication that they no longer sought compensatory and consequential damages, as pleaded in their original Complaint and Amended Complaint.

On August 2, 2022, the Court entered separate Orders granting Plaintiffs' Motion for Class Certification (ECF Doc. 270) and granting Plaintiffs' Motion for Summary Judgment (ECF Doc. 271). In sum, Plaintiffs have succeeded on one of two proposed classes, on three of five claims, and recovered one of two types of damages sought, and Plaintiffs settled two additional claims.

While Plaintiffs assert in a footnote that they are not “seeking fees and costs associated with the dismissed plaintiffs and defendants,” Plaintiffs cannot cleanly separate all bills and assign them to particular Plaintiffs and particular Defendants. Pl.’s Mem. of Law, p. 2 n.2 (ECF Doc. 285). For instance, Plaintiffs submitted the time records of attorney Tara Borelli, who omitted time entries specifically naming Plaintiffs or potential Plaintiffs other than Plaintiffs Fain and Anderson. Borelli Time Record, p. 2 (ECF Doc. 284-4). On the same page, however, attorney Borelli billed for calls, emails, and team meetings related to medical records collection protocols, multiple plaintiff interviews, research, complaint drafting, and damages issues and drafted and revised a complaint. Borelli Time Record, p. 2 (ECF Doc. 284-4). These time entries may have assisted Plaintiffs Fain and Anderson in the successful prosecution of their claims, but these time entries also assisted Plaintiffs Martell and McNemar in their settled claims against The Health Plan, Plaintiffs Martell and McNemar in their unsuccessful claims against Cheatham/Haught, and Plaintiff James in her unsuccessful claims against Cheatham/Haught.

Defendants do not dispute that, pending appeal, Plaintiffs are entitled to attorney fees pursuant to 42 U.S.C. § 1988. Defendants also do not dispute that the hourly rates requested by Plaintiffs’ counsel are generally in line with other awards in the District Court for the Southern District of West Virginia for civil rights cases. Defendants oppose Plaintiffs’ Motion on the grounds that: (1) Plaintiffs have not reduced their hours billed for the prosecution of the claims of Zachary Martell, Brian McNemar, and Leanne James; (2) Plaintiffs’ counsel’s billing for deposition attendance remains excessive; and (3) the hourly rate of \$500.00 for attorney Walt Auvil is excessive for attendance at depositions and hearings as the sponsoring attorney. Defendants request that the Court reduce Plaintiffs’ attorney fees award based upon these three issues affecting relatedness and reasonableness.

ARGUMENT

“In furtherance of establishing appropriate fees, the movant bears the burden of establishing the hours claimed through adequate documentation.” *Meadows v. AM & GH LLC*, 2018 U.S. Dist. LEXIS 137972 *12, 2018 WL 3876587 (S.D.W. Va. Aug. 15, 2018) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (“The applicant . . . should maintain billing time records in a manner that will enable a reviewing court to identify **distinct** claims.”) (emphasis added)). “Counsel’s fee request ‘should, at a minimum, (1) provide dates work was performed, (2) a reasonable, specific description of the work, and (3) time expended on the work.’” *Id.* (quoting *Central Cab Co., Inc. v. Cline*, 972 F. Supp. 370, 374 (S.D. W. Va. 1997)). “The movant must also demonstrate that the claimed hours were ‘reasonably’ expended. *Id.* (citing *Hensley*, 461 U.S. at 433-34); *see also Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1359 (4th Cir. 1995); *Broyles v. Director*, 974 F.2d 508, 513 (4th Cir. 1992). “The Court may make reductions for unreasonably expended hours either by conducting an hour-by-hour review or making a percentage reduction if the evidence is voluminous and such a review would be impractical or inadequate.” *Id.* (citing *Shore v. Fed. Express Corp.*, 42 F.3d 373, 381 (6th Cir. 1994); *Loranger v. Stierheim*, 10 F.3d 776, 783 (11th Cir. 1994)). “While no definitive rules exist to aid the Court in determining reasonable hours, the *Hensley* Court noted that excessive hours, redundant hours, and unnecessary hours are not compensable.” *Id.* (citing *Hensley*, 461 U.S. at 434).

“Fourth Circuit law in this area is well-developed. In calculating an award of attorneys’ fees in fee-shifting cases, courts must first determine a ‘lodestar figure’ by multiplying the number of reasonable hours expended times a reasonable rate.” *Koontz v. Wells Fargo N.A.*, Civil Action No. 2:10-cv-864, 2013 U.S. Dist. LEXIS 45509 *28, 2013 WL 1337260 (S.D.W. Va. Mar. 29,

2013) (citing *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 243 (4th Cir. 2009) (citing *Grissom v. The Mills Corp.*, 549 F.3d 313, 320 (4th Cir. 2008))). ““After determining the lodestar figure, the court then should subtract fees for hours spent on unsuccessful claims unrelated to successful ones. . . . [O]nce the court has subtracted the fees incurred for unsuccessful, unrelated claims, it then awards some percentage of the remaining amount, depending on the degree of success enjoyed by the plaintiff.”” *Id.* (quoting *Robinson*, 560 F.3d at 244).

I. Plaintiffs have not reduced their hours billed for the prosecution of the claims of Zachary Martell, Brian McNemar, and Leanne James.

In *Prison Legal News v. Stolle*, 681 Fed. Appx. 182 (4th Cir. 2017) (*per curiam*), the Fourth Circuit reviewed a District Court’s award of attorney fees to Prison Legal News following it obtaining a permanent injunction and findings of constitutional and due process violations. *Id.* at *183. The District Court applied the three-step framework established in *McAfee v. Boczar*, 738 F.3d 81 (4th Cir. 2013), which required the District Court to analyze in detail the number of hours billed, the rates billed, and the type of work conducted, then reduce hours for duplicative work and adjust the award for degree of success. *Prison Legal News*, 681 Fed. Appx. at 183. The District Court found that, because the defendants had demonstrated that they were qualifiedly immune from money damages, the plaintiff had not succeeded on all claims, and the District Court reduced the lodestar by 45%. *Id.* at 184. On appeal, the plaintiff challenged the District Court’s 45% reduction on the grounds that the plaintiff “achieved excellent results in the litigation” and on the grounds that “it did not primarily seek money damages, and therefore, the court unfairly accounted for its lack of damages in reducing the fee award.” *Id.* at 185. Affirming the District Court’s 45% reduction, the Fourth Circuit stated, “when a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole, times a reasonable hourly

rate, may be an excessive amount ‘even where the plaintiff’s claims were interrelated, nonfrivolous, and raised in good faith.’” *Id.* (quoting *Hensley*, 461 U.S. at 436).

Here, Plaintiffs have submitted a lodestar figure of \$817,661.25 in attorney fees. As discussed above, while Plaintiffs assert in a footnote that they are not “seeking fees and costs associated with the dismissed plaintiffs and defendants,” Plaintiffs cannot cleanly separate all bills and assign them to particular Plaintiffs and particular Defendants. Pl.’s Mem. of Law, p. 2 n.2 (ECF Doc. 285). For instance, Plaintiffs submitted the time records of attorney Tara Borelli, who omitted time entries specifically naming Plaintiffs or potential Plaintiffs other than Fain and Anderson. Borelli Time Record, p. 2 (ECF Doc. 284-4). On the same page, however, attorney Borelli billed for calls, emails, and team meetings related to medical records collection protocols, multiple plaintiff interviews, research, complaint drafting, and damages issues and drafted and revised a complaint. Borelli Time Record, p. 2 (ECF Doc. 284-4). These time entries may have assisted Plaintiffs Fain and Anderson in the successful prosecution of their claims, but these time entries also assisted Plaintiffs Martell and McNemar in their settled claims against The Health Plan, Plaintiffs Martell and McNemar in their unsuccessful claims against Cheatham/Haught, and Plaintiff James in her unsuccessful claims against Cheatham/Haught.

Plaintiffs have succeeded on one of two proposed classes, on three of five claims, and recovered one of two types of damages sought, and Plaintiffs settled two additional claims. From filing to summary judgment, litigation in this matter lasted for 21 months. Plaintiffs Martell and McNemar and Defendant The Health Plan were parties for 14 of 21 months, or for 66.7% of the litigation. Defendant Cheatham/Haught was a party for 16 of 21 months, or for 76.2% of the litigation. Plaintiff Leanne James was a party for 5 of 21 months, or for 23.8% of the litigation. Given that Plaintiffs have reduced their bills for time spent specifically on work for the individual

claims of Plaintiffs Martell, McNemar, and James but have not reduced their bills for time spent on work for all claims, successful, unsuccessful, and settled, Defendants request that this Court, after reducing the lodestar for duplicative time and excessive rates, reduce the lodestar by 50% to account for fees related to settled and unsuccessful claims.

II. Plaintiffs' counsel's billing for deposition attendance remains excessive.

The Supreme Court of the United States and this Court have held that “redundant hours ... are not compensable.” *Meadows*, 2018 U.S. Dist. LEXIS 137972 at *12 (citing *Hensley*, 461 U.S. at 434). In this case, attorney Walt Auvil served as the sponsoring attorney for all other Plaintiffs' counsel. Thus, Defendants submit that it was reasonable for attorney Auvil to attend depositions with a visiting attorney who was taking or defending the deposition. At most depositions, however, attorney Auvil was accompanied by at least two other attorneys and, in some instances, was accompanied by as many as five additional attorneys. Plaintiffs' Motion and accompanying exhibits show that five attorneys attended the deposition of Sarah Young on behalf of the Plaintiffs. While Plaintiffs have not submitted the time of attorney Avatara Smith-Carrington, Plaintiffs are requesting fees for the attendance of attorneys Walt Auvil, Carl Charles, Nicole Schladt, and Tara Borelli, combining for a fee request of \$13,400 for a single deposition. Attorney Charles took the deposition, and attorney Auvil attended as sponsoring attorney; however, the attendance and fees of attorneys Schladt and Borelli totaling \$6,200 are redundant and should not be awarded.

Similar issues arise for the following depositions:

1. Defendant Secretary Crouch – Auvil, Schladt (lead), Borelli - \$950.00 in redundant time for attendance of attorney Borelli;

2. Plaintiff's Expert Schechter – Auvil, Schladt, Borelli, Smith-Carrington (cut), Huppert (lead in defending) - \$4,602.50 in redundant time for attendance of attorneys Schladt and Borelli;

3. Defendant Cynthia Beane – Smith-Carrington, Borelli (lead), Auvil, Schladt - \$3,680.00 in redundant time for attorneys Smith-Carrington and Schladt;

4. Dr. James Becker – Smith-Carrington (lead), Borelli, Schladt - \$5,852.50 in redundant time for attorneys Borelli and Schladt;

5. F. Lewis – Smith-Carrington (lead), Borelli (cut), Auvil, Schladt, Prakash - \$3,525 in redundant time for attorneys Schladt and Prakash;

6. B. Lewis – Auvil, Schladt (lead), Prakash - \$1,350.00 in redundant time for attorney Prakash;

7. Myers – Smith-Carrington, Borelli (cut), Auvil, Schladt, Prakash (lead) - \$1,355.00 in redundant time for attorneys Smith-Carrington and Schladt;

8. Manning – Smith-Carrington, Borelli (cut), Schladt (lead), Prakash - \$1,812.50 in redundant time for attorneys Smith-Carrington and Prakash;

9. Thompson – Smith-Carrington (lead), Borelli, Auvil, Prakash - \$1,850.00 in redundant time for attorneys Borelli and Prakash;

10. Plaintiffs' Expert Karasic – Smith-Carrington (lead in defending), Borelli, Auvil - \$3,040.00 in redundant time for attorney Borelli;

11. Plaintiff Anderson – Smith-Carrington, Borelli, Clanton-Lockhart (cut), Buchert (lead in defending), Auvil - \$3,000.00 in redundant time for attorneys Smith-Carrington and Borelli;

12. Plaintiff Fain – Smith-Carrington (cut), Borelli (cut), Clanton-Lockhart (cut), Buchert (lead in defending), Auvil, Prakash - \$1,350.00 in redundant time for attorney Prakash.

Even when permitting the fees for the lead attorney and the sponsoring attorney, the redundancies in attendance at depositions alone total \$38,567.00. Plaintiffs' counsel's bills are replete with additional redundancies for calls, form document drafting, and written discovery. For example, on July 6, 2021, the parties convened a call to discuss the discovery of and protocols for electronically stored information. Attorney Caleb David attended the call on behalf of these Defendants and billed 0.5 hours for the call. Attorney Eric Salyers attended on behalf of then-Defendant Cheatham, and attorney Aaron Boone attended on behalf of then-Defendant The Health Plan. Attorneys Nicole Schladt, Anna Prakash, Walt Auvil, and Tara Borelli and paraprofessionals Angela Kittelson and Michele Clanton-Lockhart attended on behalf of the Plaintiffs. Attorneys Schladt, Prakash, and Borelli, and paraprofessional Kittelson billed 1.0 hours for the call; attorney Walt Auvil billed 1.5 hours for the call; and paraprofessional Clanton-Lockhart billed 1.3 hours for the call. Combined, Plaintiffs' counsel billed \$2,262.50 for a single call, billed at least double the time for the call as attorney David, and billed at different increments for attendance at the same call. Thus, in addition to this call being in furtherance of successful, unsuccessful, and settled claims alike, the attendance of four attorneys and two paraprofessionals is unreasonable and redundant.

Because redundant hours are not compensable, Plaintiffs' fee request must be reduced. As this Court and others have noted, “[t]he Court may make reductions for unreasonably expended hours either by conducting an hour-by-hour review or **making a percentage reduction if the evidence is voluminous and such a review would be impractical or inadequate.**” *Meadows*,

2018 U.S. Dist. LEXIS 137972 *12 (citing *Shore v. Fed. Express Corp.*, 42 F.3d 373, 381 (6th Cir. 1994); *Loranger v. Stierheim*, 10 F.3d 776, 783 (11th Cir. 1994)) (emphasis added). While an hour-by-hour review is possible for events such as depositions and hearings, the evidence related to calls, document drafting, emails, etc., is voluminous and would be impractical. Therefore, Defendants request that this Court reduce the Plaintiffs' requested fee award by \$38,567 for redundant hours attending depositions and, as indicated in the prior section, reduce the lodestar by 50% to account for additional redundancies and to account for fees related to settled and unsuccessful claims.

III. The hourly rate of \$500.00 for attorney Walt Auvil is excessive for attendance at depositions and hearings as the sponsoring attorney.

“When calculating reasonable fees, establishing the hourly rate is generally the critical inquiry.” *Wolfe v. Green*, Civil Action No. 2:08-cv-1023, 2010 U.S. Dist. LEXIS 102623 *11, 2010 WL 3809857, (S.D.W. Va. Sept. 24, 2010) (citing *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289 (4th Cir. 2010)) (citation omitted). “The fee applicant bears the burden of establishing the reasonableness of the requested rate.” *Id.* (citing *Westmoreland Coal Co.*, 602 F.3d at 289). To meet that burden,

“In addition to the attorney’s own affidavits, the fee applicant must produce satisfactory specific evidence of the prevailing market rates in the relevant community for the type of work for which he seeks an award. Although the determination of a “market rate” in the legal profession is inherently problematic, as wide variations in skill and reputation render the usual laws of supply and demand largely inapplicable, the Court has nonetheless emphasized that market rate should guide the fee inquiry.”

Id. at *11-12 (quoting *Westmoreland Coal Co.*, 602 F.3d at 289). A reasonable hourly rate is “typically established by affidavits of counsel with similar experience as to what they would charge for a similar case, amounts awarded to counsel with similar experience in similar litigation,

and amounts awarded to counsel for his services in prior litigation.” *Meadows*, 2018 U.S. Dist. LEXIS 137972 at *11.

Defendants do not dispute that this Court has found \$500.00 to be a reasonable hourly rate for an attorney with the experience and expertise of attorney Auvil. At depositions and hearings, however, attorney Auvil attended as the sponsoring attorney, did not ask questions, did not make objections, and did not present arguments to the Court. Plaintiffs have produced no evidence that \$500.00 is a reasonable hourly rate for serving as a sponsoring attorney at depositions and hearings. Plaintiffs have failed to present any affidavits of counsel stating that they would charge \$500.00 per hour to serve as a sponsoring attorney, that they are aware of such an hourly rate being awarded to sponsoring attorneys in similar litigation, or that attorney Auvil has been awarded \$500.00 per hour to serve as a sponsoring attorney. Thus, Plaintiffs have failed to meet their burden of establishing \$500.00 per hour as a reasonable hourly rate for the services of attorney Auvil as a sponsoring attorney. Therefore, Defendants request that this Court reduce attorney Auvil’s hourly rate for his attendance at depositions and hearings.

WHEREFORE, Defendants respectfully request that this Honorable Court reduce Plaintiff’s lodestar by \$38,567.00 for redundant appearances at depositions, reduce attorney Auvil’s hourly rate for his attendance at depositions and hearings and apply that reduction to the lodestar, and reduce the lodestar by 50% to account for additional redundancies and to account for fees related to settled and unsuccessful claims. Defendants request all other and further relief this Honorable Court deems just and proper.

**WILLIAM CROUCH, CYNTHIA BEANE, and
WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
BUREAU FOR MEDICAL SERVICES,
By counsel**

/s/ Caleb B. David

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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION**

CHRISTOPHER FAIN and **SHAUNTAE ANDERSON**; individually and on behalf of all others similarly situated,

Plaintiffs,

**Civil Action No. 3:20-cv-00740
Hon. Robert C. Chambers, Judge**

v.

WILLIAM CROUCH, in his official capacity as Cabinet Secretary of the West Virginia Department of Health and Human Resources; **CYNTHIA BEANE**, in her official capacity as Commissioner for the West Virginia Bureau for Medical Services; and **WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES**,

Defendants.

CERTIFICATE OF SERVICE

Now come Defendants William Crouch, Cynthia Beane and West Virginia Department of Health and Human Resources Bureau for Medical Services, by counsel, and do hereby certify that on the 14th day of October, 2022, a true and exact copy of “**DEFENDANTS’ RESPONSE TO PLAINTIFFS’ MOTION FOR ATTORNEYS’ FEES AND EXPENSES**” was served on counsel via electronic means as follows:

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