IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

IDALIA DOCKERY, Plaintiff v. GOVERNMENT OF THE VIRGIN ISLANDS, MARIA RIVERA and OTHER NURSES and DOCTORS Defendants	CIVIL NO. 405/83

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FEUERZEIG, J.

MEMORANDUM OPINION
(May , 1985)

The court is confronted with yet another request for attorney's fees and costs by a plaintiff as the prevailing party. The court will not rehash the rationale for its decision that the plaintiff is the prevailing party, having elaborated on this issue at length in its memorandum opinion dated November 26, 1984 and also, to a more limited extent, in its December 13, 1984 memorandum and order denying defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. There is absolutely no question that the plaintiff was the prevailing party. As the court has stated in the past, this case should not have gone to trial. Moreover, there should have been little doubt from what was known by the parties before trial that a finding of negligence, at least as to the Government, virtually was inevitable. The only contention that may have warranted a trial was whether the individual defendant, Maria Rivera, also was liable for malpractice, which the jury so found.

As a result, the court has reviewed the October 9, 1984 and January 22, 1985 affidavits, regarding the time and expenses of plaintiff's counsel. These affidavits have not been contested. This court, therefore, cannot disregard them. Cunningham v. City of McKeesport, No. 84-3209 (3d Cir. Jan. 15, 1985). Nonetheless, the court must determine whether the claimed time and expenses are reasonable.

I.

Before a court can value an attorney's services, it must ascertain just what those services were. The first step in this process is a determination of how many hours were spent by each attorney and in what manner. Next the court must determine the value of each attorney's services. This calculation results in the lodestar amount. Lindy

Bros. Bldrs. Inc. of Philadelphia v. American Radiator & Sanitary Corp., 487 F.2d 161, 167-68 (3d Cir. 1973) (Lindy I), and Estien v. Christian, 11 V.I. 464, 507 F.2d 61 (3d Cir. 1975).

Plaintiff initially claimed 97.38 hours for lead counsel Samuel H. Hall, Jr., and 16.25 hours for Mr. Hall's legal assistant. In response to this court's orders, plaintiff now concedes that at least eight hours of Mr. Hall's time spent taking depositions may not be allowed. Kriegel v. St. Thomas Beach Resorts, Inc., 18 V.I. 365, 368 (D.V.I. 1981). However, as stated, no opposing affidavits have been filed and defendants did not seek an evidentiary hearing. Therefore, in accord with Cunningham v. City of McKeesport, supra, in making the initial calculation to arrive at the lodestar, the court finds that the plaintiff's lead counsel devoted 89.38 hours to this case, and his legal assistant 16.25 hours. 1/

Turning to the second calculation in determining the lodestar, the court is of the belief that the teachings of the Third Circuit Court of Appeals and the United States Supreme Court warrant acceptance of plaintiff's counsel's time at his claimed normal billing rate of $125 per hour. As the Third Circuit said in Lindy I, 487 F.2d at 167:

1/ Because of the court's ultimate conclusion and because there has been no challenge to the claimed time, the court has not deducted from lead counsel's time hours that it

> The value of an attorney's time generally is reflected in his normal billing rate. A logical beginning in valuing an attorney's services is to fix a reasonable hourly rate for his time - taking account of the attorney's legal reputation and status (partner, associate). . . .

More importantly, as the Third Circuit recently stated, In re: Fine Paper Antitrust Litigation, No. 83-1172, Slip op. at 52-53 (3d Cir. Dec. 13, 1984):

> Ever since Lindy I . . . both in fund in court cases and in statutory fee cases, we have reiterated that individual determinations of reasonable billing rates are required for the lodestar determination. Our premise has been that the reasonable value of an attorney's time is the price that time normally commands in the market place for legal services in which those services are offered. Recently we have been given clear direction by the Supreme Court that our

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might not consider in calculating the lodestar. Had the time been contested, the court would have been inclined to deduct the following time as not having been reasonably expended:

.50 hours on 2/22/84 for ordering a hospital bill;
.25 on 3/22/84 to leave message with Attorney Warlick;
.25 hours claimed for 6/13 and 6/25/84 to do a notice of deposition;
2.5 hours of the 4.0 hours claimed to prepare opening and closing arguments;
4.0 of the 7.50 hours claimed on research and drafting instructions;
2.50 of the 3 hours for interviewing Frances Roberts and Alicia Connor, prospective witnesses who did not testify;
3 of the 5 hours for research on the locality v. specialty rule;
2 of the 4 hours claimed for meeting with Mary Johnson, Dr. Burkett, Angela Vanterpool and the plaintiff;
2 hours of the time claimed for more than 25 telephone calls during the course of this action.

market standards rule is required as a matter of law. In his separate opinion in Hensley v. Eckerhart, 461 U.S. 424 (1983) (a statutory fee case), Justice Brennan wrote:

> As nearly as possible, market standards should prevail, for that is the best way of ensuring that competent counsel will be available to all persons with bona fide civil rights claims. This means that judges awarding fees must make certain that attorneys are paid the full value that their efforts would receive on the open market in non-civil-rights cases, both by awarding them market-rate fees, and by awarding fees only for time reasonably expended. . . .

Id. at ______ (Brennan, J., concurring in part and dissenting in part) (citations omitted) (emphasis in original). Still more recently, in Blum v. Stenson, _____ U.S. ______ , 104 S.Ct. 1541 (1984), Justice Powell, for a unanimous court, announced as the standard for lodestar determinations, even for cases litigated by not for profit law offices, the prevailing market rate in the relevant community. See also Laffey v. Northwest Airlines, Inc., No. 83-1838 (D.C. Cir. Sept. 28, 1984) (district court must base hourly rates on the firm's established billing rates, not on "true value" of attorneys' services).

Although this is not a civil rights action, this court believes that given the facts in this case and Mr. Hall's status in the legal community, the $125 per hour fee fixed by him as his prevailing rate is the appropriate calculation to be utilized in determining the lodestar. The $50 per hour for counsel's legal assistant also is an appropriate rate. That being the case the court determines the lodestar to be $11,985.00. 2/

Once the lodestar is determined, the court must adjust it to reflect the contingent nature of the attorney's

2/ That figure is determined by multiplying lead counsel's time of 89.38 hours times $125 for a total of $11,172.50 and by adding his legal assistant's time of 16.25 hours times $50, or $812.50.

undertaking. Lindy I, 487 F.2d at 168. That adjustment involves two aspects: (1) the likelihood of success in obtaining a judgment in the underlying lawsuit, which is measured at the time the attorney's time was committed to the case, Id., and Lindy Bros. Bldrs. of Philadelphia v. American Radiator & Standard Corp., 540 F.2d. 102, 113 (3d Cir. 1976) (Lindy II), and (2) the value of compensation long delayed, when compared with the normal billing and collection practice of law firms for fees and expenses. Lindy II, 540 F.2d at 117. Finally, the court is required to adjust the amount by the quality of an attorney's work. Lindy I, 487 F.2d at 168.

Here, the delay in compensation certainly was not great or sufficient to warrant an upward adjustment. Secondly, although the likelihood of success may in retrospect seem high, it may not have been so at the time the suit was filed. Therefore, the court will not reduce the attorney's fee award on that ground. The court believes, though, that the contingent fee agreement of counsel and plaintiff, by which counsel would receive 33 1/3 percent of any recovery, should establish the outside limits of any attorney's fee reward. Given the jury verdict and the $27,600 judgment against defendant Maria Rivera, [3] the court believes the lodestar should be reduced to a maximum of one-third of $27,600, or $9,200, and that is what the court will award plaintiff as and for her attorney's

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3/ The jury found Ms. Dockery's damages to be $46,000, which was reduced by the jury finding that Ms. Dockery was at fault for 40 percent of her injuries.

fees. 4/

The judgment of the court against the Government of the Virgin Islands was only $16,000. Applying the same contin-

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4/ Counsel should not assume that this court has construed the recent holdings of the Third Circuit and the United States Supreme Court as divesting this court of its broad discretionary power to make attorney fees awards. This court must admit, though, that clarification from either the Appellate Division of the District Court of the Virgin Islands or the Third Circuit Court of Appeals is necessary with respect to the impact on 5 V.I.C. §541 (1967) of the more recent Third Circuit decisions, e.g., Institutionalized Juveniles v. Secretary of Public Welfare, Nos. 83-1696 and 83-1722 (3d Cir. March 26, 1985); In re: Fine Paper Antitrust Litigation, supra, and Cunningham v. City of McKeesport, supra. The last definitive pronouncement of the Third Circuit interpreting 5 V.I.C. §541 was given in 1975 in Estien v. Christian, 11 V.I. 464, 507 F.2d 61 (3d Cir. 1975). That decision though, was bottomed on Lindy I, which, of course, was not a Virgin Islands case, let alone one construing section 541.

This court, continues to read Estien v. Christian, supra, and its predecessor, Lucerne Investment Company v. Estate Belvedere, Inc., 7 V.I. 242, 411 F.2d 1205 (3d Cir. 1969), as giving the courts of the Virgin Islands broad power to exercise their discretion, albeit consistent with the more recent teachings of the Third Circuit. Consequently, this court continues to believe that

> [t]he amount of attorney's fees to be awarded to the prevailing party is discretionary with the court, as the statute states, and is reversible on appeal only in case of a clear abuse of discretion. Tebbs v. Alcoa Steamship Company, 3 Cir 1957, 3 V.I. 592, 241 F.2d 276. It is nonetheless intended to be an indemnification of the prevailing party for a fair and reasonable portion of his attorney's fees incurred in the prosecution or defense of the action, and not for the whole amount charged by the attorney, especially if that amount is excessive under the facts of the case.

Lucerne Investment Company v. Estate Belvedere, Inc., 7 V.I. at 245, 411 F.2d at 1207. See Vitex Manufacturing Co., Ltd. v. Wheatley 12 V.I. 527, 531, 70 F.R.D. 588, 590 (D.V.I. 1976) ("[T]he matter is entirely up to the discretion of the court (5 V.I.C. §541 (b)) and discretion includes the option of fixing reasonable fees or disallowing them in their gency fee rationale by which the court reduced the fee award to $9,200 against Ms. Rivera, the court will enter a judgment against the Government of $5,333.33, which will be assessed against Maria Rivera and the Government of the Virgin Islands jointly and severally. 5/

II

Turning then to the costs claimed by plaintiff, the court will award the following claimed items:

Filing fee	$ 15.00
Deposition of Maria Rivera	345.95
Ben Cole witness fee	30.00
Kenneth O'Neal (service of subpoena)	20.00
Wendy Elliot (deposition of Ben Cole)	148.25
Dr. Eugene Burkett:	
Hotel	232.88
Plane fare	377.00
Fees: 31 hours x $80.00	2,480.00
Wendy Elliot (deposition of Dr. Burkett)	192.00
Claudette Glover (witness fee)	30.00
Glen Curtis (service of subpoenas)	100.00
Mary Johnson:	
Hotel	103.34
Plane fare	311.00
Taxifare	10.00
Total	$ 4,395.42

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entirety,").

This court believes its award here is consistent not only with Estien v. Christian, supra, and Lucerne Investment Company v. Estate Belvedere, Inc., supra, but also the more recent Third Circuit holdings cited in this opinion.

5/ The Government's liability being founded on a theory of respondeat superior, plaintiff cannot recover more than $27,600, of which the Government and Maria Rivera are jointly and severally liable for $16,000. Plaintiff also will not be able to recover more than $9,200 in attorney's fees, $5,333.33 of which, as stated, the Government and Maria Rivera will be jointly and severally liable.

The court will disallow the claimed costs for photocopies because there is no indication that this was incurred for copying exhibits that were offered at trial. Heyl & Patterson, International, Inc. v. F.D. Rich Housing of the Virgin Islands, Inc., Civil No. 75-785 (D.V.I., St.T and St.J Oct. 24, 1980). Plaintiff contends that 5 V.I.C. §541(a)(5) (1967) provides that the necessary expense to copy any public record, book or document used as evidence during a trial may be allowed as costs in a civil action and that under Kriegel, 18 V.I. at 369, copies of documents may be allowed as costs when they are necessary to the proper presentation of the case. The court does not quarrel with those positions, but the plaintiff has made no showing that justifies copying costs of $364 for 1,040 copies at $0.35 per copy. In fact, plaintiff has not itemized which copies were necessary or were used as evidence. Moreover, the court finds that the amount plaintiff claims for presentation of her case nowhere approaches the claimed amount. This cost, therefore, will be denied in its entirety.

The court also is disallowing postage, messenger service, express mail and long distance telephone calls as they "either fall in the category of normal office expenses or require a special explanation before they may be allowed." Heyl & Patterson International, Inc. v. F.D. Rich Housing of the Virgin Islands, Inc., supra; Stevens v. Padmore, 15 V.I. 294 (Terr. Ct. 1978).

Finally, the court will disallow the claimed witness fees of Dr. Roy L. Schneider, Gertrude Plaskett and Ilva Boynes because they were not called as witnesses. Plaintiff contends that to deny these costs would unnecessarily result in counsel for plaintiff putting witnesses on the stand solely so plaintiff could later seek compensation for witness fees. Counsel states that these witnesses were not called at trial because, as the evidence developed, their testimony either would have been redundant or unnecessary. In the court's opinion, good preparation certainly should have indicated that such a circumstance could arise. More importantly, counsel certainly could have made arrangements to have the witnesses on call and avoid the necessity of their apparently being present without being used.

The court in disallowing this claim does not mean to discourage appropriate preparation. In fact, this case indicates what good preparation can accomplish. At the same time, though, the court does not believe that such preparation should result in additional costs to the defendant. The results of good preparation are reflected where it is appropriate, in the verdict, as happened in this case. Consequently, no further costs will be taxed against defendant because of plaintiff's counsel wanting to be certain that all the "i's" are dotted and the "t's" crossed.

The court believes some comment is necessary, however, with respect to the award of costs for the depositions of Maria Rivera and Dr. Ben Cole and the costs and fees for the expert witnesses, Dr. Gene Burkett and Nurse Mary Johnson. Roberts v. S.S. Kyriakoula D. Lemos, 651 F.2d. 201 (3d Cir 1981), and Kriegel, supra, outline the court's power with respect to these issues.

> Where depositions are taken but not used at trial, the cost of the transcript of such depositions is not recoverable as a matter of right. . . . The cost of the transcript of a deposition though not used at trial may be taxed as cost in the discretion of the Court if the deposition was reasonably necessary for the proper presentation of the case and was not merely investigative in nature.

Kriegel at 368. In this case, the court believes that the depositions of Dr. Cole, Maria Rivera and Dr. Burkett clearly were necessary for the proper presentation of the plaintiff's case. In fact, as plaintiff points out, the primary purpose of taking the deposition of Dr. Burkett was to induce settlement. This was done only after defendants denied requests for admissions with respect to the fact that guaze packing was left in the vagina of Ms. Dockery as well as any negligence. As a result, the plaintiff felt compelled to seek an expert. It was the hope of the plaintiff, as was represented on numerous occasions before trial, that by taking the deposition of Dr. Burkett the defendants would concede liability and, therefore, limit the trial solely to the issue of damages. As was their right, though, defendants refused to concede liability even after Dr. Burkett's deposition.

While arguably plaintiff could have proved negligence without calling Dr. Burkett as a witness and by relying solely on his deposition, the court does not believe such was required or would have been prudent. There can be little doubt that Dr. Burkett's testimony "was not only helpful . . . but also played a crucial rule in the resolution of the issues presented." Roberts v. S.S. Kyriakoula D. Lemos, 651 F.2d at 204. As a result, the court believes his costs and expenses also should be recovered.

Nurse Johnson's testimony also was necessary to respond to statements by Maria Rivera that she saw Ms. Johnson give Ms. Dockery a Tampax, and that Ms. Rivera, in Ms. Johnson's presence, told Ms. Dockery not to use the Tampax. Ms. Johnson, a nurse midwife like Maria Rivera, expressly denied any such statement or occurrence. Obviously, the jury in finding that Maria Rivera was liable disbelieved Ms. Rivera's testimony and credited the testimony of both Ms. Johnson and the plaintiff. In the court's opinion, therefore, her testimony also was crucial and the expenses incurred by the plaintiff in calling her should be reimbursed. The court, thus, concludes that the plaintiff is entitled to costs in the amount of $4,395.42 and attorney's fees in the amount of $9,200 and judgment will enter accordingly.

HENRY L. FEUERZEIG, JUDGE

ATTEST: Viola E. Smith
VIOLA E. SMITH
Administrator/Clerk of the Court

SENIOR DEPUTY CLERK, I