

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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|-------------------------------|---|----------------------|
| Kathy Hainey, <u>et al.</u> , |) | |
| |) | |
| Plaintiffs, |) | Case No. 1:02-CV-733 |
| |) | |
| vs. |) | |
| |) | |
| Dr. Carl Parrott, Jr., |) | |
| <u>et al.</u> , |) | |
| |) | |
| Defendants. |) | |

ORDER APPROVING ATTORNEY'S FEES AND INCENTIVE AWARDS

This matter is before the Court on class counsel's memoranda in support of attorney's fees and approval of incentive awards for class representatives (Doc. Nos. 52 & 86).

This is a class action lawsuit in which Plaintiffs challenged the constitutionality of the Hamilton County Coroner's practice or policy of disposing of body parts retained for further forensic examination without prior notice to the next-of-kin or persons otherwise entitled to claim the decedent for burial. After certifying a class, the Court granted summary judgment in Plaintiffs' favor on the issue of liability. While that judgment was on appeal before the Sixth Circuit, the parties reached a settlement agreement. The Sixth Circuit then remanded the case to the Court for further proceedings.

The Court preliminarily approved the settlement and notice of the settlement was disseminated to the class members.

The Court held a fairness hearing and issued an order approving the settlement as fair, reasonable, and adequate. Doc. No. 82. As is relevant here, some class members objected to the attorney's fees requested - one third of the \$6,000,000 settlement fund - and the \$50,000 incentive award requested for each of the named/lead class representatives. The Court approved the settlement despite these objections but directed class counsel to submit a brief and supporting documentation concerning a lodestar fee amount and incentive awards. Class counsel filed a brief in compliance with this order on October 23, 2007.

The Court takes up these two issues seriatim.

A. Attorney's Fees

As the Court stated in its order approving the settlement, class counsel is entitled to be fairly compensated for the work done and results achieved. Rawlings v. Prudential-Bache Prop., Inc., 9 F.3d 513, 516 (6th Cir. 1993). Moreover, counsel's request for a fee of one third the amount of the settlement fund is near the range of reasonable fees in a class action lawsuit. Doc. No. 82, at 18. The purpose of having class counsel submit a lodestar brief was to cross-check the reasonableness of the contingency fee request.

In this case, counsel's lodestar brief indicates an expenditure of approximately 790 hours on this case, although counsel states that this figure may be somewhat low. Counsel

further indicates that he does not have a customary hourly rate because he is normally compensated on a contingent fee basis. However, counsel indicates that in other class actions, courts have approved hourly rates for his services of \$300 per hour. The Court notes further that if this were a true lodestar case, based on his experience, a reasonable hourly fee for a lawyer with class counsel's experience would be approximately \$305 per hour. See Dalesandro v. International Paper Co., Case No. 1:01-CV-109 (S.D. Ohio July 8, 2005), Doc. No. 96, at 43 & 43 n.25 (discussing formula for determining reasonable hourly rates for this market). Thus, counsel's lodestar fee calculation is approximately \$241,000. However, this is not the end of the question.

The trial court may also apply a multiplier to the lodestar calculation in order to account for the results obtained, the quality of the work performed, and the risk of a contingency fee agreement. Rawlings, 9 F.3d at 517. In Rawlings, the Court approved the district court's application of a multiplier of 2 to a lodestar award in a common fund case. Id. In Brotherton v. Cleveland, 141 F. Supp.2d 907 (S.D. Ohio 2001), which is essentially the template for this case, Judge Spiegel applied a multiplier of 1.5 to the lodestar fee based on the degree of success and the skill and performance of class counsel. Id. at 912-13. Although not a common fund case, in Barnes v.

City of Cincinnati, 401 F.3d 729 (6th Cir. 2005), the Court approved a fee multiplier of 1.75 based on the characteristics of the case. Id. at 476. The Court cautioned, however, that a fee multiplier of 1.75 is "near the upper end of what we consider 'reasonable'". Id. at 746 n.4. In words, very rarely will fee multipliers above 1.75 be considered reasonable.

In this case, applying a multiplier of 2 - above what ordinarily is reasonable - to the lodestar calculation to account for the degree of success, etc., results in a fee of \$482,000, or about 8% of the settlement fund. In the order approving the class action settlement, the Court noted that typically fee awards in common fund cases range from 10% to 30% of the fund. See Doc. No. 82, at 16. Here, even applying a generous fee multiplier, the lodestar fee method results in an award that is still below the typical fee award in common fund cases and, consequently, does not result in a reasonable fee for class counsel. Therefore, the Court finds that in this case the percentage of fund method is the appropriate method to compensate class counsel.

In determining an appropriate fee under the percentage of fund method, the trial court should consider the following factors:

(1) the value of the benefit rendered to the plaintiff class;

- (2) the value of the services on an hourly basis;
- (3) whether the services were undertaken on a contingent fee basis;
- (4) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others;
- (5) the complexity of the litigation; and
- (6) the professional skill and standing of counsel involved on both sides.

Bowling, 102 F.3d at 780. In addition, the Barnes Court listed twelve other factors, some of which overlap, to consider in determining a reasonable attorney's fee:

- (1) the time and labor required;
- (2) the novelty and difficulty of the questions;
- (3) the skill requisite to perform the legal service properly;
- (4) the preclusion of other employment by the attorney due to acceptance of the case;
- (5) the customary fee;
- (6) whether the fee is fixed or contingent;
- (7) time limitations imposed by the client or the circumstances;
- (8) the amount involved and the results obtained;
- (9) the experience, reputation, and ability of the attorneys;

- (10) the "undesirability" of the case;
- (11) the nature and length of the professional relationship with the client; and
- (12) awards in similar cases. Barnes, 401 F.3d at 746.

In consideration of the above factors, the Court finds that an award of attorney's fees of 30% of the common fund, or \$1.8 million, is appropriate in this case. In the making this finding the Court notes the following:

1. Value or benefit to the class members: Counsel obtained a \$6,000,000 settlement fund, of which approximately \$4.2 million (before deduction of administrative costs and incentive awards) is available for distribution to the class. This is a substantial benefit, particularly considering that the settlement agreement provided for the Defendants to waive the statute of limitations defense. As a result, Plaintiffs were able to avoid protracted litigation over the accrual of their claims or, worse yet, foreclosure of the claims due to the expiration of the statute of limitations.

2. Value of services on an hourly basis/Whether services were undertaken on a contingent fee basis: As stated, class counsel does not have a regular hourly fee because he typically is compensated on a contingency fee basis. This factor favors the percentage of fund method.

3. Society's stake in rewarding attorneys - This factor gauges the degree to which class counsel's expenditure of time and money benefitted small claimants who lack the resources to prosecute a case of this nature. In re Telectronics Pacing Sys., Inc., 137 F. Supp.2d 1029, 1043 (S.D. Ohio 2001). Additionally, courts have considered the benefit rendered to the class by the lawsuit, Bowling v. Pfizer, Inc., 922 F. Supp. 1261, 1281-82 (S.D. Ohio 1996), as well as whether the lawsuit raises public awareness of a particular problem. In re Cardizem CD Antitrust Lit., 218 F.R.D. 508, 534 (E.D.Mich. 2003).

Under these criteria, class counsel's performance in this case was exemplary. The out-of-pocket expenses to litigate this case were not particularly onerous - about \$2,300 according to the records. That considerably understates the matter, however. The truly significant fact is that counsel, a solo-practitioner, working without even paralegal assistance, diligently and sometimes painstakingly developed this lawsuit, guided it through five years of litigation, prevailed on the merits at each significant stage of the case, and obtained a significant settlement fund on behalf of the class, all without any interim compensation. Moreover, this lawsuit and settlement fostered a significant change in policy of the Hamilton County Coroner's Office.

In addition, this lawsuit and a follow-up case,

Albrecht v. Treon, No. 1:06-CV-274 (S.D. Ohio), have apparently spurred debate among the community of forensic scientists and may be instrumental in bringing about a national change in policy concerning autopsy procedures. See Mark Hansen, The Body in Question, ABA JOURNAL, July 2007, available at http://www.abajournal.com/magazine/the_body_in_question (visited October 30, 2007)(discussing impact of autopsy cases).

Thus, the Court finds that society has a substantial interest in rewarding attorneys who exhibit the skill and diligence of class counsel in this case as an incentive to others to not only undertake difficult cases, such as this one, but also to inspire a similar high level of performance.

4. Complexity of the Litigation/the skill required to perform the legal services properly/novelty and difficulty of the questions presented/preclusion of other employment: As just discussed, class counsel handled this case with a great degree of skill. In addition, the class benefitted greatly from counsel's unique experience litigating the Brotherton case. Although this case was an extension of Brotherton, the constitutional right in question was novel given the near-plenary authority the coroner has over all matters pertaining to autopsies. It took more than a little skill and insight to discern that Plaintiffs had a protectable constitutional interest at stake and to define that interest in a manner that is compatible with the important

functions of the Coroner's Office.

Finally, in his brief, counsel indicates that, being a solo-practitioner, and because of the time he has dedicated to this case, he has had to turn down other cases because of time constraints.

5. The customary fee/whether the fee is fixed or contingent: As indicated, counsel does not have a customary hourly fee and he took this case on a contingent fee basis.

6. The time limitations imposed by the client or the circumstances: The Court is not aware of any time limitations imposed on counsel by the clients. Obviously, however, the circumstances of operating as a solo practitioner imposes limits on the amount of time counsel is able to devote to any one case.

7. The amount involved and the results obtained: Counsel obtained an excellent result for the class, both in terms of the amount of the settlement and bringing about a change in policy in the Coroner's Office.

8. The experience, reputation, and ability of the attorneys: Class counsel is a very able and experienced class action litigator who has been involved in and settled a number of significant cases, including Brotherton and the In re Cincinnati Radiation Litigation matter. On the other side, counsel for the Defendants, Mr. David Stevenson of the Hamilton County Prosecutor's Office, is a very skilled attorney. Mr. Stevenson

also represented Hamilton County in the Brotherton case and so he also brought a great deal of relevant experience to this case. Just as importantly, the Defendants believed, and probably still believe, that they proceeded appropriately with respect to Plaintiffs' decedents. Certainly this enhanced the vigor with which the case was defended. Both counsel confirmed that settlement negotiations were hard-fought. Measured under any set of criteria this was not an easy case.

9. The undesirability of the case: Class counsel indicates that this was not a desirable case. One Plaintiff presented the case to five lawyers without being able to obtain representation. Additionally, class counsel spoke with other attorneys who apparently had potential clients with the same or similar claims but evidently opted not to accept the case.

10. Nature and length of professional relationship with client: This factor is apparently intended to determine whether an adjustment to the fee is necessary because counsel discounted his normal fee because he handles similar cases for the client.

Johnson v. Georgia Highway Exp., Inc., 488 F.2d 714, 719 (5th Cir. 1979), abrogated on other grounds, Blanchard v. Bergeron, 489 U.S. 87 (1989). This factor has no bearing in this case, however, both because counsel was retained on a contingency fee basis and because this appears to be a one-time situation.

11. Awards in similar cases: In Brotherton, the most similar

case, Judge Spiegel awarded class counsel a lodestar fee that equaled approximately 20% of the common fund. Brotherton, 141 F. Supp.2d at 913. Otherwise, as stated earlier, attorney's fees in common fund cases typically run from 10% to 30% of the fund. In this case, counsel requests attorney's fees equaling 33% of the common fund, slightly higher than the top of the range of typical attorney's fees awards.

Summary of Factors and Award

In summary, class counsel achieved an excellent result for the class members. Although based on prior case law, under the peculiar circumstances of this case, the question presented was novel. Counsel demonstrated an exemplary degree of skill, dedication, and perseverance in bringing the case to a successful conclusion. It was not a particularly desirable case, and given the duration of the case and the hours devoted to it, counsel assumed considerable risk taking the case on a contingency fee basis. The case may be of important social and/or procedural consequence. Similar cases result in fees of 20% to 30% of the fund. Under all the circumstances, the Court finds that a fee award at the top end of the typical fee range, 30%, is a reasonable fee award in this case.

Accordingly, the Court awards class counsel \$1,800,000 in attorney's fees. In addition, class counsel shall be

reimbursed from the common fund for expenses of \$2,304.45.¹

B. Incentive Awards of Class Representatives

Class counsel also requests incentive awards of \$50,000 each for class representatives Kathy Hainey, David and Cynthia Kaiser (to be shared), Michael DiSylvestro, and Debra Singler. In a recent decision, Judge Katz explained the considerations pertinent to issuing incentive awards:

Incentive awards are given to class representatives where their "services were vital to the prosecution of the litigation." 4 MOORE'S FEDERAL PRACTICE § 23.164[6] (3d ed. 2006). Incentive awards have been deemed appropriate where the class representative performed extensive service or faced a risk in spearheading the litigation. A contrary view advocates against these awards as it allows for a bonus recovery and may influence a settlement to the detriment of the class. 4 NEWBERG ON CLASS ACTIONS, § 11.38 (4th ed. 2002).

While the Sixth Circuit has not specifically spoken on this issue, they have recognized that, "[T]here may be circumstances where incentive awards are appropriate," noting, "incentive awards are usually viewed as extensions of the common-fund doctrine, a doctrine which holds that a litigant who recovers a common fund for the benefit of persons other than himself is entitled to recover some of his litigation expenses from the fund as a whole." Hadix v. Johnson, 332 F.3d 895, 898 (6th Cir. 2003), citing Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980).

The propriety of incentive awards is largely fact specific and the courts considering such requests have

¹ Class counsel's expenses will not be the only expenses paid from the common fund. The fees of the special master and the publication, notification, and mailing expenses, etc. incurred by her will also be paid from the common fund. To date administrative expenses of approximately \$113,000 have been covered by interest earned on the common fund. See Special Master's Report (Doc. No. 79), at 2.

examined the following factors in such a determination:

(1) the extent to which actions taken by the class representative protect the interests of the entire class and whether those actions resulted in a substantial benefit to the entire class; (2) whether the class representative assumed substantial direct and indirect financial risk; and (3) the amount of time and effort expended by the class representative in pursuit of the litigation.

Liberte Cap. Group v. Capwill, No. 5:99CV818, 2007 WL 2492461, at *1 (N.D. Ohio Aug. 29, 2007).

In this case, the incentive awards requested are fully justified. The class representatives were instrumental in obtaining a substantial benefit for the members of the class. Significantly, as class counsel accurately argues, although their individual cases did not present statute of limitations issues, the settlement they reached on behalf of the class preserved the claims of the absent class members and avoided extensive litigation over individual applications of the statute of limitations. In other words, the class representatives were not without incentive to settle their own claims and let the class be decertified. The record (Doc. No. 88) shows that the class representatives devoted considerable time to corresponding and meeting with class counsel, answering discovery interrogatories, preparing for and participating in depositions, and participating in the mediation sessions which resulted in this settlement agreement. The Court agrees with class counsel that the dedication and active participation of the class representatives

played important roles in both filing this lawsuit and bringing it to a successful conclusion on behalf of the class.

Accordingly, the Court grants the following incentive awards:

Kathy Hainey - \$50,000

Debra Singler - \$50,000

Michael DiSylvestro - \$50,000

David and Cynthia Kaiser - \$50,000

IT IS SO ORDERED

Date November 6, 2007

s/Sandra S. Beckwith
Sandra S. Beckwith, Chief Judge
United States District Court