

878 F.3d 1214

United States Court of Appeals, Ninth Circuit.

Manuel De Jesus Ortega MELENDRES, on behalf of himself and all others similarly situated; Jessica Quitugua Rodriguez, on behalf of themselves and all others similarly situated; David Rodriguez, on behalf of themselves and all others similarly situated; Velia Meraz, on behalf of themselves and all others similarly situated; Manuel Nieto, Jr., on behalf of themselves and all others similarly situated; Somos America, Plaintiffs–Appellees,
United States of America,
Intervenor–Plaintiff–Appellee,
v.
MARICOPA COUNTY, Defendant,
v.
Gerard A. Sheridan, Movant–Appellant.

No. 16-16663

Filed January 4, 2018

Synopsis

Background: Latino persons brought class action against sheriff and sheriff’s office, seeking injunctive relief based on allegations of Fourth and Fourteenth Amendments violations in policy of using race as factor in determining reasonable suspicion and in investigating or detaining Latino occupants of motor vehicles suspected of being in United States without authorization without any basis for state charges. After affirmance of order permanently enjoining challenged practices, 784 F.3d 1254, the United States District Court for the District of Arizona, No. 2:07-cv-02513-GMS, found county employee in civil contempt for disobeying injunction, and employee appealed. After the Court of Appeals dismissed appeal, plaintiffs moved for attorneys fees incurred in connection with appeal.

Holdings: The Court of Appeals held that:

plaintiffs were entitled to recover attorney fees they incurred in connection with appeal;

employee was liable for attorney fees; and

plaintiffs were not entitled to recover attorney fees for preparing answering brief that they never filed.

Motion granted.

Procedural Posture(s): On Appeal; Motion to Dismiss.

Attorneys and Law Firms

***1215** Dennis I. Wilenchik and John D. Wilenchik, Phoenix, Arizona, for Movant–Appellant.

Stanley Young, Covington & Burling LLP, Redwood Shores, California; Tammy Albarran, Covington & Burling LLP, San Francisco, California; Kathleen E. Brody and Brenda Muñoz Furnish, ACLU Foundation of Arizona; Cecilia D. Wang, ACLU Foundation Immigrants’ Rights Project, San Francisco, California; Anne Lai, Irvine, California; Julia Gomez, Mexican American Legal Defense and Educational Fund, Los Angeles, California; for Plaintiffs–Appellees.

D.C. No. 2:07-cv-02513-GMS

Before: J. Clifford Wallace, Susan P. Graber, and Marsha S. Berzon, Circuit Judges.

ORDER

Plaintiffs obtained an injunction against Defendant in an action under 42 U.S.C. § 1983. *Melendres v. Arpaio*, 784 F.3d 1254, 1267 (9th Cir. 2015). Sheridan, a now-retired employee of Defendant, appealed from the district court’s finding that he committed civil contempt by disobeying the injunction. After Sheridan filed his opening brief, we granted Plaintiffs’ motion to dismiss Sheridan’s appeal for lack of standing. Plaintiffs now seek attorney’s fees under 42 U.S.C. § 1988(b) for services performed in connection with the appeal. We grant the award in part.

Plaintiffs are “prevailing part[ies]” within the meaning of section 1988 in every sense. 42 U.S.C. § 1988(b). They succeeded in obtaining an injunction in the district court and succeeded in dismissing Sheridan’s appeal from its finding of contempt for violating the injunction. That we dismissed Sheridan’s appeal for lack of standing rather than on the merits does not, as Sheridan contends, divest Plaintiffs of prevailing party status. *See Sotomura v. Cty. of Hawaii*, 679 F.2d 152, 152 (9th Cir. 1982) (order)

(holding plaintiffs were prevailing parties, “even though they prevailed by obtaining dismissal of the appeal as untimely rather than affirmance on the merits”); *accord Ford v. Bender*, 768 F.3d 15, 31 (1st Cir. 2014) (holding plaintiff was prevailing party, even though plaintiff obtained dismissal of the appeal as moot, because judgment was not moot when issued by the district court); *Murphy v. Fort Worth Indep. Sch. Dist.*, 334 F.3d 470, 471 (5th Cir. 2003) (same); *Young v. City of Chicago*, 202 F.3d 1000, 1000–01 (7th Cir. 2000) (same). Our dismissal contemplates no future proceedings involving the merits of the contempt finding that could change the favorable result obtained by Plaintiffs below. *Sotomura*, 679 F.2d at 153. Plaintiffs are prevailing parties under section 1988.

Sheridan further argues that *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), stands for the proposition that a non-party may not be liable for a fee award under section 1988. We do not read *Graham* so broadly. *Graham* held that a government entity could not be vicariously liable for a fee award when plaintiffs prevailed in a lawsuit against its employees in their personal capacities. *Id.* at 167–68, 105 S.Ct. 3099. After the entity’s dismissal on Eleventh Amendment grounds, it was a non-party and did not actively participate in the litigation. *Id.* at 162, 105 S.Ct. 3099. By contrast, Sheridan disobeyed the injunction entered in the underlying litigation. He actively inserted himself into the litigation by appealing the contempt finding in the hope of clearing his name. We and our sister circuits have held that non-party *1216 contemnors may be liable for attorney’s fees in other contexts. *Portland Feminist Women’s Health Ctr. v. Advocates for Life, Inc.*, 877 F.2d 787, 789–90 (9th Cir. 1989) (holding non-party contemnors liable for plaintiffs’ attorney’s fees incurred in bringing contempt proceeding as a remedial sanction); *see also Gen. Ins. Co. of Am. v. E. Consol. Utils., Inc.*,

126 F.3d 215, 220 (3d Cir. 1997) (affirming award of attorney’s fees from non-party contemnor); *Waffenschmidt v. MacKay*, 763 F.2d 711, 726 (5th Cir. 1985) (affirming award of attorney’s fees from non-party contemnors because they aided and abetted the defendants in violating the court’s injunction). There is no reason to treat an award of fees under section 1988 any differently. Therefore, we grant Plaintiffs’ application for attorney’s fees and costs related to Sheridan’s dismissal.

Plaintiffs also seek fees for preparing an answering brief that they never filed, having instead prevailed in their motion to dismiss. We may award fees only for work “expended in pursuit of the ultimate result achieved.” *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (internal quotation marks and citation omitted). Because Plaintiffs did not succeed in opposing Sheridan’s appeal on the merits, we award them no fees for preparing the answering brief.

We refer this matter to the Appellate Commissioner to calculate the amount of reasonable attorney’s fees and non-taxable costs to award Plaintiffs consistent with this order. Any such award is subject to reconsideration by this panel. *See* Ninth Cir. R. 39-1.9.

REFERRED TO THE APPELLATE COMMISSIONER

All Citations

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