



### Legal Standard

It is well settled that a district court may award a prevailing party attorneys' fees in an action arising under 42 U.S.C. § 1983 pursuant to 42 U.S.C. § 1988. This attorney fee provision encourages private litigants to act as "private attorneys general" and plays an important role in the vindication of fundamental rights protected under the American Constitution. *Donnell v. United States*, 682 F.2d 240, 245 (D.C. Cir. 1982). A fee award under § 1988 is not a sanction or punishment against a defendant, and a defendant's good faith defense of an unconstitutional state law does not disqualify a plaintiff from an award of attorney's fees. *Lefemine v. Wideman*, 758 F.3d 551, 555-56 (4th Cir. 2014). Only in "rare occasions," where the award of an attorney's fee would be "unjust," should a prevailing plaintiff in a § 1983 action be denied an attorney's fee award under § 1988. *Id.* Such a rare, special circumstance would be where a "plaintiff's success is purely technical or *de minimus*" or the plaintiff obtained "only a Pyrrhic victory." *Pitrolo v. Cty. of Buncombe*, 589 F. App'x 619, 630 (4th Cir. 2014).

In calculating a proper fee award for a prevailing plaintiff, the Court should utilize the "lodestar" method as a starting point, which involves a calculation of the hours "reasonably expended on the litigation times a reasonable hourly rate." *Blum v. Stenson*, 465 U.S. 886, 888 (1984). The reasonableness of the computed lodestar figure should then be measured under the standards set forth in *Barber v. Kimbrells, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978), which include (1) time and labor expended; (2) novelty and difficulty of the issues raised; (3) the skill required to perform the legal services; (4) the attorney's opportunity costs in undertaking the representation; (5) the customary fee for similar work; (6) attorney's expectations at the outset of the litigation; (7) time limitations imposed by the client or circumstances; (8) amount in

controversy and results obtained; (9) the expertise, reputation and ability of counsel; (10) the nature and length of the professional relationship between attorney and client; (11) the undesirability of the case within the legal community; and (12) fee awards in similar cases. Although all of the *Barber* factors are important, a critical issue, after determining the lodestar figure and subtracting hours unrelated to successful claims, is the “degree of success enjoyed by the plaintiff.” *Hudson v. Pittsylvania County, Va.*, 774 F.3d 231, 237 (4th Cir. 2014).

### **Factual Background**

The instant action was filed by Plaintiffs on October 15, 2014, challenging the constitutionality of South Carolina’s ban on same sex marriage contained in state statutory and constitutional law. This litigation followed the Fourth Circuit’s decision in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, *Schaefer v. Bostic*, 135 S. Ct. 308 (2014), declaring a similar Virginia provision unconstitutional. By the time Plaintiffs filed this action, South Carolina was the only state in the Fourth Circuit that continued to enforce its same sex marriage ban.

Plaintiffs filed motions for a preliminary injunction and for summary judgment on October 22, 2014, and Defendants Wilson and Haley filed memoranda in opposition to the motion for preliminary injunction on November 3, 2014, and in opposition to the motion for summary judgment on November 10, 2014. (Dkt. Nos. 12, 13, 29, 34).<sup>1</sup> These memoranda vigorously contested various procedural and substantive issues and challenged the Fourth

---

<sup>1</sup> Defendant Condon took the position in his Answer that Plaintiffs were entitled to marry as a same sex couple under the United States Constitution and joined in Plaintiffs’ request for relief from this Court. (Dkt. No. 27). Plaintiffs have indicated they do not seek an attorney fee award against Defendant Condon.



Circuit's recently issued *Bostic* decision as wrongly decided. The issues raised by Defendants Wilson and Haley included such procedural issues as standing, Eleventh Amendment, the *Rooker-Feldman* doctrine, the abstention doctrine, and substantive issues regarding the application of the Due Process Clause and Equal Protection Clause to Plaintiffs' asserted claims as a same sex couple to marry. A considerable portion of the Defendants' briefs focused on their argument that the Fourth Circuit was profoundly misguided and mistaken in its *Bostic* decision. (Dkt. No. 29, 34). Plaintiffs responded to this comprehensive attack on their legal position in a memorandum filed on November 5, 2014. (Dkt. No. 32).

By order dated November 12, 2014, this Court granted Plaintiffs' motion for summary judgment and addressed in a 26-page order the various procedural and substantive issues argued by Defendants. The Court did grant Defendant Haley's motion to dismiss on Eleventh Amendment grounds but denied that same motion in regard to Defendant Wilson. The Court stayed the effect of its order until November 20, 2014, to allow the Defendant a reasonable opportunity to seek an appellate court stay. (Dkt. No. 37).<sup>2</sup> Defendant filed an appeal of the Court's order and applied to the Fourth Circuit for an emergency stay on November 13, 2014. Plaintiffs filed a memorandum in opposition to the motion for an emergency stay on November 17, 2014. The Fourth Circuit denied Defendant's request for a stay on November 18, 2015. (Dkt. No. 43). The Defendant then sought an emergency stay from the United States Supreme Court. Plaintiffs were preparing to file a response to this emergency petition when the United States Supreme Court denied the Defendant's motion to stay on November 20, 2014. At noon on

---

<sup>2</sup> For ease of reference, the Court will hereafter refer to Defendant Wilson as "Defendant."

November 20, 2014, Plaintiffs had accomplished a complete litigation victory, prevailing in their constitutional claim of a right to marry as a same sex couple.

Plaintiffs filed a petition for an attorneys' fee award on December 10, 2014, and the Defendant filed a memorandum in opposition on January 16, 2015. (Dkt. No. 46, 55). Plaintiffs filed a reply on February 9, 2015. (Dkt. No. 60). The Court thereafter agreed, at the parties' joint request, to stay the attorney fee award issue pending the United States Supreme Court's ruling on the same sex marriage issue. Following the United States Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (June 26, 2015), this Court moved to address the outstanding fee award issue. Plaintiffs advised the Court on July 30, 2015, that they wished to stand on their present briefs and Defendant filed a supplemental brief on August 5, 2015. (Dkt. Nos. 65, 67).

### **Discussion**

At the outset, the Court notes that the legal work done by counsel on all sides of this dispute was consistently excellent. The research was thorough, the reasoning was cogent, and the briefs were well written. The defense mounted was undertaken with as much skill and passion as was provided in any state, but the natural and predictable consequence of mounting such a vigorous defense was that it required opposing counsel to expend considerable time addressing the issues raised.

In the course of this litigation, the Court heard some criticism from Plaintiffs of the State mounting such a vigorous defense of its ban on same sex marriage. Defendant now criticizes Plaintiffs' counsel for expending significant time advocating their clients' positions. But in the Court's view, the conduct of all of the attorneys in this litigation reflects the highest calling of



service to their clients, their profession, and to the Court by zealously and skillfully advancing the claims or defenses of their clients. The genius of the American system of justice is that it provides an open forum to litigate difficult and emotionally charged issues in a civil and orderly way. Rather than criticize or condemn counsel for the parties, the Court praises their efforts.

Plaintiffs filed with the Court a petition setting forth its claim for an award of fees and costs and attached affidavits of six attorneys who sought to have fees awarded for their legal services to Plaintiffs. (Dkt. Nos. 46, 46-2, 46-3, 46-4, 46-5, 46-6, 46-7). Three of the attorneys for which a fee award is sought, M. Malissa Burnette, Nekki Shutt, and Jacqueline Pavlicek, practice in the Columbia, South Carolina law firm of Callison Tighe and four of the attorneys practice in a Section 501(c)(3) public interest law firm, Lambda Legal. The record establishes that the Callison Tighe attorneys are skillful litigators and the Lambda Legal attorneys bring considerable expertise in their specialized practice of advancing the legal rights of the LGBT community.

The record reflects that on or about October 10, 2014, the Callison Tighe attorneys commenced work on this litigation and immediately associated the Lambda Legal attorneys to assist them. (Dkt. No. 46-3 at 10). This was an extraordinarily dynamic and fast moving time on the marriage equality litigation front, and Plaintiffs' counsel initiated their lawsuit with the clear goal of achieving a complete and rapid victory for Plaintiffs through reliance on the Fourth Circuit's recent decision in *Bostic*. Since this approach required significant litigation resources over a relatively limited period of time, the association by the Callison Tighe attorneys of Lambda Legal attorneys was reasonable and appropriate.

The legal work performed by plaintiffs' counsel can roughly be categorized into three stages: (1) the initial legal work to obtain the District Court's judgment, which involved researching and preparing a complaint, motions and memoranda supporting a preliminary injunction and summary judgment, and a reply memorandum to Defendant's opposition to their motions for dispositive relief<sup>3</sup>; (2) the work involved in responding to Defendant's efforts to obtain an emergency stay from the Fourth Circuit Court of Appeals and the United States Supreme Court; and (3) the fee petition that is now before the Court. Although the legal work in this matter was done in a relatively compressed period of time, there is no doubt that a great deal of work was required of Plaintiffs' counsel. That work was performed skillfully and efficiently without undue duplication by Plaintiffs' legal team.

The Defendant's brief in opposition to an attorney fee award opens with the suggestion that the work of Plaintiffs' counsel was of no consequence because other courts had already settled the issues in this litigation. (Dkt. No. 55 at 1). If that is so, one might reasonably ask why the State filed a 57-page brief raising a broad array of procedural and substantive issues, including a methodical attack on recent Fourth Circuit precedent. The Court does not suspect for a moment that the State attorneys were not sincere in advancing what they asserted were meritorious legal positions, and the Court does not doubt the need of Plaintiffs' counsel to vigorously contest the arguments advanced by the Defendant. Simply stated, the Defendant cannot engage in a no holds bar defense and then complain that Plaintiffs' counsel expended considerable but reasonable time responding to that defense.

---

<sup>3</sup> The parties advised the Court that they did not believe an evidentiary hearing was necessary and did not seek oral argument on the dispositive motions.



Defendant argues that no fee award is appropriate here because this would act as a punishment for defending an existing state law and constitutional provision, and the legal issue was unsettled until the United States Supreme Court ruled. (Dkt. Nos. 55 at 9; 67 at 1-10). This argument badly misapprehends the law in the Fourth Circuit. A fee award under § 1988 is not a punishment for “bad defendants” or only for defendants who defend an unconstitutional law in bad faith. *Lefemine v. Wideman*, 758 F.3d at 557. There is no “good faith defense” or qualified immunity defense for defendants under the Attorney Fee Award Act. Instead, the Act “is meant to compensate civil rights attorneys who bring civil rights cases and win them.” *Id.*, quoting *Williams v. Hanover Hous. Auth.*, 113 F.3d 1294, 1302 (1st Cir. 1997).

An important issue in determining both the appropriateness and the amount of an award is the degree and significance of the success realized by Plaintiffs. *Pitrolo v. Cty. of Buncombe, NC*, 589 F. App’x at 630. Despite submitting a 22-page brief in opposition to an attorney fee award and a 14-page supplemental brief, this issue was only minimally addressed by Defendant. Plaintiffs began this litigation asserting a right as a same sex couple to marry, which the State of South Carolina prohibited by law. They sought a declaration that these provisions of State law were unconstitutional and an injunction prohibiting Defendants from interfering with their right to marry. Upon the completion of this litigation, they had obtained complete relief. This complete litigation victory has benefitted themselves and thousands of other same sex couples in South Carolina. Plaintiffs’ success in this litigation weighs heavily in favor of a reasonable attorney fee award.

The Defendant described the hours sought to be reimbursed by Plaintiffs’ counsel as “outrageously excessive” and “shocked the conscience.” (Dkt. No. 55 at 2, 5). The Defendant



specifically points to time expended by Plaintiffs' counsel preparing the complaint, the memoranda in support of dispositive relief, and the memorandum in reply to Defendant's filing. (*Id.* at 11-13). At the time of the filing of this lawsuit, there were literally dozens of recent appellate and district court decisions to review and complex issues to address. The Court is, of course, intimately aware of the legal issues contested in this matter, having personally read the parties' voluminous filings and the significant body of relevant case law. The Court finds that the time expended by Plaintiffs' counsel in this matter to have been reasonable and not excessive.

The Defendant makes specific complaint about Lamba Legal attorney Elizabeth Littrell traveling from Atlanta, Georgia to Charleston, South Carolina to meet her clients, which was characterized as "completely unnecessary." (*Id.* at 15). The Court respectfully disagrees with this criticism, since an experienced specialist counsel, such as Ms. Littrell, may well gain valuable insight into her case by personal contact with her clients. The Defendant also opposes the efforts of Plaintiffs' counsel to be reimbursed for time expended responding to the Defendants' petition for an emergency stay in the United States Supreme Court because the Court denied the stay before Plaintiffs' counsel had the opportunity to file their opposing memorandum. (*Id.*). The legal work challenged was generated by the Defendant's emergency petition, and the time was reasonably expended. The fact that the Supreme Court denied the petition rapidly and without benefit of Plaintiffs' opposition memorandum does not provide a basis to deny reimbursement for this work.

The Defendant does raise legitimate issues about a few areas in which Plaintiffs' counsel seek reimbursement. First, Defendant questions an award for time expended from October 7-9, 2014, which appears to involve legal work associated with an unsuccessful effort to intervene in

South Carolina Supreme Court litigation titled *State v. Condon*. This included research and preparation of a motion to intervene in that action. (Dkt. Nos. 46-2 at 7; 46-3 at 10; 67-2). The first legal services provided for this lawsuit appear to have occurred on October 10, 2014, with the time sheet entry “[w]ork on marriage equality lawsuit.” (Dkt. No. 46-3 at 10). The Court finds the time expended by Plaintiffs’ counsel before October 10, 2014, is not reimbursable. Thus, the Court disallows during this time period 16.9 hours sought by Attorney Burnette, 21.3 hours sought by Attorney Shutt, and 2.7 hours by Attorney Pavlicek. (Dkt. Nos. 46-2 at 7; 46-3 at 10).

Second, Defendant questions reimbursement for time expended by Plaintiffs’ counsel providing legal advice or information to persons other than the Plaintiffs themselves. Time records indicate that immediately before and at the time of the expiration of this Court’s stay on November 20, 2014, Attorneys Burnette and Shutt were preparing materials and expending time attempting to explain the implications of the Court’s order to non-parties to this litigation. (Dkt. Nos. 46-2 at 9; 46-3 at 19). While this work is certainly commendable and was undoubtedly a valuable public service, it is not a reimbursable legal service under § 1988 in this litigation. Thus, the Court disallows 2.5 hours sought by Attorney Burnette on November 19, 2014, and 3.4 hours on November 19, 2014, and 6.6 hours on November 20, 2014, sought by Attorney Shutt. (*Id.*).

Except for the adjustments set forth above, the Court finds the remainder of the fees requested by Plaintiffs, which total 390.25 hours, to have been “reasonably expended on the litigation.” *Blum v. Stenson*, 465 U.S. at 888. The Court has itemized these allowable hours per attorney at the conclusion of this order.



Counsel for the parties have pointed the Court to attorney fee awards and requests in other same sex marriage cases, some which have been substantially larger than the fees requested here and a few have been smaller. (Dkt. Nos. 60-1; 67 at 12). In the course of evaluating the Plaintiffs' fee request, the Court reviewed the attorney's fee requested in a related case in this District, *Bradacs v. Wilson*, C.A. No. 3:13-2351, Dkt. No. 113 (D.S.C.). Although *Bradacs* and *Condon* dealt ultimately with different legal questions, there was certainly overlap on a number of issues. The attorneys in *Bradacs* have sought approval for 269.15 hours. *Id.* at 6.

There was at least one major difference in the legal tasks undertaken by counsel in the two cases. Counsel in this action, *Condon v. Wilson*, were required to expend considerable time contesting the Defendant's petitions for an emergency stay in the Fourth Circuit Court of Appeals and the United States Supreme Court. This resulted in 68 attorney hours being expended by Plaintiffs' counsel resisting the Defendant's emergency petitions between November 13 and November 20, 2014. (Dkt. No. 46-2 at 9; 46-3 at 17-19; 46-4 at 7; 46-5 at 7; 46-7 at 7-8). The rapid filing and response times on these petitions created a period of intense activity by Plaintiffs' counsel, essentially making this an "all hands on deck" situation. While the Defendant in *Bradacs* also sought a stay, minimal work was required by the *Bradacs* counsel because the United States Supreme Court denied a stay in *Condon* almost immediately after the *Bradacs* emergency stay petition was filed, effectively bringing the merits portion of both cases to an end. Once the attorneys fees expended in responding to the emergency stay petitions in *Condon* are factored out, the attorney time expended in *Bradacs* and *Condon* are not materially different.

Plaintiffs have sought reimbursement at hourly rates ranging from \$175.00 to \$400.00 per hour for attorneys. (Dkt. No. 46 at 22). Plaintiffs filed affidavits from practicing attorneys supporting the reasonableness of these rates. (Dkt. No. 46-8, 46-9). Defendant has not indicated any objection to these hourly rates. The Court finds the hourly rates to be reasonable and approves them as requested. Plaintiffs also request approval of 31.7 hours of paraprofessional services at hourly rates ranging from \$90.00 to \$115.00 per hour, for a total reimbursement of \$3,239.50, and costs of \$1,426.48. (Dkt. No. 46 at 22-23). Defendant has made no objection to these proposed costs and paraprofessional fees. The Court finds these costs and paraprofessional fees reasonable and approves them as requested.

After finding the hourly rates and hours requested (as adjusted above) to be reasonable, the Court examined the potential award under the standards set forth in *Barber v. Kimbrells, Inc.*, 577 F.2d at 226, to further assess the reasonableness of the proposed award. The factors considered were as follows:

1. Time and labor expended: The Court finds the time and labor expended by counsel, as adjusted, to be reasonable and necessary. This factor weighs heavily in favor of a reasonable fee award.
2. Novelty and difficulty of the issues raised: The Court finds the procedural and substantive issues to be complex and required a high degree of skill and expertise. This factor weighs heavily in favor of a reasonable fee award.
3. The skill required to perform the legal work: This case involved adjudication of complex constitutional issues at the district court and appellate court levels and required the highest degree of legal skill. This factor weighs heavily in favor of a reasonable fee award.



4. The attorneys' opportunity costs in undertaking this representation: Counsel have offered no evidence to support this factor.

5. Customary fee for similar work: Plaintiffs have offered persuasive evidence that the hourly rates requested were reasonable and consistent with customary fees in similar matters in the legal marketplace.

6. Attorneys' expectations at the outset of this litigation: Counsel have offered no evidence to support this factor.

7. Time limitations imposed by the client or circumstances: This case required an extensive devotion of time over limited period of time. This is not a significant factor in determining the reasonableness of the fee requested.

8. Results obtained: Plaintiffs sought declaratory and injunctive relief regarding South Carolina's statutory and constitutional ban on same sex marriage. They obtained complete relief. This factor weighs heavily in favor of a reasonable fee award.

9. The expertise, reputation and ability of counsel: Counsel have considerable experience and demonstrated outstanding ability in the performance of their duties on behalf of Plaintiffs. This factor weighs heavily in favor of a reasonable fee award.

10. The nature and length of the relationship between attorney and client: Counsel has offered no evidence regarding this factor.

11. Undesirability of the case within the legal community: Counsel has offered no evidence to support this factor.

12. Fee awards in similar cases: As discussed above, the fee requests and awards in similar cases have varied, and the fees requested here fall within a range of reasonableness in

comparison to other cases.

### Conclusion

Based upon the foregoing, the Court finds the hours, rates and total compensation set forth below are reasonable and satisfy the reasonableness standards of *Barber* and other Fourth Circuit precedents for the award of attorneys' fees. Therefore, the Court hereby approves and awards reasonable attorneys' fees against Defendant Wilson in his official capacity<sup>4</sup> pursuant to 42 U.S.C. § 1988 as follows:

	Hours	Rate	Total
M. Malissa Burnette	98.45	\$350.00	\$34,457.50
Nekki Shutt	101.90	\$325.00	\$33,117.50
Jacqueline Pavlicek	4.80	\$175.00	\$ 840.00
Elizabeth Littrell	142.80	\$325.00	\$46,410.00
Gregory Nevins	22.00	\$375.00	\$ 8,250.00
Camilla Taylor	11.70	\$350.00	\$ 4,095.00
Jon Davidson	8.60	\$400.00	\$ 3,440.00
<b>Total</b>	<b>390.25</b>		<b>\$130,610.00</b>

Additionally, the Court approves reimbursement of paraprofessional fees of \$3,239.50 and costs of costs of \$1,426.48. Thus, the total award of fees and costs is **\$135,275.98**.

---

<sup>4</sup> Defendant Wilson urges this Court to grant any attorney fee award in this litigation against the State of South Carolina, rather against him in his official capacity and references authorities in support of that approach. (Dkt. No. 55 at 19-21). The Court's difficulty with this request is that the Court would be imposing liability on an entity that is not a named party in this litigation. The Court finds the reasoning of Judge Currie in *Summers v. Adams*, C.A. No. 3:08-2265-CMC, 2010 WL 2179571 at \*7 (D.S.C. May 26, 2010) persuasive on this point, and the Court will grant the fee award against Defendant Wilson in his official capacity.



AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'RM Gergel', is written over a horizontal line.

Richard Mark Gergel  
United States District Court

August 10, 2015  
Charleston, South Carolina