

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION**

RYAN HAYGOOD, DDS, ET AL

CIVIL ACTION NO. 13-0335

Plaintiffs

JUDGE S. MAURICE HICKS, JR.

V.

BRIAN BEGUE, ET AL

**MAGISTRATE JUDGE MARK L.
HORNSBY**

Defendants

**MOTION FOR ATTORNEY'S FEES BY DEFENDANTS BARRY OGDEN,
CAMP MORRISON, DANA GLORIOSO, AND KAREN MOORHEAD**

NOW INTO COURT, through undersigned counsel, come Defendants, Barry Ogden, Camp Morrison, Dana Glorioso, and Karen Moorhead (collectively referred to as "Defendants"), who respectfully request this Honorable Court grant them reasonable attorney's fees under 42 U.S.C. § 1988(b) and La. R.S. § 51:1409.

1.

Defendants filed a Motion to Dismiss Pursuant to 12(b)(6), alternatively, Motion to Dismiss Pursuant to 12(B)(1), and alternatively, Motion for more Definite Statement under Rule 12(e) (Doc. 29) on May 3, 2013 relating to Plaintiffs' claims under 42 U.S.C. § 1983, 15 U.S.C. § 1 and 2, Louisiana defamation laws, and the Louisiana Unfair Trade Practices Act ("LUTPA"). This motion was granted by this Court on March 31, 2014 (Doc. 111). A Memorandum Ruling (Doc. 110) was also issued that same day, which dismissed all of Plaintiff's claims against Defendants.

2.

For reasons more fully explained in the supporting memorandum, attached and incorporated herein, Defendants are the prevailing parties with respect to Plaintiffs' § 1983 and LUTPA claims under the Court's Order (Doc. 111) and Memorandum Ruling (Doc. 110). Accordingly, Defendants are entitled to reasonable attorney's fees under 42 U.S.C. § 1988(b) and La. R.S. § 51:1409 as the § 1983 and LUTPA claims against them were frivolous and brought in bad faith.

WHEREFORE, Defendants, Barry Ogden, Camp Morrison, Dana Glorioso, and Karen Moorhead, pray that this motion be granted and they be awarded reasonable attorney's fees in accordance with 42 U.S.C. § 1988(b) and La. R.S. § 51:1409.

Respectfully submitted:

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**ATTORNEYS FOR DEFENDANTS, BARRY
OGDEN, CAMP MORRISON, KAREN
MOORHEAD, AND DANA GLORIOSO**

CERTIFICATE

I HEREBY CERTIFY that the above and foregoing Motion for Attorney's Fees was electronically filed with the Clerk of Court of the United States District Court for the Western District of Louisiana by using the CM/ECF System, which will send a notice of electronic filing to all counsel of record upon all counsel of record, on this **13th** day of **March, 2018**.

/s/ Barbara Bell Melton

OF COUNSEL

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
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JUDGE S. MAURICE HICKS, JR.

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MAGISTRATE JUDGE MARK L.
HORNSBY

Defendants

**MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEY'S FEES BY
DEFENDANTS BARRY OGDEN, CAMP MORRISON, DANA GLORIOSO, AND
KAREN MOORHEAD**

Defendants Barry Ogden, Camp Morrison, Dana Glorioso, and Karen Moorhead (collectively referred to as "Defendants") submit this memorandum in support of their Motion for Attorney Fees. Based upon the law and argument presented herein, Defendants, as the prevailing parties with respect to Plaintiffs' frivolous § 1983 claims and LUTPA claims, are entitled to recover reasonable attorney fees under 42 U.S.C. § 1988(b) and La. R.S. § 51:1409.

I. Background and present status

Plaintiffs, Ryan Haygood, DDS and Haygood Dental Care, LLC, filed a "Complaint for Damages Arising out of Violations of 42 U.S.C. §1983, and 15 U.S.C. §1 and §2" on February 13, 2013, and named, among others, Barry Ogden, Camp Morrison, Dana Glorioso, and Karen Moorhead as defendants (Doc. 1).

Defendants filed a Motion to Dismiss under Rule 12(b) (Doc. 29) on May 3, 2013, seeking dismissal of Plaintiffs' claims under 42 U.S.C. § 1983, 15 U.S.C. § 1 and 2, Louisiana defamation laws, and the Louisiana Unfair Trade Practices Act ("LUTPA"). The Court entered an Order on

March 31, 2014 (Doc. 111) granting the motion. A Memorandum Ruling (Doc. 110) was issued that same day dismissing all of Plaintiffs' claims against these Defendants.

Defendants show that they are the prevailing parties with respect to Plaintiffs' §1983 and LUTPA claims under the Court's Order (Doc. 111) and Memorandum Ruling (Doc. 110). Accordingly, they are entitled to reasonable attorney fees under 42 U.S.C. § 1988(b) and La. R.S. § 51:1409 as the § 1983 and LUTPA claims against them were frivolous and brought in bad faith.

II. Law and Analysis

A. Recoverability of attorney's fees under 42 U.S.C. § 1988(b).

42 U.S.C. § 1988(b) provides that in certain civil rights cases, including § 1983 actions, the court, in its discretion, may award the prevailing party "a reasonable attorney's fee." The Supreme Court has held that § 1988 authorizes a district court to award attorney's fees to a defendant "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation."¹ Further, the "presence of reasonable allegations in a suit does not immunize the plaintiff against paying for the fees that his frivolous claims imposed."²

Generally, in determining whether the plaintiff's claims are frivolous, courts should consider "whether the plaintiff established a prima facie case, whether the defendant offered to settle, and whether the court held a full trial."³ However, these factors are "guideposts," and

¹ *Fox v. Vice*, 131 S.Ct. 2205, 2213 (2011) (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)).

² *Id.* at 2214.

³ *Myers v. City of W. Monroe*, 211 F.3d 289, 292 (5th Cir. 2000).

frivolousness must be judged on a case-by-case basis.⁴ “Where a claim is ‘so lacking in merit’ as to render it groundless, it may be classified as frivolous.”⁵

As recently held by this Court in *this* case, “Claims that are clearly time-barred are meritless and are properly deemed frivolous.” (Doc. 227).⁶ And other Louisiana’s federal district courts have correctly, and consistently, held that prescribed claims are frivolous.⁷ For the same reasons identified in this Court’s holding in Document 227 of this case and the Court’s Judgment at Document 228, movants herein are also entitled to reasonable attorney fees under 42 U.S.C. § 1988.

B. Defendants are entitled to recover attorney’s fees under 42 U.S.C. § 1988(b) because Plaintiffs knew or should have known that their § 1983 claims were prescribed when filed.

This Court found that Plaintiffs’ § 1983 claims were prescribed at the time of filing, because Plaintiffs “clearly knew, or should have known, of the overt acts which might constitute a § 1983 violation at least two years before the instant suit was filed.” (Doc. 110, p. 5). A claim

⁴ *Doe v. Silsbee Indep. Sch. Dist.*, 440 Fed.Appx. 421, 425 (5th Cir. 2011) (per curiam).

⁵ *Provensal v. Gaspard*, 524 F. App'x 974, 976 (5th Cir. 2013) (citing *United States v. Mississippi*, 921 F.2d 604, 609 (5th Cir. 1991)).

⁶ See also *Provensal*, 524 F. App'x at 977; *Pope v. MCI Telecommunications Corp.*, 937 F.2d 258, 267 (5th Cir. 1991); *Brown v. Pool*, 79 F.App'x 15, 17 (5th Cir. 2003) (unpublished); *Zihlavsky v. Police Dep't of Bossier City*, 244 F.3d 136 (5th Cir. 2000) (unpublished).

⁷ *Gamez-Abrego v. Orleans Par. Jail*, No. 10-1595, 2010 WL 3523038, at *3 (E.D. La. July 19, 2010) report and recommendation adopted, No. 10-1595, 2010 WL 3523037 (E.D. La. Sept. 1, 2010); *Jeanpierre v. Orleans Sheriff Gusman*, No. 10-4395, 2010 WL 5638296, at *1 (E.D. La. Nov. 30, 2010) report and recommendation adopted sub nom. *Jeanpierre v. Gusman*, No. 10-4395, 2011 WL 231747 (E.D. La. Jan. 24, 2011); *Willis v. W. Carroll Par. Det. Ctr.*, No. 09-1716, 2010 WL 2291994, at *5-6 (W.D. La. Apr. 28, 2010) report and recommendation adopted, No. 09-1716, 2010 WL 2291996 (W.D. La. June 2, 2010).

under § 1983 is subject to state statute of limitations for personal injury actions.⁸ In Louisiana, § 1983 claims are subject to a one (1) year prescriptive period as established by La. C.C. art. 3492.⁹ As this Court recognized, Plaintiffs clearly knew or should have known of the overt acts that might constitute a § 1983 violation when their state lawsuit was filed in September 2011. (Doc. 110, p. 5). Therefore, because Plaintiffs knew or should have known that their § 1983 claims were clearly prescribed at the time of filing the instant action, those claims were frivolous, unreasonable, and without foundation. Accordingly, Defendants, as the prevailing parties in regard to Plaintiffs' frivolous § 1983 claims, are entitled to reasonable attorney's fees under 42 U.S.C. § 1988(b).¹⁰

C. Recoverability of attorney's fees under La. R.S. § 51:1409.

The Louisiana Unfair Trade and Consumer Protection Act (LUTPA) provides that when a plaintiff asserts baseless LUTPA claims, either in bad faith or to harass the defendant, the court may award the defendant reasonable attorney fees and costs. *See* La. R.S. 51:1409. Section 1409(a) specifically provides, in part, that “[u]pon a finding by the court that an action under [LUTPA] was groundless and brought in bad faith or for purposes of harassment, the court may award to the defendant reasonable attorney fees and costs.”

⁸ *Owens v. Okure*, 488 U.S. 235, 249-251 (1989).

⁹ *See Hawkins v. McHugh*, 46 F.3d 10, 12 (5th Cir. 1995); *Dixon v. Doe*, No. 06-2330, 2007 WL 1296785, *2 (W.D. La. 2007).

¹⁰ These Defendants are entitled to attorney's fees under Section 1988 for the same reasons articulated by this Court in its Memorandum Ruling regarding H.O. Blackwood, DDS's Motion for Attorney's Fees. *See* Doc. 227.

Further, although Louisiana courts have described this provision as “penal in nature and subject to reasonably strict construction,”¹¹ attorney fees have still been awarded to the defendant even when the plaintiff’s claims may have some merit, if brought in bad faith, and the primary purpose of harming or harassing the defendant.¹² In *Frank’s Casing*, attorneys’ fees were awarded under Section 1409 despite the trial court granting a partial summary judgment finding that the defendant-employee had breached a confidentiality agreement. This did not preclude a jury from finding that the plaintiff-employer brought unfair trade practices and trade secrets claims in bad faith, warranting recovery of attorney fees by the defendant. Likewise, the trial court’s judgment awarding attorney fees to the defendant under section 1409 in *Bobby & Ray Williams Partnership* was affirmed, upon a finding that the plaintiffs knew that their LUTPA claims, as asserted in their petition, were groundless. The trial court had found that the plaintiffs acted in bad faith in filing the lawsuit “without adequate investigation or foundation to provide a reasonable basis for the allegations in their petition.”¹³

D. Defendants are entitled to recover attorney’s fees under La. R.S. § 51:1409 because Plaintiffs’ LUTPA claims were frivolous, brought in bad faith, and unsupported by any evidence.

This Court dismissed Plaintiffs’ LUTPA claims against Defendants because (1) Plaintiffs failed to establish that a conspiracy existed in the LUTPA context, and (2) Plaintiffs failed “to

¹¹ *Bobby and Ray Williams P’ship, L.L.P. v. The Shreveport La. Hayride Co., L.L.C.*, 38-224, p. 12 (La. App. 2 Cir. 4/21/04); 873 So.2d 739; *see also Grace–Cajun Oil Co. No. Two v. Damson Oil Corp.*, 897 F.2d 1364 (5th Cir. 1990).

¹² *Frank’s Casing Crew & Rental Tools, Inc. v. Sipos*, 08-640 (La. App. 3 Cir. 2/18/09); 6 So.3d 298 *writ denied*, 09-0664 (La. 5/15/09); 8 So.3d 585.

¹³ *Id.* at 746.

allege any act by these Defendants which would enable them to achieve an unfair competitive advantage over Plaintiffs (nor can he since none of these Defendants are dentists).” (Doc. 110 at 11-12). Simply put, even when assumed true and construed in favor of Plaintiffs in the context of a Rule 12(b)(6) motion,¹⁴ Plaintiffs’ factual allegations failed to establish a colorable claim under LUTPA.

Generally, dismissal of LUTPA claims does not automatically make those claims groundless.¹⁵ However, when the LUTPA claims asserted by the plaintiff are not only dismissed because of the plaintiff’s failure to adequately plead facts to maintain such a claim, but also the existence of such facts is inconceivable, the only reasonable conclusion is that these claims were asserted to harass and in bad faith. This is precisely the case here.

Plaintiffs’ LUTPA claims asserted against these Defendants are premised upon unsupported legal conclusions and are devoid of sufficient factual allegations. As recognized by this Court, these Defendants are not dentists (Doc. 110, p. 12), thus, these Defendants have no business or competitive advantage to gain. It is, therefore, difficult to comprehend what facts Plaintiffs could have alleged that would have given rise to a valid LUTPA claim. Plaintiffs’ meritless LUTPA claims against these Defendants were brought in bad faith. Accordingly, Defendants are entitled to reasonable attorney fees and costs pursuant to La. R.S. § 51:1409.

¹⁴ In evaluating a 12(b)(6) motion, district courts must liberally construe the complaint in favor of the plaintiff, and assume that all facts pleaded in the complaint are true. *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997).

¹⁵ *Beauregard Par. Sch. Bd. v. Honeywell Inc.*, 2:05 CV 1388, 2008 WL 4084420, at *3 (W.D. La. Aug. 28, 2008).

E. Calculation of attorney's fees.

Once it is determined that an award of attorney's fees is appropriate, the amount of the award is calculated through a two-step process called the "lodestar" method.¹⁶ First, the district court must determine the reasonable number of hours spent on the litigation. *See* Doc. 228. The "lodestar" is calculated by multiplying the reasonable number of hours by the reasonable hourly rate.¹⁷ The court should consider the factors announced in *Johnson v. Georgia Highway Express, Inc.*¹⁸ when analyzing the reasonableness of the hours expended and the hourly rate(s) requested.

The *Johnson* factors are:

(1) the time and labor required to represent the client or clients; (2) the novelty and difficulty of the issues in the case; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney; (5) the customary fee charged for those services in the relevant community; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Id. The "lodestar" may then be adjusted up or down based on the *Johnson* factors. "The lodestar, however, is presumptively reasonable and should be modified only in exceptional cases."¹⁹

Pursuant to Local Rule 54.2, attorneys seeking an award of attorney fees must "submit to the court a contemporaneous time report reflecting the date, time involved, and nature of the

¹⁶ *Hensley v. Eckerhardt*, 461 U.S. 424, 432 (1983); *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 323-24 (5th Cir. 1995).

¹⁷ *La. Power & Light Co.*, 50 F.3d at 324.

¹⁸ 488 F.2d 714, 717-19 (5th Cir. 1974)

¹⁹ *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993).

services performed.” Defendants have contemporaneously filed a motion for leave to postpone the filing of the LR54.2 time report until the Court has considered and ruled upon Defendants’ motion for attorney’s fees. If, or when, the Court grants Defendants’ motion for attorney’s fees, Defendants will promptly submit a time report pursuant to Local Rule 54.2 for a determination of the amount recoverable. To be clear, Defendants merely seek to *postpone* the filing of the time report if the motion for attorney’s fees is granted, not relieve them of the obligation altogether. If the Court rules that Defendants are not entitled to recover attorney’s fees, then significant time and recourses will have been wasted by counsel or the Court in preparing and reviewing the time report.

III. Conclusion

Defendants, Barry Ogden, Camp Morrison, Dana Glorioso, and Karen Moorhead, pray for a ruling holding that Plaintiffs’ § 1983 claims and LUTPA claims were frivolous, and therefore Defendants are entitled to recover reasonable attorney fees under 42 U.S.C. § 1988(b) and La. R.S. § 51:1409, in an amount to be determined by a later-filed time report.

Respectfully submitted:

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CERTIFICATE

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/s/ Barbara Bell Melton

OF COUNSEL