



Court of Claims of Ohio

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DARRELL HOUSTON

Plaintiff

v.

STATE OF OHIO

Defendant

Case No. 2012-08516-WI

Judge Jennifer Smart Sargus

DECISION

{¶ 1} This case was tried to the court on September 9-11, and 25, 2013. The parties reached an agreement with regard to attorney fees owed to Rufus Sims pursuant to R.C. 2743.48(E)(2)(a), which shall be addressed in the judgment entry filed concurrently herewith.

{¶ 2} In addition, plaintiff's September 23, 2013 and defendant's September 26, 2013 motions to supplement the trial record are both GRANTED, instanter. Therefore, Plaintiff's Exhibits 36-39 and Defendant's Exhibits AA-DD are ADMITTED. Lastly, defendant's June 7, 2013 motion to vacate or modify the preliminary judgment shall be addressed in the decision, and it is, therefore, DENIED as moot.

I. PROCEDURAL HISTORY

{¶ 3} On September 27, 2012, the Eighth District Court of Appeals for the State of Ohio affirmed the Cuyahoga County Common Pleas Court's determination that Darrell Houston had been wrongfully imprisoned. Sentenced to an aggregate term of 33 years to life in prison, Houston had been convicted of the September 1991 aggravated murder and aggravated robbery of Said Ali ("Ali"), a delicatessen owner in Cleveland, Ohio. He

had spent sixteen years in prison. The ruling that Houston had been wrongfully imprisoned included the five part analysis set forth in R.C. 2743.48(A), an analysis which required Houston to prove with preponderant evidence that he been charged with a felony after September 24, 1986 and found guilty; that the conviction was reversed, vacated, or dismissed; that no further prosecution would occur, and that he was innocent. The State of Ohio did not appeal the appellate court's ruling, and the judgment was final.

{¶ 4} The declaration of wrongful imprisonment permitted Houston to file the second part of his action in The Ohio Court of Claims, the court given exclusive, original jurisdiction to decide the damages to be awarded in wrongful imprisonment actions. *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 72, 1998-Ohio-275, citing *Walden v. State*, 47 Ohio St.3d 47 (1989). Houston's action included a claim for the statutory rate of compensation for each year spent wrongfully incarcerated, a claim for lost wages, expenses of litigation, cost debts, and a claim for attorney fees, all of which are allowed by R.C. 2743.48(E)(2).¹

¹ R.C. 2743.48(E)(2) states, in relevant part: "In a civil action as described in division (D) of this section, upon presentation of requisite proof to the court of claims, a wrongfully imprisoned individual is entitled to receive a sum of money that equals the total of each of the following amounts:

"(a) The amount of any fine or court costs imposed and paid, and the reasonable attorney's fees and other expenses incurred by the wrongfully imprisoned individual in connection with all associated criminal proceedings and appeals, and, if applicable, in connection with obtaining the wrongfully imprisoned individual's discharge from confinement in the state correctional institution;

"(b) For each full year of imprisonment in the state correctional institution for the offense of which the wrongfully imprisoned individual was found guilty, forty thousand three hundred thirty dollars or the adjusted amount determined by the auditor of state pursuant to section 2743.49 of the Revised Code, and for each part of a year of being so imprisoned, a pro-rated share of forty thousand three hundred thirty dollars or the adjusted amount determined by the auditor of state pursuant to section 2743.49 of the Revised Code;

"(c) Any loss of wages, salary, or other earned income that directly resulted from the wrongfully imprisoned individual's arrest, prosecution, conviction, and wrongful imprisonment;

"(d) The amount of the following cost debts the department of rehabilitation and correction recovered from the wrongfully imprisoned individual who was in custody of the department or under the department's supervision:

"(i) Any user fee or copayment for services at a detention facility, including, but not limited to, a fee or copayment for sick call visits;

{¶ 5} In September 2013, a trial was held. Determining how long Houston had been wrongfully incarcerated proved central to resolution of issues raised in litigation. Two separate weapon charges had been incorporated into the sentence for Ali's aggravated robbery and aggravated murder.² One weapon charge had been appended to the murder and robbery charges. It stemmed from the allegation Houston had killed Ali and utilized a weapon while so doing.³ During the Ali trial, the parties had reached an agreement that Houston would enter a plea of guilty to the weapon charge if convicted of the murder and robbery. The plea had been contingent upon a wrongful conviction: if convicted of the robbery and murder of Ali—charges which had no basis in fact—Houston had agreed to plead to the other charge that had no basis in fact, the charge he had killed Ali with a weapon possessed while under legal disability. After Houston had been exonerated of the murder and robbery, the plea which was contingent upon the wrongful conviction became a nullity, and the Eighth District Court of Appeals found the plea was void. For, in the absence of a valid conviction in the Ali murder, the court did not have jurisdiction to entertain the plea in the weapon under disability case.⁴ No appeal was taken.

{¶ 6} The second weapon charge (hereinafter "weapon under disability case") arose in July 1991. In this case, Houston had been charged with possessing a weapon while under disability, and sentencing enhancements from a previous conviction of carrying a concealed weapon (Case No. CR 248467 in the Court of Common Pleas of Cuyahoga County) were appended to the charge of wrongful weapon possession. Following the terms of the agreement, Houston entered a plea of guilty to the charges and was sentenced on February 5, 1992, the same day that the same judge sentenced him for the Ali murder. In the weapon under disability case, the judge sentenced

“* * *

¹ The court notes that the state does not maintain in its post-trial brief that any part of Houston's sentence in the Said Ali matter is subject to subtraction from the total number of compensable days served. Moreover, any claim otherwise would constitute a collateral attack on an unappealed judgment.

² No physical evidence linked Houston to the Ali murder.

Houston to a three- year gun specification as well as an indeterminate sentence of 1½ to five years, all to run concurrent to the aggregate 33 year to life sentence for the aggravated robbery and aggravated murder of Ali. At the 2013 trial in this matter, the parties agreed that the Ali case and the weapon under disability case were separate and distinct matters.

II. EVIDENCE ADDUCED AT TRIAL

{¶ 7} At the trial in the damages action, The State of Ohio disputed Houston's claim he was entitled to wrongful imprisonment damages for sixteen years of incarceration, for attorney fees, lost wages, and expenses. The state maintained that Houston had served less than eight years wrongfully, that he was not employed at the time of his 1992 arrest and therefore had no claim for lost wages, and that the attorney fees and expenses claimed were excessive. Houston withdrew his claim for emotional distress.⁵

{¶ 8} To resolve these issues, the parties introduced extensive evidence concerning the plaintiff's work history, criminal history, temperament, educational attainments, and personal life. The evidence established that Houston had been a troubled youth who spent sixty days in confinement for an assault conviction. An earlier conviction for assault had resulted in Houston's placement on probation. Houston had not graduated from high school, but he had worked in his grandmother's restaurant as an adolescent, contributing his share to the household expenses. Other jobs held by Houston included employment at Denny's, Peterson Nut Company, a neighborhood car wash, and seasonal landscaping businesses. After his release from prison, Houston bettered himself by acquiring and operating a car wash, by managing rental property, and by serving as an inspirational speaker.

¹ No appeal having been taken to this finding, the ruling is final and not subject to collateral attack.

¹ Therefore, defendant's September 3, 2013 motion in limine to preclude plaintiff's claim for emotional injuries is DENIED as moot.

{¶ 9} Both sides also offered evidence concerning Houston's period of incarceration. The state emphasized plaintiff's history of infractions. Houston's record of infractions reveals that he began his incarceration as a less than model prisoner. On more than one occasion, he placed cardboard inside the locking mechanism of his cell door and was placed in administrative segregation. He made "hooch" from ingredients present in the prison diet and, on at least one occasion, he smoked marijuana. Houston was involved in several prison scuffles. As his legal appeals brought hope, however, Houston became a compliant prisoner.

{¶ 10} The state presented the testimony of Melissa Adams, the chief of the Bureau of Computation and Record Management, who testified as to the likely time of Houston's release based upon the sentencing entries and her understanding of the law. She testified that when entries do not appear to comply with sentencing statutes, the Bureau either sends a form letter to the sentencing judge or construes the entry in compliance with the law. To construe the entry correctly, Melissa Adams testified the Department of Rehabilitation and Correction (DRC) consults a computer program. She did not indicate that official court processes were utilized to clarify entries, suggesting that the sentencing court's entry could be modified by DRC. Melissa Adams believed that if Mr. Houston had not been wrongfully imprisoned he would have been eligible for release on October 6, 1999.

{¶ 11} The state also called Cynthia Mausser, a lawyer who has worked with the Ohio Adult Parole Authority since 1995. Based on Houston's prior convictions, his prison behavior, and Ms. Mausser's experience in the parole authority, Ms. Mausser testified that Houston would not have been released before 1999 even if he had he not been wrongfully convicted. Both Ms. Adams and Ms. Mausser, Esq. were qualified as experts in the particular tasks associated with their jobs. Both witnesses assumed that Darrell Houston would conduct himself the same way if he were not wrongfully convicted as he did when he was wrongfully convicted. Both assumed he would have

behaved the same way in a part of the prison intended for non-violent offenders as in a part of the prison reserved for the most dangerous criminals.

{¶ 12} Both sides introduced testimony from financial experts. According to the state's witness, Gerald J. Lynch, Ph.D., if Houston had served 4.5 years on the weapons case, Houston would have lost \$205,859.00 in wages because of the wrongful incarceration. His calculation was based on minimum wage coupled with employer contribution of 7.65% for Social Security, and it was adjusted for inflation. Utilizing the same approach, Dr. Lynch offered different figures based upon time served. For plaintiff, Dr. John Burke calculated wage loss under numerous scenarios, utilizing factors of 10% and 27% for fringe benefits. His figures ranged from \$618,842.00 to \$1,449,100.00. The period of time lost due to wrongful incarceration coupled with the appropriate fringe benefit rates affected the final figures of both experts. The testimony of both experts was based on measurable traits such as race and level of education. Neither expert factored in unmeasured factors such as the extent of family support, the motivational level of the subject, and the opportunities available to the wage earner.

{¶ 13} Plaintiff also offered testimony from George W. Cyphers, M.Ed., LPC, CRC, CDMS, and Rehabilitation Counselor. He opined that Darrell Houston has the natural abilities required to serve as a retail sales manager or to be a property manager. He stated that the entry level earnings in these fields were about \$24,000; incomes of experienced retail sales managers and property managers could be as high as \$58,330. He believed plaintiff has the ability and commitment required to improve his educational background and obtain employment as a retail sales manager or as a property manager. Gene Burkhammer, LPCC, testified as to the extent of post-traumatic stress disorder (PTSD) experienced by Darrell Houston, and the long term effect it will have upon Mr. Houston.

{¶ 14} Darrell Houston offered evidence as to his personal experiences during his time in prison for murder, testimony which explained his history of infractions. Housed with the most dangerous criminals, Houston felt a constant undercurrent of violence.

On one occasion, Houston was present and behind bars during a murder of a fellow inmate. Because of gang hostilities, an inmate who feared for his life decided to kill another inmate, an inmate who, according to Houston, was recognized by other inmates as someone improperly placed in the most dangerous part of the prison. From his cell, Houston overheard the victim's cries. Blood leaked down the hall of the cell block as the murdered inmate died. It was, Houston testified, an environment in which a person "wasn't safe for twenty minutes."

{¶ 15} Throughout his incarceration, Houston sought help. Upon reaching Lorain Correctional Facility, Houston began phoning his mother. He attested to his innocence and his belief lawyers could surely reverse the conviction. Angela Huggins, Houston's mother, testified that either she or Darrell's sister spoke almost daily to Houston, encouraging him and helping him with his case. Huggins estimated that accepting collect calls cost the family approximately five hundred dollars monthly. Houston also sought help from mental health practitioners within the prison system. Because Houston claimed he was innocent, the mental health practitioners determined he was in denial. Medications were prescribed which generated intolerable side effects, and Houston stopped turning to counselors for help.

{¶ 16} Houston turned his attention to seeking redress from the legal system. The history of his defense is an odyssey. After he was sentenced to an aggregate 33 years to life in prison, Houston filed a direct appeal to the Eighth Appellate District Court of Appeals; he lost; the Ohio Supreme Court did not accept the appeal in *State v. Houston*, 69 Ohio St.3d 1478 (1994). Claiming ineffective counsel, Houston filed an application to reopen his appeal under App. R. 26(B) in *State v. Houston*, 8th Dist. No. 64574, 1994 Ohio App. LEXIS 52 (Jan. 13, 1994), *reopening disallowed*, Motion No. 259344 (Feb. 15, 1995). Holding that Houston had failed to show good cause for his untimely filing of the application for reopening in *State v. Houston*, 73 Ohio St.3d 346, 1995-Ohio-317, the Ohio Supreme Court affirmed the appellate court rulings. Houston's petitions in habeas corpus failed. *Houston v. Anderson*, 129 F.3d 1264 (6th Cir. 1997).

In December of 2003, Houston filed a motion for a new trial on grounds of newly discovered evidence. The state's chief witness submitted a sworn affidavit that he had lied. The trial court denied the petition, finding the evidence was not new, and the ruling was affirmed. Finally, in January of 2007, Houston filed a second application for leave to file a motion for a new trial based on sworn testimony identifying the actual murderer as Eugene Demarr Ware, a former Cleveland resident incarcerated in Georgia. Two witnesses corroborated the identification, and the motion for a new trial was sustained. Houston was released in November 2007 and retried in August 2010. The state dismissed all charges based upon their chief witness' testimony. The murder had been solved.

III. DECISION

{¶ 17} Pursuant to the court's request, after the trial in this matter, counsel submitted certified copies of the indictment and sentencing in the weapons under disability case. (Plaintiff's Exhibits 36-39.)

{¶ 18} Although the sentencing entry in the weapon under disability case prescribed time "concurrent" with the Ali murder and robbery sentence, the entry must be read so that it is consistent with the facts and law. The entry reads that Count One of the Indictment was dismissed. The Indictment, however, only contained one count and two enhancements. The defendant was sentenced on one count and one enhancement; no one appealed the February 5, 1992 entry. It follows that the dismissed "count" referred to the enhancement which was not utilized in sentencing. Although the entry states that time was to be served concurrently, the referenced statute provided otherwise. Hence, the entry is construed herein in conformity with fact and law.

{¶ 19} It is settled law that a wrongfully imprisoned individual cannot receive compensation for time served on a valid sentence. In *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, the Ohio Supreme Court stated that under the plain language of

R.C. 2743.48(A)(2), a person who pled guilty to an offense is not eligible to be declared a wrongfully imprisoned individual. Other cases anticipated this interpretation of the law. See *Smith v. State*, 10th Dist. No. 99AP-568, 2000 Ohio App. LEXIS 1295 (Mar. 30, 2000); *Joseph Fears, Jr. v. State*, Ct. of Cl. No. 2009-03461-WI, p.5, (July 28, 2010). Houston pled guilty in the weapon under disability case arising in July 1991.

{¶ 20} The law of sentencing on gun specifications provides that the full three year term must be served prior to commencement of time served on the underlying charge. R.C. 2929.14(C)(1)(a). *State v. Parker*, 8th Dist. No. 98272, 2013-Ohio-2898. In this case, Houston was sentenced to 1½ to 5 years on the underlying weapons charge. Based upon R.C. 2929.14(C)(1)(a), Houston's criminal record, and his record of incarceration, this court finds Houston served 4½ years on the weapon under disability case arising in July 1991. All other time is compensable time. Houston served a total of 5,773 days. He is entitled to 5,773 days minus 1,642 days (4131 days) at a rate of \$137.93 per day or \$569,788.83 as statutory damages for wrongful incarceration.⁶

{¶ 21} On January 10, 2013, the court issued an entry of preliminary judgment in the amount of \$378,195.71, which represents fifty percent of the amount described in R.C. 2743.48(E)(2)(b). On September 25, 2013, plaintiff filed a closing statement for distribution of the preliminary judgment.⁷ The closing statement shows that plaintiff was distributed 70 percent of the preliminary award. Therefore, the court finds that \$264,736.99 shall be reduced from plaintiff's final award pursuant to R.C. 2743.48(F)(1), resulting in damages pursuant to R.C. 2743.48(E)(2)(b) in the amount of \$305,051.84.

{¶ 22} Houston also claims damages for lost wages during his 4,131 days of wrongful incarceration. R.C. 2743(E)(2)(c) provides that an individual declared to be wrongfully imprisoned is entitled to any loss of wages, salary, or other earned income

⁷ The adjusted annual amount determined by the auditor of state pursuant to R.C. 2743.49 in effect for 2013 and 2014 is \$50,344.75.

that directly resulted from the wrongfully imprisoned individual's arrest, prosecution, conviction, and wrongful imprisonment. The state maintains that because Mr. Houston was not employed at the time of his arrest, he is entitled to no lost wages.

{¶ 23} Looking at the record as a whole, the court finds that Darrell Houston has demonstrated an ongoing commitment to work, which, although it did not create an unbroken record of employment, nevertheless demonstrates he is hard working and determined. His resumption of employment after release from prison underscores this fact. The court notes that Darrell Houston has resumed employment despite PTSD and an injury to the head resulting from a shooting in which he was the victim shortly after his release from prison. Overall, Darrell Houston must be credited with exceptional resilience and determination, both of which are factors affecting any person's wage earning ability.

{¶ 24} Dr. Burke, plaintiff's expert, opined that plaintiff's actual loss directly resulting from his wrongful incarceration was \$618,842.00. This represented an award for wages lost during 15.8164 years of incarceration minus amounts plaintiff earned in calendar years 2010 and 2011. Dr. Gerald J. Lynch, Ph.D., Defendant's expert economist, calculated the lost wages as \$448,802. Assuming that Houston would serve 4.5 years on the weapons case, Dr. Lynch opined that plaintiff's lost wages were \$205,859.00. Neither expert utilized individual factors affecting earning ability such as mental and physical health; expectation of inheritance; access to vocational and psychological counseling; family support; and the individual's drive to succeed. Taking into consideration the entire record, preponderant evidence establishes Houston would have earned \$295,000 during the period of his wrongful incarceration.

{¶ 25} R.C. 2743.48(E)(2)(a) also provides that a wrongfully imprisoned individual is entitled to recover other expenses incurred by him as a result of his wrongful imprisonment. Angela Huggins, Darrell Houston's mother, testified at trial that she had

⁷The closing statement is marked as Plaintiff's Exhibit 40 and is ADMITTED.

incurred phone bills in the amount of five hundred dollars per month for the entire period of her son's wrongful imprisonment. She testified that the phone calls were a way of allowing Darrell Houston to communicate information pertinent to his case and also a way of providing emotional support to her son during a difficult time of his life. Her testimony was uncontradicted, and the court finds her testimony credible. The odyssey of Houston's defense underscores the extent of his struggle and corroborates his mother's testimony concerning the frequency of contact. Because the testimony also establishes that the calls provided emotional as well as legal support, the court must apportion costs assumed to assist in his defense and those assumed to provide consolation. Occasioned by the duress of imprisonment, the cost of the calls cannot be treated as voluntarily assumed, or, in other words, as gifts. The court finds preponderant evidence establishes that Huggins assumed defense-related calls costing at least \$1,500.00 annually for the time that plaintiff was wrongfully imprisoned. Accordingly, the court awards Huggins \$16,978.41, which represents defense-related calls based upon plaintiff's wrongful imprisonment of 4,131 days. Huggins is also entitled to be reimbursed for \$2,500.00 in fees advanced by her to private investigators and counsel.

{¶ 26} In addition, the evidence showed that Houston incurred copayments for sick call visits during his incarceration in the amount of \$27. (Plaintiff's Exhibit 21.) Therefore, pursuant to R.C. 2743.48(E)(2)(d)(i), that amount shall be included in the award.

IV. ATTORNEY FEES

{¶ 27} Plaintiff is also entitled to an award for the reasonable fees of the counsel that represented him in the civil action for damages.⁸ Plaintiff provided an itemized list

⁸ R.C. 2743.48(F)(2) states: "If the wrongfully imprisoned individual was represented in the civil action under this section by counsel of the wrongfully imprisoned individual's own choice, the court of

of attorney fees and expenses. (Plaintiff's Exhibit 34.) The parties also both filed post trial briefs with regard to attorney fees. Accordingly, Plaintiff's Exhibits 34A, 34B, and Defendant's Exhibits A and B are hereby ADMITTED. Defendant filed its objections to the attorney fees and expenses submitted by plaintiff. After a thorough review of these filings, exhibits, and the testimony presented at trial, the court finds the following.

{¶ 28} Initially, the court notes that it must award the "reasonable" attorney fees incurred by plaintiff in this matter. The parties disagree as to what is reasonable.

{¶ 29} "Where a tribunal is empowered to award attorney fees by statute, the amount of such fees is within the sound discretion of the tribunal hearing the matter. In determining an amount of fees to award, the tribunal must first compute the 'lodestar' figure, the number of hours expended multiplied by a reasonable hourly rate. Once a tribunal calculates the lodestar figure, the tribunal may modify that calculation by the factors set forth in the Ohio Rules of Prof.Cond.R. 1.5(a) * * *." (Citations omitted.) *Sims v. Nissan North Am., Inc.*, 10th Dist. Nos. 12AP-833, 12AP-835, 2013-Ohio-2662, ¶ 46.

{¶ 30} "An application for attorney fees must present sufficient documentation of the hours worked and the work performed to permit a determination regarding the merits of the application." *Miller v. Leesburg*, 10th Dist. No. 97APE10-1379, 1998 Ohio App. LEXIS 5645 (Dec. 1, 1998), citing *Natl. Assn. of Concerned Veterans v. Secy. of Defense*, 675 F.2d 1319, 1327, 219 U.S. App. D.C. 94 (C.A.D.C.1982). "The burden of proving that the time was fairly and properly used and the reasonableness of the hours expended rests upon the attorney. The tribunal must base its determination of reasonable attorney fees upon the actual services performed, and there must be some evidence that supports the tribunal's determination." *Sims, supra*, at ¶ 47, citing *Climaco, Seminatore, Delligatti & Hollenbaugh v. Carter*, 100 Ohio App.3d 313, 323 (10th Dist.1995).

claims shall include in the judgment entry referred to in division (F)(1) of this section an award for the reasonable attorney's fees of that counsel. These fees shall be paid as provided in division (G) of this section."

{¶ 31} Attorney David Gallup testified that he has been licensed to practice law in the state of Ohio since 1979. Gallup & Burns includes Gallup, Mark Porter, Rebecca Price, and two other attorneys. Gallup testified that Porter obtained his license in 2000 and that Price obtained her license in 2003. The hourly rates that Gallup & Burns charges for its attorneys are as follows: Gallup, \$300; Porter, \$225; and Price, \$200. According to Gallup, these hourly rates have not changed for six years and are reasonable for the greater Cleveland area.

{¶ 32} Gallup further testified that plaintiff entered into a contingency fee agreement with the firm in October 2010. (Defendant's Exhibit L.) Initially, the court notes that the fee agreement states that Gallup & Burns will represent plaintiff in connection with plaintiff's claim "against the state of Ohio, Cuyahoga County and possible others, in connection with the captioned claim arising out of your 1991 incarceration." However, pursuant to R.C. 2743.48(F)(2), this court is obligated to limit an award of reasonable attorney fees to those fees incurred by plaintiff during his representation in the civil action for damages against the state for his claim of wrongful imprisonment. Therefore, the court is mindful of the fact that plaintiff may have incurred attorney fees via his contingency fee agreement with Gallup & Burns that may not be directly related to his wrongful imprisonment claim. The contingency fee agreement shall be addressed further at the end of this decision.

{¶ 33} On September 26, 2013, defendant filed its post-trial brief, wherein defendant highlighted the fees and expenses it asserts are not related to plaintiff's claim for wrongful imprisonment. (Defendant's Exhibit A.) Defendant asserts that plaintiff is not entitled to attorney fees for the following: meeting with financial planners, talking to members of the media, working on real estate documents, creating a limited liability corporation, evicting tenants from leased properties, researching business tax issues, and communicating with non-profit organizations about speaking engagements. Defendant also asserts that plaintiff is not entitled to attorney fees incurred in defense of civil lawsuits brought for breach of contract by his former attorney, Rufus Sims.

Defendant argues that inasmuch as those charges were incurred in a separate lawsuit, they should not be compensated by this court. In addition, defendant cites the contingency fee agreement between plaintiff and his counsel which states: "All fees claimed by Rufus Sims are your responsibility. * * * In any event, be assured that we will assist you in dealing with Mr. Sims throughout this matter at no charge." (Defendant's Exhibit L, paragraph 2.) Defendant calculated that 30 hours should be deducted for attorney fees related to defending Sims' claims.

{¶ 34} At trial, Gallup testified that all of the fees and expenses that have been submitted are related to plaintiff's claim for wrongful imprisonment. However, Gallup conceded that certain business expenses, such as filing fees at the offices of the Ohio Secretary of State, the Cuyahoga County Auditor, the Cuyahoga County Recorder, and the Cleveland Municipal Court were not related to plaintiff's claim for wrongful imprisonment.

{¶ 35} Upon review of the evidence, the court finds that the hours that plaintiff's attorneys worked in defending plaintiff from Sims' claims in the common pleas court are not related to the civil action for wrongful imprisonment, nor were they contemplated to be charged to plaintiff. The contingency fee agreement states as much. Therefore, 30 hours will be deducted from the lodestar figure. In addition, the court finds that the legal work related to plaintiff's rental properties is not directly related to plaintiff's claim for wrongful imprisonment and such attorney fees and costs will not be granted. However, the court further finds that there is a reasonable basis to award attorney fees and costs for the remaining issues inasmuch as those claims, such as meeting with financial planners and the media, are related to plaintiff's claim for wrongful imprisonment. The court finds Gallup's testimony persuasive that the firm worked to ensure that plaintiff's interests were protected when he was granted a preliminary judgment in light of plaintiff's lack of familiarity with how to manage a large sum of money. In addition, the court finds that the work performed for tax and financial issues is reasonably related to plaintiff's claim.

{¶ 36} In sum, 30 hours will be deducted for work with regard to Attorney Sims' claims, and 6.5 hours will be deducted for work related to real estate issues (from January 31, 2013 to April 17, 2013). With regard to billable hours shown on Plaintiff's Exhibit 34, the court finds that the total of 395.5 hours must be reduced by 36.5 hours. Therefore, the court finds that plaintiff has proven by a preponderance of the evidence that Gallup & Burns performed 359 hours of work on his claim of wrongful imprisonment from October 2010 through August 31, 2013.

{¶ 37} Turning to Plaintiff's Exhibit 34(B)9, the parties agree that Gallup & Burns worked an additional 126.6 hours on this matter from September 2 through September 25, 2013. Therefore, the court finds that Gallup & Burns performed a total of 485.6 hours of legal work directly related to plaintiff's wrongful imprisonment claim.

{¶ 38} With regard to expenses, Plaintiff's Exhibit 34B includes an updated list of expenses, which reflects deductions for filing fees at the offices of the Ohio Secretary of State, the Cuyahoga County Auditor, the Cuyahoga County Recorder, and the Cleveland Municipal Court for matters dealing with real estate and property matters in the amount of \$485.50. After these expenses are deducted, the total expenses are \$19,132.38. However, defendant asserts in its October 2, 2013 filing that certain expenses listed, including hotel charges, charges for meals, parking fees, and mileage fees cannot be compensated. The court agrees and shall reduce the billable expenses by \$1,306.91 to account for those charges. Therefore, expenses in the amount of \$17,825.47 will be awarded from November 30, 2010 through September 25, 2013.

{¶ 39} The court further finds persuasive Gallup's testimony that his firm's hourly rates are reasonable for the Cleveland area. Accordingly, to determine the lodestar figure, the court shall take an average of those three rates to establish a reasonable hourly rate of \$240. Accordingly, 485.6 hours multiplied by \$240 equals \$116,544 as the initial lodestar figure.

¹ The court notes that Plaintiff's Exhibit 34B shall be relied upon instead of Plaintiff's Exhibit 34A, inasmuch as Plaintiff's Exhibit 34A contained inaccurate billable hours due to computer error.

{¶ 40} Plaintiff urges the court to make an upward adjustment in the lodestar calculation by considering the eight factors set forth in Prof.Cond.R. 1.5(a). On September 25, 2013, counsel for plaintiff filed the affidavit of Gallup, wherein he provides his opinion with regard to each factor.¹⁰ Defendant has set forth its arguments in its post-trial brief on attorney fees. Prof.Cond.R. 1.5 states, in part:

{¶ 41} “(a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of all of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:” The court shall address each factor individually.

{¶ 42} FACTOR (1): “the time and labor required, [25] the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;”

{¶ 43} Gallup states that a claim for wrongful imprisonment presents unique, complex litigation in a novel area, and requires a heightened level of attention and skill which normally commands higher fees than those charged. In contrast, defendant asserts that in claims for wrongful imprisonment, pursuant to R.C. 2743.48(F)(3), the state admits liability; there are no novel legal issues; all attorney fees and expenses are reimbursed; and that there is virtually no risk of non-recovery to a plaintiff once a declaration of wrongful imprisonment is obtained. Also, defendant notes that plaintiff had been released from incarceration and his criminal case had been dismissed with prejudice before Gallup & Burns was retained.

{¶ 44} FACTOR (2): “the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;”

¹⁰Gallup's affidavit is marked as Plaintiff's Exhibit 41 and is ADMITTED.

{¶ 45} Gallup states that inasmuch as Gallup & Burns is a small firm, it had to make adjustments in its caseload, and its attorneys have set aside other client matters to serve plaintiff.

{¶ 46} FACTOR (3): “the fee customarily charged in the locality for similar legal services;”

{¶ 47} Gallup states that wrongful imprisonment claims are a form of unique, complex litigation that commands higher fees, and that his firm’s hourly rates are reasonable in the Cleveland area. In contrast, defendant asserts that an hourly rate in the range of \$100 to \$200 would be reasonable.

{¶ 48} FACTOR (4): “the amount involved and the results obtained;”

{¶ 49} Gallup estimates that this claim is worth more than one million dollars, and points to the success in obtaining both plaintiff’s declaration of wrongful imprisonment and a preliminary judgment.

{¶ 50} FACTOR (5): “the time limitations imposed by the client or by the circumstances;”

{¶ 51} Gallup describes the time limitations in this case as being moderate.

{¶ 52} FACTOR (6): “the nature and length of the professional relationship with the client;”

{¶ 53} Gallup states that this case was the first time that his firm had represented plaintiff, but the firm has a relationship with plaintiff’s family.

{¶ 54} FACTOR (7): “the experience, reputation, and ability of the lawyer or lawyers performing the services;”

{¶ 55} Gallup states that his firm is well-experienced and skilled, and is known for high quality services at below market rates.

{¶ 56} FACTOR (8): “whether the fee is fixed or contingent.”

{¶ 57} Gallup states in his post-trial filings that his firm will receive a 30 percent contingent fee of the total award pursuant to plaintiff’s written fee agreement, and he represents that any award of legal fees to plaintiff will be applied to the 30 percent

contingent fee as privately contracted. Defendant asserts that a reasonable attorney fee is reflected in Gallup & Burns itemized billing statement and that ordering any additional award would be clearly excessive and unreasonable.

{¶ 58} After consideration of the factors listed above, the court finds that unique issues are involved in wrongful imprisonment claims. The court also notes that Gallup & Burns has performed a considerable amount of work on this claim, including obtaining a declaration of wrongful imprisonment in the common pleas court which was appealed to the Eighth District Court of Appeals. However, the court is also mindful that once a declaration of wrongful imprisonment is obtained, a civil claim for damages presents little risk to the attorney, inasmuch as reasonable attorney fees are awarded per statute. Accordingly, the court finds that the lodestar figure shall be adjusted upward by a factor of 1.2. Therefore, pursuant to R.C. 2743.48(F)(2), plaintiff is entitled to an award of reasonable attorney fees for work performed by Gallup & Burns in the amount of $1.2 \times \$116,544 = \$139,852.80$. The court further finds that plaintiff has incurred expenses to Gallup & Burns, including the court's \$25 filing fee, in the amount of \$17,825.47, which shall be awarded.

{¶ 59} Turning to the contingency fee agreement, the court notes that plaintiff agreed to pay Gallup & Burns "a sum of money equal to thirty percent (30%) of whatever may be received in collected proceeds of settlement or judgment, including but not necessarily limited to the amounts ordered to be paid pursuant to or as allowed by the following statutory sections:

{¶ 60} "(1) R.C. 2743.48(E)(2), scheduled damages plus costs, past expenses, lost wages, etc.,

{¶ 61} "(2) R.C. 2743.48(B)(3), the 50% advance of the scheduled portion of the statutory

{¶ 62} damages,

{¶ 63} “(3) R.C. 2743.48(F)(2), reasonable attorney’s fees to be submitted on an hourly basis, but excluding that portion of fees awarded to Rufus Sims, Esq., if any, upon his direct submission of proof, and

{¶ 64} “(4) R.C. 2743.48(F)(3), physical injury and other non-wrongful-imprisonment claims

{¶ 65} arising “out of circumstances occurring during * * * confinement in the state correctional institution.” (Defendant’s Exhibit L.)

{¶ 66} Although plaintiff’s attorneys argue that this court should award attorney fees pursuant to the contingent agreement, the court concludes otherwise for the following reasons. The court notes that plaintiff entered into a contingency fee agreement with Gallup & Burns at the outset of this litigation, and that the agreement is a contract that allocates risk and reward between counsel and client. However, there is no reason for defendant to be bound by an agreement between plaintiff and his counsel. As the Supreme Court of Ohio has stated, a contingent fee agreement cannot be enforced against a party that did not agree to it. *Landis v. Grange Mut. Ins. Co.*, 82 Ohio St.3d 339 (1998); See also *Branham v. CIGNA Healthcare of Ohio, Inc.*, 81 Ohio St.3d 388 (1998). Whether a fee was fixed or contingent is only one of the eight factors for the court to consider in awarding reasonable attorney fees. While a court should consider such an agreement, the court is not bound by any such agreement. See *Savage v. Thomas*, 11th Dist. No. 94-L-062, 1995 Ohio App. LEXIS 3401 (Aug. 18, 1995). Indeed, the court finds the contingency fee agreement cannot be enforced as written and is, in fact, unreasonable in the following respects.

{¶ 67} First, the agreement states that Gallup & Burns is entitled to an additional 30 percent of any attorney fees awarded pursuant to R.C. 2743.48(F)(2). The court finds that to enforce that portion of the agreement would be awarding attorney fees on top of attorney fees. The court finds that pursuant to Prof.Cond.R. 1.5(a), that provision of the agreement would result in a clearly excessive fee.

{¶ 68} Furthermore, the court finds that to award attorney fees in excess of the adjusted lodestar amount would result in a clearly excessive award, in light of the usual hourly rates charged by Gallup & Burns. If the court were to award an additional award of 30 percent of the entire judgment, as contemplated in the contingent fee agreement, Gallup & Burns would be entitled to an hourly rate of \$644, which is clearly excessive. In summary, the court finds that the contingency fee agreement is not controlling in this respect and shall not be enforced.

{¶ 69} As reflected in plaintiff's closing statement, Gallup & Burns was distributed 30 percent of the preliminary judgment for attorney fees. $\$378,195.71 \times .3 = \$113,458.71$, therefore, \$113,458.71 shall be deducted from the \$139,852.80 in attorney fees awarded in this judgment to Gallup & Burns.

{¶ 70} Lastly, pursuant to Defendant's Exhibits AA-DD, expenses should be paid to Stevenson Reporting Service, Inc., Thornsberry Reporting, PRI Court Reporting, Inc., and Gerald J. Lynch, Ph.D., in the amounts listed in the judgment entry.

V. SUMMARY

{¶ 71} Pursuant to R.C. 2743.48 et seq., the court finds that plaintiff has proven, by a preponderance of the evidence, that he is entitled to receive a sum of money that equals the total of each of the following amounts:

{¶ 72} \$19,478.41 for expenses incurred by Angela Huggins in connection with all associated criminal proceedings and appeals and in connection with obtaining plaintiff's discharge from confinement;

{¶ 73} \$50,000 for attorney fees to Rufus Sims;

{¶ 74} \$305,051.84 for remaining annual statutory damages less the amount plaintiff received from the preliminary judgment pursuant to R.C. 2743.48(F)(1);

{¶ 75} \$295,000 for lost wages;

{¶ 76} \$27 for copays;

{¶ 77} \$26,394.09 in reasonable attorney fees, plus \$17,825.47 in costs to Gallup & Burns;

{¶ 78} \$5,006.60 for court reporting and expert fees.

{¶ 79} Therefore, pursuant to R.C. 2743.48 (F)(1), judgment shall be rendered in favor of plaintiff in the amount of \$718,783.41, which includes the \$25 filing fee.

JENNIFER SMART SARGUS
Judge



Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

DARRELL HOUSTON

Plaintiff

v.

STATE OF OHIO

Defendant

Case No. 2012-08516-WI

Judge Jennifer Smart Sargus

JUDGMENT ENTRY

{¶ 80} This case was tried to the court on the issue of damages. The court has considered the evidence and for the reasons set forth in the decision filed concurrently herewith, judgment is hereby rendered in favor of plaintiff in the amount of \$718,783.41, which includes the filing fee paid by plaintiff.

{¶ 81} The warrant of payment of judgment in the amount of \$600,078.84 shall be sent to Darrell Houston, in care of his attorney, Mark Porter, The Leader Building, Suite 810, 526 Superior Avenue East, Cleveland, Ohio 44114.

{¶ 82} The warrant of payment of judgment in the amount of \$19,478.41 shall be sent to Darrell Houston, for the benefit of Angela Huggins, in care of his attorney, Mark

Porter, The Leader Building, Suite 810, 526 Superior Avenue East, Cleveland, Ohio 44114.

{¶ 83} The warrant of payment of judgment in the amount of \$44,219.56, which represents reasonable attorney fees and costs, shall be sent to Mark Porter, The Leader Building, Suite 810, 526 Superior Avenue East, Cleveland, Ohio 44114.

{¶ 84} The warrant of payment of judgment in the amount of \$50,000, which represents reasonable attorney fees and costs, shall be sent to Rufus Sims, in care of his attorney, W. Scott Ramsey, The Standard Building, Suite 330, 1370 Ontario Street, Cleveland, Ohio 44113.

{¶ 85} The warrant of payment of judgment in the amount of \$461.50 shall be sent to Stevenson Reporting Service, Inc., 2197 Macon Court, Westlake, Ohio 44145.

{¶ 86} The warrant of payment of judgment in the amount of \$613.60 shall be sent to Thornsberry Reporting, 829 Bethel Road, Suite 129, Columbus, Ohio 43214.

{¶ 87} The warrant of payment of judgment in the amount of \$256.50 shall be paid to PRI Court Reporting, Inc., 390 S. Washington Ave., Columbus, Ohio 43215.

{¶ 88} The warrant of payment of judgment in the amount of \$3,675.00 shall be sent to Gerald J. Lynch, Ph.D., 601 Ridgewood, West Lafayette, Indiana, 47906.

{¶ 89} R.C. 2743.48(G) provides: "The clerk of the court of claims shall forward a certified copy of a judgment under division (F) of this section to the president of the controlling board. The board shall take all actions necessary to cause the payment of the judgment out of the emergency purposes special purpose account of the board." Therefore, subject to the provisions of R.C. 2743.19(D), the clerk shall forward a certified copy of this judgment to the president of the controlling board. Interest on the judgment shall be allowed per R.C. 2743.19.

{¶ 90} Court costs are absorbed by the court. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

JENNIFER SMART SARGUS
Judge

cc:

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