IN THE COURT OF APPEALS OF IOWA

No. 1-681 / 11-0443
Filed October 5, 2011

ANNE HENSLER,
Plaintiff-Appellee,

vs.

CITY OF DAVENPORT,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Gary McKendrick, Judge.

Defendant appeals the district court's order requiring it to pay plaintiff's attorney fees in an action challenging a city ordinance under 42 U.S.C. §§ 1983 and 1988. **REVERSED AND REMANDED.**

Thomas D. Warner, City Attorney, and Christopher S. Jackson, Assistant City Attorney, Davenport, for appellant.

Randall C. Wilson of ACLU of Iowa Foundation, Des Moines, and Michael J. McCarthy of McCarthy, Lammers & Hines, Davenport, for appellee.

Considered by Doyle, P.J., Mullins, J., and Schechtman, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

SCHECHTMAN, **S.J.**

I. Background Facts & Proceedings

Anne Hensler received a municipal citation for a second violation of the Davenport Parental Responsibility Ordinance based on the conduct of her teen-age son.[1] She filed a civil rights petition under 42 U.S.C. § 1983 against the City of Davenport, claiming the ordinance violated her right to due process of law. The district court concluded the ordinance violated Hensler's substantive due process rights under the United States and Iowa Constitutions.

The issue of attorney fees was addressed in a separate order. The court found the statutory and constitutional claims for invalidating the ordinance were intertwined and not readily separable. The City rejected offers to revise the ordinance to satisfy Hensler's constitutional objections, which the district court considered in determining the reasonableness of the fee claims. The court allowed the local counsel his entire fee requested, $5130. The court reduced the fee for Randall Wilson, an ACLU staff attorney, awarding $15,727.40. The City appealed the court's order finding the ordinance unconstitutional, as well as the attorney fee awards. Hensler cross-appealed the attorney fee award to Wilson.

---

[1] The Davenport City Council adopted an ordinance, which provided that each time there was an "occurrence" (defined as the filing of a delinquency complaint against a child or taking the child into custody) this was a breach of the parent's responsibility to exercise sufficient control over the child. Davenport Mun. Code § 9.56.010, et seq. (2006). The ordinance included a rebuttable presumption that upon a second occurrence, the parent failed to exercise reasonable parental control of the child. *Id*. § 9.56.040. The ordinance imposed penalties. *Id*. § 9.56.050. For the first offense, a parent would receive a warning letter; second offense, the parent is ordered to attend a parenting skills class; third or subsequent offense, a civil penalty of at least $100 nor more than $750 and any other order that the court deemed equitable. *Id*.

The Iowa Supreme Court found the bulk of the ordinance constitutional. *Hensler v. City of Davenport*, 790 N.W.2d 569, 580-84 (Iowa 2010). The court did conclude a section of the ordinance was unconstitutional and violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 588 ("[A]llowing a fact finder to presume negligence and causation based on a happening of an 'occurrence,' rather than finding negligence and causation based on the facts, is arbitrary and irrational. . . ."). The Court severed that section alone, finding that severance did not impair the legislative intent of the preserved portion. *Id.* at 589.

On the issue of attorney fees the court held:

> The court, in its discretion, may award reasonable attorney fees to a prevailing party in a civil rights action. One of the factors to be considered when awarding attorney fees under 42 U.S.C. § 1988 is the level of the prevailing party's success in the litigation. Therefore, we must vacate the award of attorney fees and remand the case to the district court to determine the proper award of attorney fees, if any, considering the level of the prevailing party's success in this litigation.

Id. at 589-90 (citations omitted).

On remand, the district court found Hensler was the prevailing party, stating "the Supreme Court's decision is more profoundly in favor of the plaintiff than was this Court's decision." The court reasoned "a successful prosecution under the parental responsibility ordinance in the wake of the Supreme Court's decision is an extremely remote possibility." It concluded that as a practical matter Hensler's status as a prevailing party was enhanced as a result of the Iowa Supreme Court's decision. The court determined Hensler was entitled to the full award of the attorney fees previously ordered. The court additionally

awarded appellate attorney fees of $11,456.69 for Wilson and $3015 for McCarthy. The combined amount of attorney fees awarded was $35,329.09.

The City filed a motion to reconsider asserting (1) no attorney fees were warranted because "the offending portion of the City's ordinance did not at any time apply to the Plaintiff, as she had never stood trial under the ordinance and the offending portion dealt only with burden of proof at trial," and (2) the City should not be responsible for the ACLU fee that had not been billed to Hensler. The district court denied the City's motion and, in addition, awarded an additional $386.25 in attorney fees incurred in response to the motion. The City appeals the district court's rulings awarding the respective attorney fees.

II. Standard of Review

We review the district court's award of attorney fees for an abuse of discretion. *Boyle v. Alum-Line, Inc*., 773 N.W.2d 829, 832 (Iowa 2009). We will reverse only when the district court rests its discretionary ruling on grounds that are clearly unreasonable or untenable. *GreatAmerica Leasing Corp. v. Cool Comfort Air Conditioning & Refrigeration, Inc.*, 691 N.W.2d 730, 732 (Iowa 2005).

III. Analysis

A. Prevailing Party

The court, in its discretion, may award attorney fees to the prevailing party in any civil rights action. 42 U.S.C. § 1988(b). The purpose of § 1988(b) is to assure "'effective access to the judicial process'" to those aggrieved by civil rights' violations. *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S. Ct. 1933, 1937, 76 L. Ed. 2d 40, 48 (1983) (citation omitted).

The mandate from the Iowa Supreme Court in its order of remand is clear: "to determine the proper amount of attorney fees, if any, considering the level of the prevailing party's success in this litigation." *Hensler*, 790 N.W.2d at 589-590. The "most critical factor" to be considered when awarding fees under 42 U.S.C. § 1988 is the level of success by the prevailing party. *Hensley,* 461 U.S. at 436, 103 S. Ct. at 1941, 76 L. Ed. 2d at 52.

It is fundamental that a district court is required to follow the mandate of its appellate court. *City of Okoboji v. Iowa Dist. Ct.*, 744 N.W.2d 327, 331 (Iowa 2008). A lower court, upon remand for a special purpose, "is limited to do the special thing authorized by this court in its opinion, and nothing else." *Id*.

An explicit directive on the issue of attorney fees in 42 U.S.C. § 1988 contests is contained in *Farrar v. Hobby,* 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992). The first step in the analysis is to determine whether the plaintiff was the prevailing party. *Farrar*, 506 U.S. at 109, 113 S. Ct. at 572, 121 L. Ed. 2d at 502. The City argues on appeal that Hensler was not the prevailing party. Though the district court addressed this issue and found Hensler to be a prevailing party, we conclude that the Iowa Supreme Court had already determined that issue by the terms of the remand itself, i.e. to consider "the level of the prevailing party's success in this litigation." *Hensler*, 790 N.W.2d at 589-90.

The court's directive was not to determine who the prevailing party was, but to set attorney fees for the prevailing party due to its reversal of the trial court's ruling holding the entire ordinance unconstitutional. That Hensler was

deemed the "prevailing party," in absolute terms, is shown by the court's summary remarks in the lead portion of the opinion: "We also vacate the attorney fee award and remand the case to the district court to reconsider its attorney fee award by considering the level of the *plaintiff's* success as one of the factors in determining reasonable attorney fees."[2] *Hensler*, 790 N.W.2d at 575 (emphasis added). It is clear the remand did not include a directive to decide whether Hensler was the prevailing party, as the supreme court had conclusively decided that question in the affirmative. We accordingly reject the City's argument on this point.

B. Level of Success

The second step in the analysis, per *Farrar*, is to decide whether the degree of success merits attorney fees and, if that is answered in the affirmative, to consider the extent (or level) of the prevailing party's success to warrant the award of a reasonable attorney fee. 506 U.S. at 114, 113 S. Ct. at 574, 121 L. Ed. 2d at 505; *accord Hensley*, 461 U.S. at 434, 103 S. Ct. at 1940, 76 L. Ed. 2d at 51 (stating in addressing this factor, two questions must be answered: "First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which

[2] The level of a party's success, or the results obtained, is one of twelve factors set forth in *Hensley* to be considered in determining reasonable attorney fees. 461 U.S. at 430, 103 S. Ct. at 1938, 76 L. Ed. 2d at 48. The other factors are: (1) time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of employment by the attorney because of acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the experience, reputation, and ability of the attorneys; (9) the "undesirability" of the case; (10) the nature and length of the professional relationship with the client; and (11) awards in similar cases. *Id.* at 430 n.3, 103 S. Ct. at 1938 n.3, 76 L. Ed. 2d at 48 n.3. The only factor that was significantly challenged by the Iowa Supreme Court's reversal of the district court's ruling was the level of the plaintiff's success. That factor was identified by *Hensley* as the "most critical factor" in the analysis. *Id.* at 436, 103 S. Ct. at 1941, 76 L. Ed. 2d at 52.

he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?").

We conclude that obliterating the deleted section of the ordinance was of sufficient force, for Hensler as well as other parents in Davenport, to warrant attorney fees in some amount.[3] It accomplished a limited public effort by attacking, then striking, a portion of the law that made convictions easier to obtain because of a rebuttable presumption of guilt.[4] "[M]aking attorney's fees available under a private attorney general theory" affords "a tool that ensures the vindication of important rights, even when large sums of money are not at stake." *Farrar*, 506 U.S. at 122, 113 S. Ct. at 578, 121 L. Ed. 2d at 510, (O'Connor, J. concurring).

We agree with the trial court that the efforts of the plaintiff's attorneys have merited them an award of attorney fees in some amount. We recognize this is not a de novo review, and it would accordingly be unwise and improper for this court to set the attorney fees. The district court is regarded an expert in what constitutes a reasonable attorney fee award. *Boyle*, 773 N.W.2d at 832. Our mission is to determine whether the district court abused its discretion in

---

[3] The prosecution against Hensler for a second violation was stayed pending determination of the validity of the ordinance. The City contends the charge against Hensler was later dismissed after the stay was lifted when it learned of the plaintiff's multiple efforts (attending a parenting class and paying for drug rehabilitation) vis-à-vis her seventeen year-old son. Hensler asserts the dismissal arose because of the ruling that the section, relating to the second violation, infringed upon the Due Process Clause. There are no facts in the record to support either contention. "Facts not properly presented to the court during the course of trial and not made a part of the record presented to this court, will not be considered by this Court on review." *Rasmussen v. Yentes,* 522 N.W.2d 844, 846 (Iowa Ct. App. 1994).

[4] The stricken portion of the ordinance provides: "A second occurrence . . . establishes a rebuttable presumption that the parent failed to exercise reasonable parental control of said parent's minor(s)." Davenport Mun. Code § 9.56.010.

concluding the supreme court's reversal did not justify a further reduction in its attorney fee award. *See id.* at 833 (noting reductions in requested attorney fees "'may be made . . . for such things as partial success, duplicative hours or hours not reasonable expended'" (citation omitted)).

In addressing this issue the trial court stated:

> While this Court had invalidated the parental responsibility ordinance in its entirety based on the ordinance's definition of an occurrence, the Supreme Court only invalidated the ordinance's shift of the burden of proof. On the surface, the Supreme Court's decision results in a much more narrow victory for the plaintiff than this Court's decision was. However, in analyzing the practical impact of the two decisions, the Supreme Court's decision is more profoundly in favor of the plaintiff than was this Court's decision.
>
> The defendant easily could have remedied the flaw in the ordinance under this Court's decision by modifying the definition of "occurrence" to provide for an independent probable cause determination. On the other hand, the Supreme Court's invalidation of the shift of the burden of proof is not remediable. Thus a successful prosecution under the ordinance now requires the defendant to prove by clear and convincing evidence that the ordinance is applicable to the parent and that the parent's failure of supervision was the cause of the juvenile's delinquent act.

The aforesaid comments appear to punish the City for its refusal to change a section of the ordinance (not the severed section) which, arguably, if done, would have avoided the appeal; that it was this refusal that was the cause for the appeal itself and the attorney fees expended to bring the appeal and, by inference, the cause for the remainder of the fees accrued prior to the appeal. This appears more untenable when the district court, in a later passage, comments as follows: "[T]he Court notes that the defendant made attempts to address the plaintiff's complaints regarding the ordinance prior to the trial of the action. The plaintiff declined to compromise on the claims asserted."

In any event, the passage of ordinances, and their content, is the function of the city council. It is not appropriate for courts, as the third branch of government, to award (or not award) attorney fees upon its conjecture that an amendment, by a municipality's ruling body, to its ordinance would have avoided litigation attacking that ordinance. That is an inappropriate consideration of the level of success by the prevailing party in civil rights litigation. It is an abuse of the court's discretion and amounts to an indirect monetary punishment for a suggested legislative failure to act.

Nor was the comparison of the impact between the two decisions relevant to the determination of the level of success of Hensler. Even if such a comparison is appropriate, the district court's conclusion that the result of the appeal, which validated the City's objective to deter juvenile delinquency, was more favorable to Hensler's parental interests than the district ruling that had struck the entire ordinance, is facially and factually without merit. Confirmation of the full fee set by trial court without an appropriate measure of the level of success by the plaintiff did not comply with the order of remand or with the United States Supreme Court's directive in *Hensley*. *See Hensley*, 461 U.S. at 440, 103 S. Ct. at 1943, 76 L. Ed. 2d at 54-55 ("Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. *But where the plaintiff*

achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." (emphasis added)).

We conclude the district court failed in its mandate to consider the level of success of Hensler while reconsidering the reasonableness of the fees to be awarded to the attorneys for the plaintiff, as the prevailing party. Its ruling appears to analyze the issues of prevailing party and the level of success together, when they are separate and distinct issues. In fact, the ruling appears barren of consideration of the level of success issue. Comparisons are made with the results in district court and the appellate court, when those comparisons should be made between the situation before the district court action was filed and after the conclusion of the appeal.[5] We find an abuse of discretion.

It would be preferable to avoid a remand and a third piece of major litigation, but our lack of de novo review does not allow us to adjust the fees ourselves based upon our perceived degree of level of success. Yet it is within our role to comment upon the various levels, in broad terms, to augment the absence of such findings by the district court, which lapse is in itself and under these circumstances, an abuse of discretion. *See Boyle*, 773 N.W.2d at 834 (noting the district court must make findings of fact for the appellate record that will enable us to review the reasonableness of the attorney-fee award). Further, this general commentary may assist the district court in its role and avoid yet another litigious trek.

[5] The district court's ruling is patently inconsistent, as after this comparison, there is an acknowledgment that comparison is not appropriate.

A plaintiff's success can be considered "material" if it produces "some public goal other than occupying the time and energy of counsel, court, and client." *Farrar*, 506 U.S. at 121-122, 113 S. Ct. at 578, 121 L. Ed. at 510 (O'Connor, J., concurring). Hensler, by this action, did render it more difficult for the municipality to prove lack of parental control (needs clear and convincing evidence) but only for certain violations. In reality, that burden would not appear difficult to meet in those violations where the juvenile authorities have been involved, as the results would be in writing and not difficult to admit. The striking of the burden may have some lasting effect upon a parent that commits an alleged "second occurrence." But this may dilute the measure of success and the number of potential parents reasonably effected.

On the other hand, Hensler's success was not purely technical or *de minimus*. "Such a plaintiff either has failed to achieve victory at all, or has obtained only a Pyrrhic victory. . . ." *Id.* at 117, 113 S. Ct. at 576, 121 L. Ed. at 507.

On remand, the district court will need to decide if the result was "significant" or "limited" to whatever degree. But even if significant, a "reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Hensley*, 461 U.S. at 439, 113 S Ct. at 1943, 76 L. Ed. 2d at 54. Hensler's scope was to annihilate the ordinance, but only a limited obliteration appears achieved.

C. Additional Defenses Asserted By City

The City did not validly contest the lodestar amount (hours reasonably expended times a reasonable hourly rate). Error was not preserved on any contention that the fees were excessive or there was a lack of efficacy. Though it was the plaintiff's burden, the City did not object to specific entries as either unnecessary or a duplication. The City's objections appear to be constrained to general complaints about the total amount of time expended in relation to the complexity of the issues, the lack of discovery and contested hearings, and the abbreviated trial. A losing party waives its ability to challenge the amount of attorney fees by failing to make timely specific objections. *Earthquake Sound Corp. v. Bumper Indus.*, 352 F.3d 1210, 1219 (9th Cir. 2003); *see also Boyle*, 773 N.W.2d at 832 ("'[T]he party opposing the fee award then has the burden to challenge, by affidavit or brief with sufficient specificity to give fee applicants notice, the reasonableness of the requested fee.'" (citation omitted)).

The City did claim that one of Hensley's attorneys, who had expended the majority of the time on the case, would not have billed Hensler directly, as he is associated with ACLU of Iowa Foundation. Even if this were true, it is of no assistance to the City. "The statute and legislative history establish that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel." *Blum v. Stenson*, 465 U.S. 886, 895, 104 S. Ct. 1541, 1547, 79 L. Ed. 2d 891, 899-900 (1984). An award of attorney fees to a successful plaintiff is not contingent upon an obligation to pay

an attorney and is not affected by the fact no fee was charged. *See Alexander S. ex rel. Bowers v. Boyd*, 929 F. Supp. 925, 933 (D.S.C. 1995). Likewise, the assessment of the appeal court costs by the Iowa Supreme Court (each party to pay its own), contrary to the City's assertion, is not an indication by that court of the level of success or a factor to be considered by the remand court.

IV. Conclusion

Having found an abuse of discretion, the matter is remanded to the district court. The district court should award only that portion of those fees, whether earned at the trial or appellate level, that is reasonable in relation to its determination of the level of results obtained by the plaintiff. The district court should also allow such attorney fees for this appeal as are reasonable.

REVERSED AND REMANDED.