

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-002747-MR

GEORGES BIRENBAUM, M.D.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE F. KENNETH CONLIFFE, JUDGE  
ACTION NO. 92-CI-002206

ROYCE E. DAWSON, M.D.;  
OLNEY M. PATRICK, M.D.;  
JOHN S. LLEWELLYN, M.D.;  
DANNY M. CLARK, M.D.;  
FRANK M. GAINES, JR., M.D.;  
CORNELLA SERPELL;  
CHARLES L. CONLEY, D.O.;  
WALTER R. BREWER, M.D.,  
AS MEMBERS OF THE KENTUCKY  
BOARD OF MEDICAL LICENSURE;  
AND THE KENTUCKY BOARD OF  
MEDICAL LICENSURE

APPELLEES

OPINION  
VACATING AND REMANDING

\*\* \*\*

BEFORE: GUIDUGLI, KNOPF AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Georges Birenbaum, M.D. (Birenbaum), brings this appeal from a "Memorandum and Order" of the Jefferson Circuit Court entered September 24, 1998.

BACKGROUND FACTS

The underlying facts of this case were set forth in Dawson v. Birenbaum, Ky., 968 S.W.2d 663 (1998), and we hereby adopt the following portion of the Kentucky Supreme Court's opinion in that case as our own:

This case arose as a result of actions taken by the Kentucky Board of Medical Licensure (Board) against appellee Georges Birenbaum, M.D. The Board is charged with the duty to "regulate, control and otherwise discipline the licensees who practice medicine and osteopathy within the Commonwealth of Kentucky." KRS 311.355. The procedural framework the Board must follow for investigating and disciplining licensed medical doctors is established in KRS 311.591. Under the statute, the president of the board divides the members of the board into two panels. The inquiry panel is charged with investigating the grievances which are filed with the Board. Under section three (3) of the [sic] KRS 311.591, when an inquiry panel investigation is concluded, it is authorized to take only one of three actions: (1) it may find that the grievance is without merit and that further action by the board is not necessary; (2) it may find the physician's misconduct insufficient to warrant a complaint, and thus may issue an admonishment; or (3) it may issue a complaint against a physician. If a complaint is issued by the inquiry panel, then the hearing panel takes over, and ultimately hears the case against the licensee.

Appellee is an ophthalmologist licensed by the board, practicing in Fayette County. In November 1990 two grievances were filed against appellee with the board, and in March, 1991 another grievance was filed against him. Pursuant to KRS 311.591, the grievances were assigned to an inquiry panel, and that panel investigated the grievances. The minutes of the August 15, 1991, meeting of the inquiry panel reveal the action taken:

. . . ACTION: Upon discussion, a motion was made by Dr. Gaines that it appeared no violation of the Medical Practice Act occurred in this case and the investigation should be closed. Dr. Gaines further recommended that ten additional patient records should be obtained for further review by a Board consultant. Seconded by Ms. Serpell, the motion carried.

In addition, appellee was notified that his license was placed on "monitor status" at that meeting by a letter dated January 9, 1992, from Lee Weese a "probation officer" with the Board. That letter stated:

The Kentucky Board of Medical Licensure Inquiry Panel A, at its meeting on August 15, 1991, reviewed an investigation regarding the care and treatment you provided to an individual patient.

After long and thoughtful review, it was the consensus of the Panel that your license to practice medicine in the Commonwealth of Kentucky be placed in a monitor status.

Thus, contrary to KRS 311.591(3) the inquiry panel did not issue a complaint against appellee, admonish appellee for any misconduct, or decide that no further action was necessary. Rather, the inquiry panel placed appellee's medical license on "monitor status" and subpoenaed additional patient records from his office for review. Prior to such action, appellee was not afforded a hearing before the Board regarding the status of his license, and he was not given notice of the Board's action placing his license on "monitor status" until January 1992, well after the Board had taken the August 1991 action. On February 20, 1992, the inquiry panel again discussed the status of appellee's license, and denied appellee's request to be removed from "monitor status." [footnote omitted]

Appellee challenged the board's action by seeking a declaration of rights and injunctive relief in the Jefferson Circuit Court. In his complaint, appellee alleged that the board's actions violated statutory procedures set out in KRS 311.530 to 311.620, specifically KRS 311.591 and KRS 311.605. He also asserted claims pursuant to 42 U.S.C. [Sec.] 1983 for vindication of his rights under the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution; and he asserted that he should be awarded attorney's fees pursuant to 42 U.S.C. [Sec.] 1988.

The circuit court granted summary judgment for appellee on his state statutory claims. The circuit court did not address appellee's federal constitutional claims, but focused on the propriety of the Board's actions in light of controlling state statutes. The court held that the Board, in placing appellee's medical license on "monitor status," deviated from the statutory procedure set out in KRS 311.591. The Court concluded that "there is no authorization in the statute for a 'monitor' status and that the Board must either [follow the procedure of] KRS 311.591(3), or, cease and desist its periodic review of Plaintiff's files." The court was also highly critical of the Board's actions taken at the August 1991 meeting:

. . . Assuming the additional inquiry commenced in August, 1991, how long must the Plaintiff expect to be kept under the cloud of investigation? Is this truly an active ongoing investigation by the Board of some existing misconduct as defined by KRS 311.595, or is it some kind of quasi disciplinary action called "monitor status?"

The Court from the undisputed facts, can only infer that this is some sort of quasi disciplinary action taken without compliance with the literal intent of the statute.

Appellee moved for attorney fees pursuant to 42 U.S.C. [Sec.] 1988. The circuit court denied attorney's fees based on KRS 311.603, a statute which confers immunity on the board for actions taken within the scope of its authority. The circuit court also noted that the statutory provisions regulating the board's powers and functions did not provide for attorney's fees. Additionally, the court pointed out that its previous order was based solely on Kentucky's statutory law, and that no determination regarding appellee's constitutional claim had been made.

The Court of Appeals reversed the circuit court's denial of fees, and remanded for a determination of the amount of fees. The Court of Appeals also held that the board was not immune to an award of attorney fees under

[Sec.] 1988, because under the Supremacy Clause, [Sec.] 1988 pre-empted the state's statutory grant of immunity to the board.

Dawson, 968 S.W.2d at 664-665.

Following this Court's reversal of the trial court's denial of attorney's fees, the Board appealed to the Kentucky Supreme Court, which rendered the above-cited opinion. The only issue presented before the Court on appeal was "whether a party who has alleged both federal constitutional claims and state statutory claims in state court, and prevailed on the state claims with the federal claims having been left unresolved, may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. [Sec.] 1988[.]" Dawson, 968 S.W.2d at 664. In holding that prevailing parties such as Birenbaum are potentially entitled to recover attorney's fees under 42 U.S.C. Sec. 1988, the Court adopted the following standard to be used in determining when such an award is appropriate:

Under the prevailing test, [Sec.] 1988 fees may be awarded to a party who prevails on a state law claim pleaded in conjunction with a "substantial" federal constitutional claim if the constitutional and the state law claims arise out of a "common nucleus of operative fact.

Id. at 666, citing United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218, 227-228 (1966).

The Court then addressed whether Birenbaum's federal constitutional claim was substantial. In holding that Birenbaum had set forth a substantial federal claim, the Court stated:

Under the prevailing standard, appellee's federal claim cannot be held insubstantial as a matter of law. As the Court of Appeals noted, the term "substantial" was defined in terms of what is "insubstantial" in Hagans v.

Lavine, [415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed. 2d 577 (1974)]. The Court in Hagans quoted from Goosby v. Osser, 409 U.S. 512, 518, 93 S.Ct. 854, 858-59, 35 L.Ed.2d 36 (1973), a case which summarized the ways "insubstantiality" had been characterized by the Court in previous cases. Insubstantiality" had been equated with concepts such as "essentially fictitious," "wholly insubstantial," "obviously frivolous," and "obviously without merit." (citations omitted) "Insubstantiality" had been further defined as such: "[a] claim is insubstantial only if 'its unsoundness so clearly results from [sic] the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" (citations omitted)

Previous U.S. Supreme Court decisions do not "foreclose the subject" of whether the board's departure from the statutory procedures governing investigating and disciplining licensed medical doctors was a due process violation. . . . There is at least an "inference" that the board violated appellee's due process rights. Appellee's claim is neither "obviously frivolous" nor "wholly insubstantial."

Dawson, 968 S.W.2d at 667-668. In addressing the Board's concerns that its ruling would invite abuse by artful pleaders, the Court further noted:

While it is true that the potential for abuse may exist, we believe that strict adherence to the requirements outlined in this opinion will prevent a party from obtaining an unjustified award of attorney's fees if the underlying constitutional claim is insubstantial and without probable success on the merits. Moreover, the foregoing should be considered along with the doctrine that a prevailing party should ordinarily be awarded [Sec.] 1988 attorney's fees unless there are special circumstances making such an award unjust. [citations omitted]

Id. at 668. The Court affirmed this Court's reversal of the trial court's order, and remanded the matter to the trial court

"to hold a hearing for determination of whether appellee should recover attorneys' fees and if so, in what sum, and for further proceedings consistent herewith." Id. at 668-669.

#### THE CURRENT APPEAL

Following remand, the trial court conducted a hearing, framing the issue as "whether the Plaintiff's claim under 42 U.S.C. Section 1988 was substantial, and, as a result, [whether Birenbaum is] entitled to attorneys fees." In holding that Birenbaum was not entitled to attorney's fees, the trial court found that the Board's subpoena of medical records did not amount to a substantial violation of his civil rights, reasoning:

Had the [Board] sought to hold [Birenbaum] in contempt or suspend his license or ability to make his living without literal compliance with the statute, the Court would agree that the actions of the Defendant were substantial.

. . .

Upon reflection, the "monitor" status would appear to be something less than a private letter of misconduct and not a disciplinary status of probation.

To paraphrase Justice Liebson in Meyer v. Chapman Printing Co., Inc., Ky., 840 S.W.2d 814 (1992), this case has been one where the tail is wagging [sic] the dog. The vast majority of the effort expended has been due to the efforts of Plaintiff's counsel to recover its fees.

The original issue was simple and was simply resolved. There is no substantial violation of the Plaintiff's constitutional rights justifying attorney fees in this case, and the motion, therefore, is denied.

This appeal followed.

Once again Birenbaum contends that the trial court erred in refusing to compensate him for his attorneys fees and,

based on the Dawson opinion, we agree. We believe that the Supreme Court in Dawson clearly found that Birenbaum's cause of action constituted a substantial federal constitutional claim which rendered him potentially eligible for a fee award. Further, we interpret Dawson to hold that once a prevailing party is held to be entitled to an award of attorney's fees, an award is to be made unless the presence of "special circumstances" warrant a different outcome.

Here, the trial court's denial of attorney's fees on the ground that Birenbaum's federal constitutional claim was insubstantial flies squarely in the face of the finding of the Supreme Court that it was, in fact, substantial. Because the issue of substantiality was fully resolved by the Supreme Court in Dawson, we must remand the matter to the circuit court for consideration as to whether any special circumstances exist upon which a denial of a fee award can be predicated. If no special circumstances are found to exist, then the trial court must enter an appropriate award of reasonable attorney's fees in favor of Birenbaum.

We also agree with Birenbaum that any award of attorney's fees should include not only compensation for attorney's fees incurred in the initial action, but also attorney's fees spent in the appeals which have followed entry of the trial court's subsequent orders denying attorney fees. As Birenbaum illustrates in his appellate brief, such awards are allowed in federal court.

When Congress passed [42 U.S.C. Sec. 1988,] its basic purpose was to encourage the private prosecution of civil rights suits



through the transfer of the costs of litigation to those who infringe upon basic civil rights. If a successful party in a civil rights suit is awarded attorney's fees under the Act and he cannot secure attorney's fees for legal services needed to defend the award on appeal, the underlying Congressional purpose for the Act would be frustrated. We conclude that implementation of Congressional policy requires the awarding of attorney's fees for time spent pursuing attorney's fees in the cases presently under review. This award should also include amounts for legal time spent defending and prosecuting the instant appeals[.]

Weisenberger v. Huecker, 593 F.3d 49, 53-54 (6<sup>th</sup> Cir. 1979).

This reasoning has been followed by numerous other federal circuit and district courts.

Finally, Birenbaum has asked us to calculate and award attorney's fees as opposed to remanding this matter back to the trial court for such a determination. Although the idea of doing so in the name of judicial economy is appealing given the obvious reluctance of the trial court to make such an award, we note that our jurisdiction is limited to appellate jurisdiction only pursuant to Section 111(2) of the Kentucky Constitution. For us to render such a decision, we would not only have to decide the amount of award, but also the issue of whether special circumstances exist so as to deny awarding attorney's fees altogether. We are not empowered to make such factual findings.

Having considered the parties' arguments on appeal, the order of the Jefferson Circuit Court entered September 23, 1998, is vacated and this matter is once again remanded for further consideration. On remand, the trial court is instructed to consider only whether special circumstances exist which would justify denial of an award of attorney's fees. If no such

special circumstances are found, the trial court is hereby instructed to enter an award of reasonable attorney's fees in favor of Birenbaum.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kent Masterson Brown  
Christopher J. Shaughnessy  
Danville, KY

BRIEF FOR APPELLEES:

C. Lloyd Vest II  
Louisville, KY