



LOCAL GOVERNMENT LAW

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\$1 nominal damages award in civil rights case nets plaintiff's attorney zero attorney fees

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The Civil Rights Act of 1871, codified at 42 U.S.C. § 1983, provides a remedy to plaintiffs who claim that their civil rights were violated at the hands of local governmental officials. If a civil rights plaintiff prevails, he or she may recover reasonable attorney fees under 42 U.S.C. § 1988. Section 1988 is a powerful tool in the arsenal of a civil rights plaintiff's attorney. Even small jury awards can result in attorney fees exceeding six figures. *City of Riverside v. Rivera*, [447 U.S. 562](#) (1986) (upholding \$245,000 attorney fee award for \$33,000 verdict). In some cases, the threat of a substantial attorney fee petition will cause a case to settle much higher than the value of the underlying claimed injuries. However, a recent case from the Seventh Circuit Court of Appeals, *Frizzell v. Szabo*, ___ F.3d ___, 2011 WL 3132267 (7th Cir. 7/27/11), may undercut the ability of civil rights plaintiffs to leverage larger than deserved settlements.

In *Frizzell*, the plaintiff brought false arrest and excessive force claims under Section 1983 against the defendant sheriff's deputy. The case stemmed from a traffic stop. While the parties' respective stories differed in some respects, the deputy admitted shooting the plaintiff with a Taser five times and then utilizing his pepper spray during the arrest. Plaintiff also testified that defendant jumped on his chest after the tasing. The plaintiff allegedly lost his job as a result of the incident and testified that he had medical problems for two weeks following the incident but because he did not have insurance, did not seek medical attention.

At the jury instruction conference, defendant proposed a nominal damages instruction to which the plaintiff objected. The judge declined to give the instruction. However, when the jury sent a note asking if they had to award any money to the plaintiff if they found in his favor, the judge responded with the nominal damages instruction. The jury returned a verdict against plaintiff on the false arrest claim but in his favor on the excessive force claim and granted only nominal damages. The judge then denied plaintiff's motion for attorney fees citing the *de minimis* nature of the damages.

Plaintiff appealed claiming that the judge erred in giving the nominal damages instruction and in denying his motion for attorney fees. He argued that the mere fact that he was tased five times and that the jury found defendant employed excessive force should have been enough to take nominal damages off the table. The Appellate Court disagreed, finding that, while plaintiff focused throughout the trial on pain and negative after effects of the tasing, the jury might have believed that it was defendant's use of the pepper spray or jumping on his chest that was excessive and that the tasing was justifiable.

Plaintiff further argued that the nominal damage award was not merely *de minimis* and he should have been granted attorney fees. In denying the fees, the trial court observed that an award of attorney fees is not automatic to every prevailing party and plaintiff must achieve enough success to be entitled to the award. To determine whether plaintiff achieved enough success, the

court considered: (1) the difference between the judgment recovered and the recovery sought, which is the most important of the factors; (2) the significance of the legal issue on which the plaintiff prevailed, which is the least important of the factors; and (3) the public purpose of the litigation.

The Appellate Court agreed with the trial court that the factors weighed against an award of attorney fees. First and foremost, the difference between the amount plaintiff sought in his complaint—\$160,000—and the amount awarded was significant. Plaintiff argued that these numbers were irrelevant because *the complaint was never admitted into evidence at trial*. The Court did not give much credence to that argument because plaintiff cited no case law to suggest that admission into evidence of the sums sought was important. Nonetheless, the Court used a number plaintiff suggested at trial—\$75,000—and still found that the difference was too large to allow him to prevail on the argument.

In weighing the next factor, the significance of the legal issue, the Appellate Court agreed with the trial court that plaintiff prevailed only marginally. The jury rejected his entire theory pertaining to false arrest and rejected the idea that defendant used excessive force warranting compensation. Such a marginal victory did not support an award of fees in light of the other factors.

As for the final factor, the public purpose served by the suit, plaintiff argued that his suit vindicated the fundamental rights of all residents of the County pursuant to the Fourth Amendment. But all section 1983 cases seek to vindicate rights, the Appellate Court reasoned. Instead, the Court found that the prong more accurately addresses whether *the relief sought evinces a public purpose rather than merely attempts to redress a private injury and whether victory entails something more than merely a determination that a constitutional guarantee was infringed*. Plaintiff made no allegations at trial, however, that the excessive use of tasers in connection with traffic stops was the general practice in the County. The Court found that plaintiff's suit did nothing more than try to apply a common sense rule—that excessive tasing is to be avoided—to an isolated incident in an attempt to redress his private injury. Accordingly, the Appellate Court upheld the trial court's denial of attorney fees.

The Court's analysis in *Frizzel* will likely be helpful to the defense of civil rights actions. It was not the nominal nature of the award that precluded attorney fees, but rather the difference between what plaintiff sought and what plaintiff was awarded, both in terms of his claims and damages. Accordingly, facing a possible denial of fees, a plaintiff's attorney demand may be somewhat tempered during pre-trial settlement or mediation discussions, especially where the constitutional violation is relatively evident but the alleged injury is minimal. ■

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