

COMMONWEALTH OF KENTUCKY
NELSON CIRCUIT COURT
Division II
Civil Action No. 19-CI-00310

THOMAS ROSSI

PLAINTIFF

vs.

DEFENDANT'S MOTION FOR ATTORNEY'S FEES

LANDMARK of BARDSTOWN REHABILITATION
AND NURSING CENTER, LLC, et al.

DEFENDANTS

* * * * *

Comes now the Defendant, Landmark of Bardstown Rehabilitation and Nursing Center, LLC (hereinafter "Landmark of Bardstown"), by counsel, and pursuant to KRS § 216.515(26), and respectfully moves this Court for attorney's fees related to Plaintiff's Resident's Rights Claim:

I. Introduction.

Plaintiff, Thomas Rossi, sued Defendant, Landmark of Bardstown, asserting violations of KRS § 216.515, the Kentucky Resident's Rights Statute. (*See* Plaintiff's Complaint, ¶ 13). On June 28, 2021 through July 1, 2021, Plaintiff's Resident's Rights claim was tried to a jury. On July 1, 2021, the jury unanimously concluded that Landmark of Bardstown did not deprive Thomas Rossi of or infringe upon his rights. (*See* Jury Verdict Form, Instruction No. 3, attached hereto as **Exhibit A**).

KRS § 216.515(26) allows for the recovery of reasonably attorney's fees to the prevailing defendant as follows:

Any resident whose rights as specified in this section are deprived or infringed upon shall have a cause of action against any facility responsible for violation. The action may be brought by the resident or his guardian. The action may be brought in any court of competent jurisdiction to enforce such rights and to recover actual and punitive damages for any deprivation or infringement on the rights of a resident. Any plaintiff who prevails in such action against the facility may be entitled to recover reasonable attorney's fees,

costs of the action, and damages, unless the court finds the plaintiff has acted in bad faith, with malicious purpose, or that there was a complete absence of justifiable issue of either law or fact. **Prevailing defendants may be entitled to recover reasonable attorney's fees.** The remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to a resident and to the cabinet. (Emphasis added).

Based on this clear and unambiguous statutory language, Landmark of Bardstown seeks reasonable attorney's fees in the amount of \$91,644.75. (See Affidavit of William K. Oldham attached hereto as **Exhibit B**).

II. Landmark of Bardstown is Entitled to Reasonable Attorney's Fees.

What constitutes a reasonable attorney fee is an issue of law when the attorney and/or client seeks to recover a reasonable attorney fee from an opposing or third party. (*Inn-Group Mgmt. Servs. v. Greer*, 71 S.W.3d 125 (Ky, 2002)). In conducting this analysis, Kentucky's courts have adopted the "Lodestar" method used by the United States Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983), as a starting point in both statutory and contractual attorneys' fees claims. (See *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 826 (Ky. 1992)). The Lodestar amount is calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate. *Hensley*, 461 U.S. at 433).

The United States Supreme Court has emphasized that there is a "'strong presumption' that the Lodestar amount represents the 'reasonable' fee." (*City of Burlington v. Dague*, 505 U.S. 557, 562 (1992)). The Court may then adjust the Lodestar amount according to the following factors: (1) time and labor required by the case; (2) novelty and difficulty of questions presented; (3) skill needed to perform the legal service properly; (4) preclusion of employment by attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time

limitation imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) nature and length of the professional relationship with client; and (12) awards in similar cases. In conducting a Lodestar analysis, courts analyze “hourly time records, full expense statements, documentation of attorney hourly billing rates in the community for the particular type of work involved, the attorney’s particular skills and experience, and detailed billing records or client’s actual bills showing tasks performed in connection with the litigation.” (*Adcock v. Secretary of Treasury U.S.*, 227 F.3d 343, 350 (6th Cir. 2000); *See also, Gobain Autover USA, Inc. v. Xinyi Glass North America*, 2010 U.S. Dist. LEXIS 36129, *49-50 (N.D. Ohio 2010)).

Kentucky’s courts have made clear that the party seeking attorneys’ fees must “demonstrate that the amount sought is not excessive and accurately reflects the reasonable value of bona fide legal expenses incurred.” (*A & A Mechanical, Inc. v. Thermal Equip. Sales, Inc.*, 998 S.W.2d 505, 514 (Ky. App. 1999)). As a general matter, attorney billing rates that are “in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation” are reasonable. (*Blum v. Stenson*, 465 U.S. 866, 896 at n. 11 (1984)). Courts compare requested rates with the “prevailing market rates,” because an attorneys’ fee award “is to yield the same level of compensation that would be available from the market.” (*Missouri v. Jenkins*, 491 U.S. 247, 286 (1989)). The Sixth Circuit has defined the prevailing market rate as the rate that “lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record.” (*Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004)).

Moreover, many courts of appeals have held that the billing rates actually paid by clients are evidence of the prevailing rates. (*Morrison v. Davis*, 88 F.Supp. 2d 799, 802 (S.D. Ohio 2000) (“the actual rate that applicant’s counsel can command in the market is itself highly relevant proof

of the prevailing community rate.”); *See also Mathis v. Spears*, 857 F.2d 749, 756 (Fed. Cir. 1988) (“Only if the evidence reveals that the rate actually charged is abnormally high or abnormally low will the Court base an attorney fee award on an hourly rate at variance with the bill for legal services that was actually rendered to the client”) (citing *Chromalloy Am. Corp. v. Alloy Surfaces Co.*, 353 F. Supp. 429, 431 (D. Del. 1973)).

The hourly rates charged to Landmark of Bardstown in this matter ranged from \$135 an hour to \$215 an hour, with most billing occurring at \$185 or \$215 an hour. As set forth in the Affidavit of William K. Oldham, the billing rates in this matter are commensurate with the usual rates charged by counsel for Landmark of Bardstown.

Landmark of Bardstown is entitled to fees for hours “reasonably expended” by its attorneys. (*Hensley*, 461 U.S. at 434 (quoting S.Rep. No. 94-1011, p. 6 (1976))). The present litigation involved complex subject matter, substantial medical discovery, multiple depositions, and defense of the resident’s rights claim. The number of hours actually expended by counsel for Landmark of Bardstown was reasonable considering the nature of the case and the over \$1,000,000 in compensatory damages sought and \$5,000,000 in punitive damages disclosed in pretrial court filings by Plaintiff. Plaintiff pled a resident’s rights violation and all remedies thereunder in his Complaint; he hired an expert and adduced evidence about that claim from the beginning of the suit until the unanimous verdict in Defendant’s favor on that claim; and, he stridently opposed the Motion for Summary Judgment on the resident’s rights claim and the Directed Verdict motions seeking dismissal of that claim. Moreover, had Plaintiff prevailed on the Residents’ Rights count with a jury verdict, this motion and the relief requested by Defendant without question would have been sought by Plaintiff. As a result, Landmark of Bardstown seeks reimbursement for a total of \$91,644.75 in reasonable legal fees billed in this matter. (*See Exhibit B*).

III. Conclusion.

For the foregoing reasons, Landmark of Bardstown respectfully requests that the Court award it all reasonable attorney fees incurred in defending itself against Plaintiff's KRS 216.515 claims, which in total comes to \$91,644.75.

Respectfully submitted,

/s/ William K. Oldham
William K. Oldham
Vanna R. Milligan
OLDHAM LAW
1201 Story Ave., Suite 400
Louisville, Kentucky 40206
woldham@oldhamlawky.com
vmilligan@oldhamlawky.com
P: (502) 749-4040
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certified that a copy of the foregoing was electronically filed as well as sent via email, this 16th day of July, 2021 to:

James M. Bolus, Jr., Esquire
BOLUS LAW OFFICES
600 W. Main Street, Ste. 500
Louisville, KY 40202

Casey A. Krill, Esquire
KRILL LAW
600 W. Main Street, Ste. 500
Louisville, KY 40202

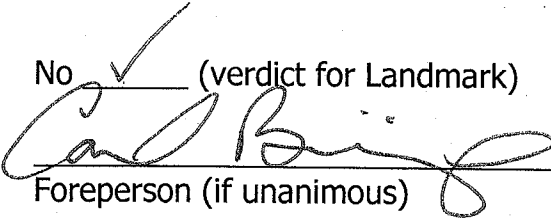
/s/ William K. Oldham
Counsel for Defendants

EXHIBIT A

INSTRUCTION NO. 3

While he was a resident at Landmark of Bardstown Nursing and Rehabilitation Center (Landmark), Thomas Rossi had a number of rights which were guaranteed to him by statute. Among those rights is the right to be free from mental and physical abuse. If you are satisfied from the evidence that Landmark deprived Thomas Rossi of, or infringed upon his right to be free from mental and physical abuse, and was damaged as a result, you will find for Plaintiff. Otherwise, you will find for Landmark.

Yes _____ (verdict for Rossi)

No ☒ (verdict for Landmark)
Foreperson (if unanimous)

If you have found for Landmark in Instructions 2 and 3, please proceed to Verdict Form

A. If you have found for Rossi in Instructions 2 or 3, please proceed to INSTRUCTION NO. 4.

EXHIBIT B

COMMONWEALTH OF KENTUCKY
NELSON CIRCUIT COURT
Division II
Civil Action No. 19-CI-00310

THOMAS ROSSI

PLAINTIFF

vs.

AFFIDAVIT AS TO REASONABLE ATTORNEYS' FEES

LANDMARK of BARDSTOWN REHABILITATION
AND NURSING CENTER, LLC, et al.

DEFENDANTS

Comes now the affiant, William K. Oldham, and after being duly sworn states the following:

1. My name is William K. Oldham. I am an attorney licensed to practice law in the Commonwealth of Kentucky, and I have been practicing in the Commonwealth of Kentucky since 1993. I am a member in good standing with the Kentucky Bar. I am the attorney for Defendant, Landmark of Bardstown Rehabilitation and Nursing Center, LLC in the above-referenced matter.
2. I have personal experience handling long-term care and medical negligence litigation in Kentucky. Further, I have personal knowledge of the reasonable and customary attorney's fees charged by attorneys and legal staff, and approved by Courts in Kentucky.
3. Fees charged in this case are reasonable considering the skill of the lawyers, the comparable rate of this area of law in the general community, and the complexity of the case. The fees charged are as follows:
 - a. Attorney-Partner: \$215/hour
 - b. Attorney-Associate: \$185/hour
 - c. Paralegal: \$135/hour

d. Nurse Analyst: \$135/hour

4. The total attorneys' fees incurred by Defendant between February 19, 2020 to July 1, 2021, associated with defending the two claims prosecuted all the way to the jury charge by Plaintiff was \$183,289.50.
5. Plaintiff's Resident's Rights Claim, brought pursuant to KRS § 216.515, represents one-half of Plaintiff's overall claims. Accordingly, pursuant to KRS § 216.515(26), Defendant requests one-half of the overall attorneys' fees expended in defending this matter, in the amount of \$91,644.75
6. I make this Affidavit in support of Defendant's Motion for Attorneys' Fees.


AFFIANT, WILLIAM K. OLDHAM

COMMONWEALTH OF KENTUCKY)
)
COUNTY OF JEFFERSON)

Subscribed and sworn to before me by William K. Oldham, who is personally known to me, this _____ day of _____, 2021.

Will submit notarized
original by mail.

NOTARY PUBLIC, STATE AT LARGE, KY.

My commission expires: _____