NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3578-10T3
A-1360-11T3
A-1361-11T3

JAMES GENSCH, on behalf of himself and all others similarly situated,

Plaintiff-Respondent/Cross-Appellant,

v.

HUNTERDON COUNTY CLERK'S OFFICE, and MARY H. MELFI, in her capacity as the HUNTERDON COUNTY CLERK, and HUNTERDON COUNTY through the HUNTERDON BOARD OF CHOSEN FREEHOLDERS,

Defendants-Appellants/Cross-Respondents.

DEAN SMITH, on behalf of himself and all others similarly situated,

Plaintiff-Appellant/Cross-Respondent,

v.

HUDSON COUNTY REGISTER and WILLIE J. FLOOD, in his capacity as the HUDSON COUNTY REGISTER and HUDSON COUNTY through the HUDSON COUNTY BOARD OF CHOSEN FREEHOLDERS,

Defendants-Respondents/Cross-Appellants.

ANDREW GARGANO, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

BERGEN COUNTY CLERK'S OFFICE, and KATHLEEN A. DONOVAN, in her capacity as the BERGEN COUNTY CLERK, BERGEN COUNTY, and the BERGEN COUNTY BOARD OF CHOSEN FREEHOLDERS,

Defendants-Respondents.

Argued June 4, 2012 – Decided July 9, 2012

Before Judges Sabatino, Ashrafi, and Fasciale.

On appeal from the Superior Court of New Jersey, Law Division, Hunterdon County, Docket No. L-0307-07 (A-3578-10); Hudson County, Docket No. L-5261-07 (A-1360-11); and Bergen County, Docket No. L-8571-06 (A-1361-11).

Sander D. Friedman and Wesley G. Hanna argued the cause for respondent/cross-appellant James Gensch in A-3578-11; appellant/cross-respondent Dean Smith in A-1360-11; and appellant Andrew Gargano in A-1361-11 (Law Office of Sander D. Friedman, LLC, attorneys; Mr. Friedman, on the briefs).

Shana L. Taylor, Hunterdon County Counsel, argued the cause for appellants/cross-respondents Hunterdon County Clerk's Office, Mary H. Melfi, Hunterdon County, and the Hunterdon County Board of Chosen Freeholders (Ms. Taylor, attorney; Gaetano M. De Sapio, of counsel and on the brief; Michael A. De Sapio, on the brief).

Steven L. Menaker argued the cause for respondents/cross-appellants Hudson County Register, Willie J. Flood and Hudson County (Chasan Leyner & Lamparello, PC, attorneys; Mr. Menaker, of counsel; Kirstin Bohn, on the brief).

John M. Carbone argued the cause for respondents Bergen County Clerk's Office and Kathleen A. Donovan (Carbone and Faasse, attorneys; Mr. Carbone, on the brief).

James X. Sattely, Jr., Bergen County Counsel, attorney for respondent Bergen County, joins in the brief of respondent Bergen County Clerk's Office.

Law Offices of Richard Malagiere, PC, attorneys for respondent Bergen County Board of Chosen Freeholders, join in the brief of respondent Bergen County Clerk's Office.

PER CURIAM

The present related appeals and cross-appeals,[1] which were argued back-to-back and which we consolidate solely for purposes of this opinion, concern trial court awards of attorneys' fees to the three respective plaintiffs pursuant to N.J.S.A. 47:1A-6, the fee-shifting provision of the Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 to -13. In all three appeals, plaintiffs, who are and have been represented by the same counsel, contend that the trial court's fee awards are

[1] The cases are James Gensch v. Hunterdon County Clerk's Office, (A-3578-10); Dean Smith v. Hudson County Register, (A-1360-11); and Andrew Gargano v. Bergen County Clerk's Office, (A-1361-11).

inadequate, particularly because none of the awards include a fee enhancement above the "lodestar" amount. In both A-1360-11 (Smith) and A-3578-10 (Gensch) the governmental defendants not only oppose plaintiffs' claims for enhancement, but further maintain that the fee award in their case should be vacated or reduced.

For the reasons described in this opinion, we affirm the fee awards in all three cases without any lodestar enhancements, although we modify the fee award in A-1360-11 (Smith) to correct for certain disallowed attorney time by an associate that was erroneously subtracted by the trial court at a partner's billing rate.

I.

The three lawsuits before us were filed as parallel efforts by the respective plaintiffs to contest the rates that various county governments were then charging citizens for the copying of public records. The general background of these lawsuits, and other similar lawsuits brought by the same counsel on behalf of other plaintiffs against other counties, is detailed in our prior opinions in Smith v. Hudson County Register, 411 N.J. Super. 538 (App. Div. 2010) ("Smith I"), and in Smith v. Hudson County Register, 422 N.J. Super. 387 (App. Div. 2011) ("Smith II"). In each case, the plaintiff contended that the County

defendants were overcharging for the reproduction of public records, thereby unduly restricting citizen access to such records.

In Smith I, we held that under the then-existing version of OPRA, governmental agencies in our State could not lawfully charge a blanket rate to copy public records if that rate exceeded the "actual cost" of such copying. Smith I, supra, 411 N.J. Super. at 562-70. We denied retrospective relief to the plaintiffs in Smith I, but remanded that case along with two companion appeals[2] to address plaintiffs' claims for counsel fees under OPRA's fee-shifting provision. N.J.S.A. 47:1A-6. In the meantime, the Legislature amended OPRA to establish a uniform copying rate of five cents per letter-sized page. See N.J.S.A. 47:1A-5(b).

Thereafter, in Smith II, we concluded that plaintiff Smith was, in fact, a "prevailing party" entitled to an award of counsel fees under OPRA because he had persuaded this court in Smith I to adopt his interpretation of the law predicated on an "actual costs" approach. Smith II, supra, 422 N.J. Super. at 396; see also Smith I, supra, 411 N.J. Super. at 570. Smith

[2] The remand of one of those two prior companion appeals, Gensch v. Hunterdon County Clerk's Office, A-2507-08, resulted in the fee award that the Hunterdon County defendants are now appealing in A-3578-10, and which plaintiff Gensch is now cross-appealing.

also prevailed in Smith I by persuading us to reject the trial court's ruling that he was not entitled to relief because he had allegedly paid the copying charges "voluntarily." Smith II, supra, 422 N.J. Super. at 395-96; see also Smith I, supra, 411 N.J. Super. at 551-54. We therefore remanded the case again to the trial court for a determination of Smith's reasonable counsel fees. Smith II, supra, 422 N.J. Super. at 399.

On remand a second time, the trial court granted Smith a fee award of $40,127.50, utilizing a $350 hourly rate for approved partner time and a $175 hourly rate for approved associate time. Smith has now appealed that award as insufficient. The Hudson County defendants have cross-appealed, seeking to have the award vacated or reduced.

In addition, the trial judge in Hunterdon County who presided over the remand in Gensch, awarded Gensch $93,265.37 in counsel fees, utilizing the same hourly rates as in Smith. The Hunterdon County defendants have now appealed that award, seeking to have it set aside or reduced, and Gensch has cross-appealed the award, seeking to have it increased.

A third trial judge in Bergen County who considered the fee application in Gargano, awarded that plaintiff $38,299.33, inclusive of costs. The Bergen County judge adopted the same $350/$175 hourly rate structure. Gargano has now appealed that

award as insufficient. The Bergen County defendants oppose his appeal, but they have not cross-appealed to seek a reduction of the award.

The record indicates that, on the whole, plaintiffs' law firm filed separate lawsuits against nineteen of the State's twenty-one counties, including the present three cases. We are advised that, in the aggregate, those nineteen cases have generated a fee recovery, either by court award or by settlement, in excess of one million dollars. One of the cases involving another county (Middlesex) resulted in a fee award (without a lodestar enhancement), which was recently sustained by another panel of this court in an unpublished opinion.[3] We were advised at oral argument that the three present cases represent the last of the unresolved fee disputes in the related nineteen cases.

II.

We begin by examining a common issue that Smith, Gensch, and Gargano all raise on appeal: whether the respective trial judges erred in denying them a percentage enhancement of the fee award beyond the so-called "lodestar" amount. For the reasons

[3] Lebbing v. Middlesex Cnty. Clerk's Office, No. A-2738-10 (App. Div. May 4, 2012) (slip op. at 23). We were advised at oral argument that no petition for certification has been filed in Lebbing.

that follow, we sustain all three judges in their denial of such a lodestar enhancement under the particular circumstances of these coordinated lawsuits. We also affirm the denial of any "incentive award" to the individual plaintiffs.

In general, New Jersey courts abide by the American rule that each party pays its own legal fees. R. 4:42-9. The award of a counsel fee, where permissible, is discretionary and normally is reviewed on appeal only for a clear abuse of discretion. Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001); accord City of Englewood v. Exxon Mobile Corp., 406 N.J. Super. 110, 123 (App. Div.), certif. denied, 199 N.J. 515 (2009).

An award of counsel fees is calculated by determining the so-called lodestar, i.e., a reasonable hourly charge multiplied by the number of approved hours expended. Rendine v. Pantzer, 141 N.J. 292, 334-35 (1995). In determining the lodestar, a court should first compare the hourly rate of the attorney to those of attorneys in the community of "comparable skill, experience, and reputation." Id. at 337 (quoting Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990)). The court must then determine whether the hourly billing rates are "fair, realistic, and accurate." Ibid. In the present three appeals, only one of the County defendants contests the respective $350

hourly rate for partners and $175 hourly rate for associates at plaintiffs' former law firm, and we concur with all three trial judges that those rates are reasonable and commensurate with the complexity of the many legal issues raised in this litigation.[4]

Second, the court must determine the hours that were reasonably expended pursuing the statutory objectives. Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 22-23 (2004). Third, the court should reduce the lodestar if the party achieved modest success in relation to the relief sought, although there is no requirement of proportionality between the fee and the damages recovered. Id. at 23. Fourth, when the attorney is being paid a contingency fee, the trial court may decide to enhance the fee to reflect the risk of non-payment when the attorney's compensation "entirely or substantially is contingent on a successful outcome." Rendine, supra, 141 N.J. at 337.

In Walker v. Guiffre, 209 N.J. 124, 128-29 (2012), the Court recently revisited the question of fee enhancements because of questions raised by Perdue v. Kenny, ___ U.S. ___, ___, 130 S. Ct. 1662, 1674, 176 L. Ed. 2d 494, 507 (2010) (holding that fee enhancements should only be awarded in exceptional circumstances). Walker, however, rejected any new

[4] We are advised that the law firm has since disbanded, although the two attorneys who primarily handled this litigation are still apparently affiliated.

approach to determining fee enhancements and instead reaffirmed Rendine's standard. Walker, supra, 209 N.J. at 129. The Court explained that the federal reasoning relied on in Perdue existed when Rendine was decided and, therefore, Perdue did not affect New Jersey law. Id. at 133-41.

Bearing in mind these general standards, we conclude that the three respective trial judges in Smith, Gensch, and Gargano reasonably found under the distinct circumstances of these related cases that plaintiffs were not entitled to fee enhancements, nor were they entitled to incentive awards. We acknowledge that each of the plaintiffs, and the lawyers who ably represented them, advanced the interests of the public at large by obtaining a result that ultimately reduced the charges for the copying of public records. See Walker, supra, 209 N.J. at 139 (noting the Legislature's recognition that one of the purposes of fee-shifting is "attracting counsel to socially beneficial litigation"). As we noted in Smith I, the prior law was "murky" as to the appropriate copy charges, Smith I, supra, 411 N.J. Super. at 570, largely due to the vague wording of the then-existing OPRA language. We have already held in Smith II that "[b]y successfully advocating their construction of the law Smith and the other appellants [in Smith I] were a catalyst for

change" and were "decidedly prevailing parties." Smith II, supra, 422 N.J. Super. at 396.

Even so, it was reasonable for the trial judges to withhold fee enhancements in these and in the other related cases because of the distinctive manner in which the cases were litigated — i.e., in multiple courts in nineteen counties — which lessened the risks involved. Rather than filing a single complaint against all nineteen counties, plaintiffs and their law firm fragmented the litigation effort by suing each county and various individual county defendants in separate forums.

We do not criticize plaintiffs' lawyers for filing separate actions, as they were not obligated to present these statewide over-charging issues in one case. It is conceivable that if a unitary action had been filed, one or more of the county defendants might have moved to sever the cases affecting them and to transfer venue to the trial court in their own county. See R. 4:3-2(a)(2) (noting that venue lies "in the county in which the cause of action arose"). But see R. 4:38-1(a) (authorizing the consolidation of actions regarding common questions of law or fact arising out of a series of transactions, even where venue lies in multiple counties). We need not resolve here whether such motions to sever and transfer, if they had been brought at all, would or should have

been granted. Our point is simply that the cases were litigated in a fragmented, county-by-county manner, a reality that affected the risks involved.

Because the cases were litigated in piecemeal fashion before a host of trial judges, the risks and stakes were lessened. For example, if one of the plaintiffs prevailed before one of the trial courts and obtained a favorable judicial ruling or a court-approved class-wide settlement, that successful outcome undoubtedly would provide some leverage to the counterpart plaintiffs represented by the same lawyers who were litigating and negotiating with defendants in other counties. A potential "domino effect" existed here that is not normally present when public interest litigation is brought in one venue. To be sure, an unfavorable ruling for a plaintiff in one of the trial courts could have had indirect adverse impacts in the other open cases.

Nevertheless, we find that plaintiffs reaped a net strategic advantage by having these cases litigated before multiple trial judges, which spread the risks of failure in a unique manner. We further note that the cases were not filed at the same time, but were instead staggered, a feature that provided plaintiffs with an opportunity to "piggyback" on a favorable outcome in one of the earlier-resolved cases.

Plaintiffs also had the chance to contain their risks by refining their legal arguments before successive judges and adversaries.

In sum, the risks of non-payment were sufficiently lessened to justify compensation at the lodestar level, without the necessity for further enhancement. In reaching this decision, we do not lose sight of the fact that the plaintiffs in all of the cases collectively obtained over one million dollars in fee shifting, a sizeable reward indicative of adequate incentive for counsel to represent them in this litigation. Consequently, the denial of a lodestar enhancement in all these cases is affirmed.

III.

We now turn to the discrete arguments raised by the parties in the three respective cases.

Smith

In his appeal, Smith, who had sought a lodestar award of $67,835.25, plus $1980 in costs and an enhancement, argues that the trial court unreasonably reduced his lodestar time and also made various calculation errors.

The Hudson County defendants in Smith, meanwhile, contend in their cross-appeal that the trial court's $40,127 fee award should be vacated because (1) Smith was not a prevailing party entitled to fees under OPRA because his complaint did not

expressly refer to OPRA; (2) Smith's counsel's receipt of fees from other cases bars Smith's right to recover fees; and (3) the fee application was excessive and included duplicative and unreasonable billing entries.

Except for one discrete item of modification respecting the treatment of associate time, we reject the parties' contentions and affirm the fee award in Smith. We do so substantially for the reasons set forth in the trial court's written ruling dated October 6, 2011. Only some brief comments are warranted.

All of the arguments presented by the Hudson County defendants seeking to vacate Smith's fee award in its entirety are without merit. The fact that Smith's complaint omitted an explicit OPRA count, a point now belatedly raised by defendants, is of no moment. As defense counsel conceded at oral argument before us, the Smith case was litigated as both an OPRA case and a common-law access case, which is consistent with the way the cases were argued and decided on appeal in Smith I, supra, 411 N.J. Super. at 562-70, and in Smith II, supra, 422 N.J. Super. at 396. Moreover, the complaint in Smith implicated OPRA, by alleging a class-wide violation of the holding in Dugan v. Camden County Clerk, 376 N.J. Super. 271, 279 (App. Div.), certif. denied, 184 N.J. 209 (2005), an OPRA-based decision. In any event, the court has discretion under Rule 4:9-2 to amend

the pleadings to conform to the record, and the Hudson County defendants surely had ample notice of plaintiff's arguments under OPRA. See Teilhaber v. Greene, 320 N.J. Super. 453, 466 (App. Div. 1999) (holding that "a 'deficient' complaint that omits a specific legal theory may be remedied at trial by showing the appropriate proofs for the omitted theory"); 68th St. Apts., Inc. v. Lauricella, 142 N.J. Super. 546, 561 n.3 (Law Div. 1976) (indicating that even when a legal theory was not advanced in the pleadings, it is properly before the court if it was "fully aired" at trial and in post-trial briefs), aff'd o.b., 150 N.J. Super. 47 (App. Div. 1977).

The trial court's award of counsel fees to Smith was not barred by the fact that his lawyers were litigating similar cases against other counties for other clients. The Hudson County trial judge sufficiently considered whether the attorney time devoted to Smith was duplicative, and she made appropriate reductions for time that was reasonably found to be excessive.

We likewise reject Smith's contention that the trial judge unfairly reduced his lawyers' billable time. Applying, as we must, our limited scope of review, see Packard-Bamberger & Co., supra, 167 N.J. at 444, we discern no abuse of discretion by the judge, nor any patent unfairness in the award. Although one might quibble about the disallowance of some of the specific

time entries in Smith, such as, for example, a minor reduction for time spent communicating with the clerk's office and modest time disallowed or reduced for certain legal research, the judge's fee ruling, on the whole, is supported by substantial credible evidence.

The only point warranting a slight adjustment in Smith is the trial judge's failure to make a distinction between associate time and partner time when she reduced the lodestar by 61.3 hours and unfortunately applied the $350 hourly partner rate for time that was incurred by both a partner and by an associate. Rather than consume further resources of the parties and the trial court on yet another remand, we exercise our original jurisdiction and increase the fee award in Smith to account for the $175 differential in the hourly rates of the partner and the associate. Specifically, we restore approximately half of the deducted amount, i.e., 1/2 x 61.3 hours x $175 rate differential, or $5,363.75, to achieve a rough approximation of the extent of the trial judge's error. Consequently, the trial court shall forthwith issue an amended final order that increases the fee award in the Smith case by $5,363.75. No further adjustments are legally or equitably necessary.

Gensch

The Hunterdon County defendants argue in Gensch that the trial court's $93,265.37 fee award should be set aside because (1) the award is unreasonable and inequitable, in light of the similar lawsuits filed in other counties by the same lawyers who also represented Gensch; (2) Gensch's counsel was allegedly motivated by pecuniary gain, and he improperly provoked Gensch to create an artificial dispute over the County's copying charges; (3) the award should be reduced because of Gensch's lack of success on appeal on certain legal issues; (4) Gensch's fee application was not timely filed in the trial court; and (5) Gensch was not a prevailing party under OPRA because he was given access to the records that he requested.

These arguments are not persuasive. For reasons similar to those already expressed as to Smith, Gensch is not precluded from obtaining a fee award just because his attorneys were pursuing other similar litigation. The Hunterdon County trial judge in Gensch adequately took into account considerations of duplicative services and unreasonable attorney time. We also reject the Hunterdon defendants' argument that Gensch's counsel improperly provoked the dispute, inasmuch as Gensch testified at his deposition that he had already been overcharged by the Hunterdon County defendants prior to signing a retainer

agreement with counsel in this case. Additionally, the fee award, on the whole, did not include an unreasonable amount of time spent on unsuccessful issues.

Although Gensch did not file his fee motion with the necessary certification of services until more than twenty days after the Hunterdon County defendants had complied with a previous consent order agreeing to reduce the County's copying rate to a level of "actual costs," that short delay did not prejudice defendants. There is ample reason here to relax, pursuant to Rule 1:1-2, the twenty-day filing requirement of Rule 4:49-2. Cf. Ricci v. Corporate Express of the E., Inc., 344 N.J. Super. 39, 46-47 (App. Div. 2001), certif. denied, 171 N.J. 42 (2002). Lastly, Gensch, like Smith, was a prevailing plaintiff under OPRA, for the reasons set forth in our precedential opinion Smith II, supra, 422 N.J. Super. at 392-98.

We similarly reject the arguments made by Gensch in his cross-appeal seeking to increase the fee award. The award, which is the largest of the three before us, is fair and reasonable, and it is supported by substantial evidence in the record.

We thus affirm the fee award in Gensch, substantially for the cogent explanations expressed by the Hunterdon trial judge in her March 14, 2011 statement of reasons.

Gargano

Gargano contests the sufficiency of the $38,299 in fees that were awarded by the Bergen County trial judge. We reject his contentions. Although the fee award was substantially less than the lodestar sum of about $58,000, the trial judge reasonably discounted that amount because of duplicative work, billings for multiple lawyers for tasks where one was sufficient, travel time, and the like. The judge also appropriately noted that there had been no discovery in the Gargano case and that it never went to trial. Here again, applying our limited scope of review on fee determinations, we affirm the trial court's reasonable decision, substantially for the reasons set forth in the Bergen County judge's October 6, 2011 bench opinion.

All other arguments presented by the parties on the appeals and the cross-appeals lack sufficient merit to warrant discussion in this written opinion. R. 2:11-3(e)(1)(E).

IV.

For these reasons, the fee awards in A-3758-10 (Gensch) and in A-1361-11 (Gargano) are affirmed in all respects. The fee award in A-1360-11 (Smith) is affirmed, as modified to reflect an increase of $5,363.75. The stay of collection previously

ordered by this court in Gensch is dissolved, effective in thirty days.[5]

Affirmed as modified.

[5] Any motion by plaintiffs for counsel fees incurred on the present appeals shall be filed, with the appropriate supporting certification of services, by no later than July 27, 2012, and any opposing papers on such a motion shall be filed by defendants by no later than August 10, 2012.

We do not express, of course, an opinion at this time as to the merits of any such motion for appellate fees and have set forth this motion briefing schedule in the interests of finality and expediency.