

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO ex rel.	:	
WILLIAM MYLES, et al.	:	Case No. 2008-1842
	:	
Relators,	:	
	:	Expedited Election Matter
vs.	:	Under S.Ct. Prac.R.X. § 9
	:	
JENNIFER BRUNNER,	:	
SECRETARY OF STATE OF OHIO	:	
	:	
Respondent.	:	

RELATORS' MOTION FOR ATTORNEY FEES AND COSTS WITH SUPPORTING
MEMORANDUM

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Attorneys for Respondent

Relators William Myles and Betty R. Smith (collectively "Relators") move the Court, pursuant to S. Ct. Prac. R. 14, § 4(A), for an order that Respondent reimburse Relators' attorney fees and costs incurred in connection with this action. Under R.C. 2335.39 the State must pay attorney fees to a prevailing party absent extenuating circumstances. Relators satisfy all of the requirements of R.C. 2335.39 and are therefore entitled to receive attorney fees from Respondent. Furthermore, because they alleged a violation of their constitutional rights Relators are also entitled to attorney fees under 42 U.S.C. § 1988. Accordingly, Relators respectfully request the Court to order Respondent to pay the Relators' attorney fees in the amount of \$42,532.70 and costs of \$6,626.72, for a total of \$49,159.42.

I. **RELEVANT FACTS**

On September 17, 2008, Relators filed an expedited election action against Respondent Secretary of State. Relators sought a writ compelling Respondent to issue a directive clarifying that no box must be checked on the McCain Absentee Ballot Application in order for the application to be accepted by the election office. On October 2, 2008, the Court issued the writ.

Relators William Myles and Betty R. Smith incurred \$42,532.70 in attorney fees and \$6,626.92 in costs in connection with this matter (Affidavit of Charles M. Miller attached hereto as Exhibit A) and now seek reimbursement of attorney fees and costs under R.C. 2335.39 and 42 U.S.C. § 1988.

II. **ARGUMENT**

A. **Respondent Must Reimburse Relators Attorney Fees Under R.C. 2335.39**

Pursuant to R.C. 2335.39, Respondent must pay Relators' attorney fees. R.C. 2335.39 compels the State to pay attorney fees if: (1) the State was not substantially justified in initiating the matter in controversy; (2) there are no special circumstances that make the award unjust; (3)

the moving party is not the State but is a party to the legal action at issue; and (4) the moving party prevailed in the legal action. *State ex rel. R.T.G., Inc. v. State of Ohio, et al.* (2002), 98 Ohio St.3d 1, 13, 2002-Ohio-6716, ¶ 63, 780 N.E.2d 998, 1010.

First, the Secretary of State was not substantially justified in initiating the matter in controversy. Specifically, the Court unanimously held that Respondent was not justified in instructing the boards of elections to reject absentee ballot applications if a square next to a qualified elector statement was not checked.

The Supreme Court of Ohio has construed R.C. 2335.39 to require awarding fees “where the State initiates either the *conduct* that gave rise to the litigation *or* initiates the *litigation* caused by the controversy.” *Id* at *14. Otherwise, the Supreme Court determined, the General Assembly would have used the term ‘litigation’ instead of the more general language of ‘matter in controversy.’ *Id*. The State has the burden of showing that its position on initiating the matter in controversy was substantially justified, because R.C. 2335.39 is designed to protect citizens from unjustified state action, such as what occurred here. *Id*.

Relators and thousands of other qualified electors properly completed and submitted McCain Absentee Ballot Applications. This Court unambiguously held that “No vital public purpose or public interest is served by rejecting electors’ applications for absentee ballots.” *State ex rel. Myles v. Brunner*, _ Ohio St.3d _, 2008-Ohio-5097, ¶ 23, _ N.E.2d _. Thus, the Court concluded that Respondent’s instruction to the boards of elections “is unreasonable and fails to apply the plain language of R.C. 3509.03.” *Id*. at ¶ 26. Because the Secretary erroneously instructed the boards of elections to reject the McCain Applications, Relators, in the face of potential disenfranchisement, were forced to bring an expedited election action for a writ of

mandamus. Thus, it is clear that Respondent initiated this matter and cannot carry the burden of showing she was substantially justified in doing so.

Second, there are no special circumstances that would make the award of attorney fees unjust. Relators faced the real possibility of losing their right to vote due to the actions of the Secretary of State, and thereby were compelled to seek the writ. In *State ex rel. R.T.G.*, a coal mining company was forced to seek a writ of mandamus over a compensation dispute after the State took their land and declared it unsuitable for mining. *State ex rel. R.T.G.*, 98 Ohio St.3d at 2. The Supreme Court of Ohio held that since the State's actions had forced the company to commence the mandamus proceeding, the company was entitled to recover attorney's fees. *Id.* at 14. Here., Relators were forced to commence a mandamus proceeding in order to protect their right and the right of thousands of other Ohioans to vote by absentee ballot. The special circumstances weigh in favor of awarding attorney fees to Relators.

Third, the moving party is not the State but is a party to the legal action at issue. Here, the party moving for fees are Relators Myles and Smith, not the State. The third requirement of R.C. 2335.39 is satisfied.

Fourth, and finally, the moving party prevailed in the legal action. As mentioned above, on October 2, 2008, the Supreme Court of Ohio issued the writ Relators sought and ordered Respondent to issue a directive that absentee-ballot applications should not be rejected based on an applicant's failure to mark a box. Thus, the fourth requirement of R.C. 2335.39 is clearly satisfied.

In summary, because they satisfy every requirement under R.C. 2335.39, Relators respectfully request the Court to rule that they are entitled to attorney fees and costs in the amount of \$49,159.62.

B. Relators Are Entitled to Attorney Fees Under 42 U.S.C. § 1988

Relators alleged that the Secretary of State violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *Myles*, at n.2. 42 U.S.C. § 1988 requires that Relators Myles and Smith be awarded their attorney fees. Federal claims do not have to be addressed in order for Section 1988 to apply; in fact, parties who plead Constitutional claims against a government and achieve some success on the merits have been held to be automatically entitled to attorney fees under § 1988. *Cleary v. Cincinnati*, Hamilton Cty. App. No. A-0007477, 2007-Ohio-2797 ¶ 19, ¶ 21. A party that brings a federal claim and seeks attorney fees under § 1988 merely has to succeed on any significant issue in litigation which achieved some of the benefit sought in bringing suit. *Fenton v. Query* (1992), 78 Ohio App.3d 731, 738, 605 N.E.2d 1303. There is no question that Relators prevailed because the Court issued the requested writ. Accordingly, Relators Smith and Myles are prevailing parties under § 1988.

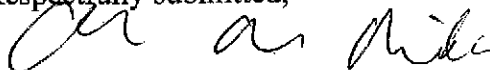
§ 1988 is concerned with the substance of a prevailing party's action, rather than the form in which it is presented; in other words, there is no talismanic language that must be recited in a complaint in order to obtain a § 1988 fee award. *Am. United for Separation of Church and State v. Sch. Dist. of Blue Ash of Grand Rapids*, 835 F.2d 627, 631 (6th Cir. 1987). All that Relators are required to show is that "some person deprived them of a federal right; and (2) [Relators] must allege that the Secretary of State acted under color of state law." *Id.* at 632. Relators alleged that the arbitrary and capricious treatment of the thousands of voters who submitted the McCain Application was a clear violation of the Equal Protection Clause of the Fourteenth Amendment. Furthermore, Secretary of State Brunner was acting under color of law when she tried to violate these voters' fundamental right. Accordingly, Relators are entitled to relief under § 1988.

As the prevailing party in this litigation, Relators are entitled to recover the great amounts they expended to right the constitutional wrong committed by Respondent against their voting rights. Therefore, Relators respectfully request the Court rule that Relators are entitled to attorney fees and costs under § 1988 in the amount of \$49,152.62.

III. CONCLUSION

For all the foregoing reasons, Relators Myles and Smith respectfully request that this Court grant their motion for an award of attorney fees in the amount of \$42,532.70 and costs of \$6,626.92, for a total of \$49,159.62.

Respectfully submitted,

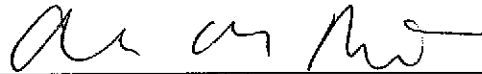


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Attorneys for Realtor

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION FOR ATTORNEY FEES AND COSTS was served upon the following parties by ordinary mail and electronic mail, this 13th day of October, 2008.

Nancy H. Rogers
OHIO ATTORNEY GENERAL
Constitutional Offices Section
Richard Coglianesse (0066830)
Damian Sikora (0075224)
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
Attorneys for Respondent



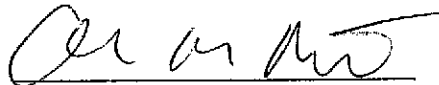
Charles M. Miller

4. A billing statement detailing how these attorney fees and costs were incurred is attached hereto as Exhibit 1.


5. I have reviewed the billing statement reflecting these fees to determine that the figures stated herein representing attorney fees and costs are accurate.

6. In my opinion, these fees and costs have been reasonable and necessary for the proper representation of Relators' interests in connection with this matter.

FURTHER AFFIANT SAYETH NAUGHT.


Charles M. Miller

Sworn to before me and subscribed in my presence on this 13th day of October, 2008.


Notary Public

Invoice No. 893094

October 10, 2008

FEDERAL ID NO. 31-0570030

PAYMENT DUE UPON RECEIPT
1% SERVICE CHARGE PER MONTH AFTER 30 DAYS

FOR PROFESSIONAL SERVICES RENDERED FROM
SEPTEMBER 13, 2008 THROUGH OCTOBER 3, 2008:

RE: Ohio Secretary of State Lawsuit in the Ohio Supreme Court re: Absentee Voter Applications

9/13/08	JEB	.30	Telephone call with Bob Coletti regarding new matter.
9/15/08	JEB	1.25	Conference call with Greg Hartmann regarding case; review draft pleadings; review background materials regarding new case; email correspondence regarding research and staffing.
9/15/08	REC	2.00	Review background materials for John Williams of Board of Elections; numerous telephone conferences with Greg Hartman to strategize; conference on litigation and drafting of complaint.
9/15/08	CXM	9.00	Meet with Bob Coletti and Jim Burke; research matter; draft complaint.
9/15/08	WNM	1.30	Research issue regarding absentee ballots.
9/16/08	JEB	1.50	Review and revise Verified Petition for Writ of Mandamus; email correspondence regarding same; email correspondence regarding filing; conference regarding same.
9/16/08	REC	1.25	Work on write; telephone conferences with John Williams and Greg Hartman on political considerations; conferences on issues.
9/16/08	CXM	7.00	Revise petition; attend various meetings regarding matter; research regarding same.
9/17/08	JEB	1.50	Review and revise Verified Petition for Writ of Mandamus; email correspondence regarding same; email correspondence regarding filing of same; review press release; conference regarding filing and service.
9/17/08	REC	.25	Telephone conferences with John Williams and Greg Hartman on final issues, press release etc.

FOR PROFESSIONAL SERVICES RENDERED: (Continued)

9/17/08	CXM	7.50	Revise and file petition; conference with AG regarding matter; revise press releases; prepare engagement letters to clients; conferences with clients.
9/18/08	ALB	1.00	Meet with Charles Miller regarding research assignment; review Writ of Mandamus filed against Secretary of State Jennifer Brunner.
9/18/08	CXM	.30	Teleconference regarding evidence.
9/19/08	ALB	3.00	Research all case law examining equal protection rights in connection with absentee ballots and absentee ballot applications; Research Ohio case law examining whether strict or substantial compliance applies to election laws.
9/19/08	JEB	2.00	Email correspondence regarding meeting with John Williams; prepare for meeting with Williams; attend meeting with Williams.
9/19/08	CXM	2.50	Attend meeting regarding evidentiary record; research regarding same.
9/22/08	ALB	8.25	Meet with Charles Miller regarding status of research; Continue research all case law examining equal protection rights in connection with absentee ballots and absentee ballot applications; Research all case law examining issue of "checkboxes" on absentee ballots or absentee ballot applications; Research all cases examining substantial or direct compliance with election laws; Research Sections 3905.03 and 3905.04 of the Ohio Revised Code before and after 2005 revisions; Research Ohio case law involving actions against the Secretary of State for election violations; Telephone call and email correspondence with Charles Miller regarding research.
9/22/08	JEB	.30	Review news article regarding filing; email correspondence regarding same; email correspondence regarding new procedures by Secretary of State for absentee voters.
9/22/08	CAC	1.60	Compile absentee ballot information received from Delaware County and Montgomery County.
9/22/08	CXM	10.00	Coordinate collection of evidence; Receive and Review Answer; Coordinate Research for Merit Briefing
9/22/08	WNM	6.30	Research voting issues in preparation for memorandum.

FOR PROFESSIONAL SERVICES RENDERED: (Continued)

9/23/08	ALB	6.75	Draft memorandum to Charles Miller detailing case law research; Review merit brief filed in related action for any additional support to arguments; Telephone call with Charles Miller regarding research; Email correspondence with Charles Miller and William Minor regarding review of merit brief.
9/23/08	JEB	.50	Review Answer of Secretary of State; email correspondence regarding same.
9/23/08	CAC	8.50	Telephone call to Cuyahoga County Board of Elections requesting rejected applications; email to Montgomery County Board of Elections regarding missing date of birth information; compile absentee ballot information received from Hamilton County; draft affidavits for authentication of documents to be signed by employees of Boards of Elections of Butler County, Delaware County, Franklin County, Montgomery County, Warren County, Clermont County, Cuyahoga County, and Hamilton County; compile absentee ballot information for Franklin County; compile absentee ballot information for Butler County; sent affidavit to Montgomery County for signature; sent affidavit to Butler County for signature; sent affidavit to Delaware County for signature; sent affidavit to Franklin County for signature; sent affidavit to Hamilton County for signature; redact signatures from Franklin County applications.
9/23/08	CXM	4.50	Continued Coordination of Evidence Gathering and Legal Research
9/23/08	WNM	4.40	Draft and revise federal issue/absentee ballot memorandum.
9/23/08	WNM	4.80	Research state law absentee ballot issues.
9/24/08	ALB	.80	Review Brief of Amicus Curae in related action for additional support in merit brief arguments; Review draft of merit brief to be filed against the Ohio Secretary of State; Telephone call with Charles Miller regarding the same.
9/24/08	CAC	6.92	Redact information from Delaware County Applications in preparation of filing; redact information from Hamilton County in Applications in preparation of filing; revise Montgomery County Board of Elections Affidavit; send Affidavit to Warren County Board of Elections for signature; compile application data from documents received from Clermont County; draft and send Affidavit to Cuyahoga County for signature.

FOR PROFESSIONAL SERVICES RENDERED: (Continued)

9/24/08	VAK	8.50	Voter Registration Redaction and Production of documents.
9/24/08	CXM	13.00	Draft Merits Brief; continued coordination of evidence gathering and legal research
9/24/08	WNM	4.40	Continued research and drafting on state law absentee ballot issues; draft and review argument section.
9/24/08	WNM	3.60	Research ORC and secretary of state issues on absentee ballots.
9/25/08	JEB	1.00	Review and revise Merit Brief of Relators; email correspondence regarding same; email correspondence regarding filing of Merit Brief.
9/25/08	CAC	5.75	Compile ballot application data from Butler County; prepare evidence to be filed with brief to Supreme Court; revise spreadsheet of ballot application data.
9/25/08	CXM	6.00	Finalize and file Merits Brief and Evidence. Compose and File Procedural Motion Regarding Filing Requirement
9/25/08	WNM	1.30	Assemble cases for appendix; revise affidavit and excel charts in preparation for filing brief.
9/26/08	VAK	2.75	Production of documents
9/26/08	CXM	3.50	Receive and Review documents filed in related cases; Coordinate Research; Media Relations.
9/26/08	WNM	1.40	Begin researching issues in preparation of Ohio Secretary of State response.
9/26/08	WNM	2.20	Gather boxes of evidence and draft letter to court in response to Ohio Supreme Court's order requesting more copies.
9/27/08	WNM	4.70	Continued research on issues in response to Secretary of State and begin drafting memorandum.
9/29/08	JEB	.75	Review Secretary of State Merits Brief; email correspondence regarding same; email correspondence regarding Allen County.
9/29/08	CXM	2.00	Coordinate filing of additional evidence
9/29/08	CXM	5.00	Receive and Review Secretary of State's Merit Brief; Coordinate Research in Response. Receive and Review Decisions in 6 Day overlap cases
9/29/08	WNM	7.40	Research, draft and revise memorandum on responses to Secretary of State answer.
9/29/08	WNM	.70	Research cases on quo warranta issue and reported findings.
9/30/08	CXM	13.00	Research, Compose and File Reply Brief
9/30/08	WNM	3.20	Review briefs and opinions from recent Ohio decisions in support of arguments for response.

PLEASE RETURN DUPLICATE WITH PAYMENT

FOR PROFESSIONAL SERVICES RENDERED: (Continued)

10/01/08	JEB	.60	Review Reply Brief of Relators; email correspondence regarding same.
10/01/08	CXM	3.00	Teleconferences with court regarding obtaining a decision; teleconference with Brenna Center re amici briefing; conferences regarding dismissal of duplicative case filed by another firm; teleconference with client; correspondence to opposing counsel.
10/02/08	JEB	1.00	Telephone call with John Williams; review Supreme Court opinion; email correspondence regarding same; telephone call with Rich Cogliani regarding outcome.
10/02/08	CXM	3.00	Conferences with amici attorney; receive and review decision; correspondence and teleconferences regarding victory.
10/03/08	JEB	1.25	Review ACLU brief; review articles regarding Supreme Court opinion; email correspondence regarding decision.
10/03/08	WNM	4.40	Review case law in preparation for motion for attorney fees.

PROFESSIONAL SERVICES:

\$42,532.70

COSTS ADVANCED:

Messenger Services	\$ 749.37
Lexis Legal Research	495.83
Westlaw Legal Research	47.93
Postage Charges	4.72
Color Reproduction Charges	630.50
Reproduction Charges	4,547.20
Long Distance Phone Charges	.75
Filing Fee to Clerk, Supreme court – Verified Petition for Writ of Mandamus	140.00
Express Delivery Charges	10.62

TOTAL COSTS ADVANCED:

6,626.92

TOTAL:

\$49,159.62

REC:maf

PLEASE RETURN DUPLICATE WITH PAYMENT