No. _____

In The

Supreme Court of the United States

RAVI SOOD, M.D.,

Petitioner,

v.

MICHAEL GRAHAM, M.D., PH.D.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Iowa

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has repeatedly held that a plaintiff asserting a civil rights claim pursuant to 42 U.S.C. § 1983 is not required to exhaust state level administrative remedies before filing suit. In the context of a procedural due process claim, most Circuits have adhered to this precedent and have required an examination of whether such exhaustion occurred as a function of whether a plaintiff can *prove* a deprivation of procedural due process.

The Eighth Circuit Court of Appeals, which was cited by the Iowa appellate courts in this action, takes a different approach. It does not view exhaustion as a function of proof, but rather, contrary to this Court's precedent, as a prerequisite to filing suit. Absent exhaustion, the Eighth Circuit routinely holds that procedural due process claims under 42 U.S.C. § 1983 are *waived*. The question presented in this case then is:

1. Does the Eighth Circuit's requirement that a § 1983 plaintiff exhaust state administrative remedies before filing suit violate this Court's precedent which interprets 42 U.S.C. § 1983 as allowing judicial enforcement as a right in the first instance?

PARTIES TO THE PROCEEDINGS

Petitioner Ravi Sood, M.D., was the Plaintiff and Appellee below. Respondent Michael Graham, M.D., Ph.D., was the Defendant and Appellant below.

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PETITION FOR A WRIT OF CERTIORARI

Ravi Sood, M.D. respectfully petitions for a writ of certiorari to review the judgment of the Iowa Court of Appeals, of which discretionary review by the Iowa Supreme Court was denied on April 6, 2015.

OPINIONS BELOW

The decision and opinion of the Iowa Court of Appeals is reprinted in the Appendix (App.) at App. 1-App. 11. The trial court's opinion is reprinted in the Appendix at App. 12-App. 34. The decision of the Iowa Supreme Court denying discretionary review is reprinted at App. 35.

JURISDICTION

The Iowa Supreme Court denied discretionary review on April 6, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section One of the Fourteenth Amendment to the United States Constitution states that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life,*

liberty, or property, without due process of law. . . ." [Emphasis added]

42 U.S.C. § 1983 states that: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

STATEMENT OF THE CASE

I. Introduction

Petitioner Ravi Sood, M.D. ("Dr. Sood") was denied procedural due process when the State of Iowa, through Respondent Dr. Michael Graham ("Dr. Graham"), his supervisor at the University of Iowa Hospitals and Clinics ("UIHC"), revoked his clinical privileges to practice nuclear medicine without any pre- or post-deprivation process. After hearing the evidence, including the framework that UIHC had established to provide pre- and post-deprivation processes, a jury determined that said processes were inadequate and that as such, Dr. Sood had proven his procedural due process claim. On appeal, the Iowa Court of Appeals reversed the jury's factual determination and held that since Dr. Sood did not engage in

the pre- or post-deprivation administrative procedures, he had waived his claim.

In so holding, the Iowa Court of Appeals relied on Eighth Circuit precedent that requires § 1983 procedural due process plaintiffs to first exhaust administrative remedies before filing suit. In essence, the Iowa Court of Appeals held in this case that Dr. Sood's claim was waived for failing to engage in the very administrative remedies that the jury determined to be illusory. This strange, unfair result is the precise reason that this Court has repeatedly held that § 1983 plaintiffs are not required to exhaust administrative remedies before filing suit. The Iowa Court of Appeals' application of contrary Eighth Circuit precedent thus presents this Court with an opportunity to correct that and other Circuits' flawed approach to this issue.

II. Statement of Facts

Dr. Sood was hired by the State of Iowa through the University of Iowa Hospitals and Clinics ("UIHC") as a visiting associate in the Nuclear Medicine department in July 2008. On October 1, 2008, Dr. Sood was granted full clinical privileges,[1] which

[1] Clinical privileges are the property of the physician, and since they are the physician's professional reputation, and affect the physician's ability to earn a living, they are protected property rights of the physician.

were subject to UIHC Bylaws, Rules and Regulations ("the Bylaws").

Dr. Sood officially began working in the Nuclear Medicine clinic on October 22, 2008. Respondent, Dr. Michael Graham, was Dr. Sood's supervisor and had full responsibility for staffing the clinic. Days after Dr. Sood began working in the clinic, Dr. Graham decided that he didn't want Dr. Sood to work there anymore. Dr. Graham preferred that his personal friend, who was in the job market, assume Dr. Sood's position.

Thus, on October 28, 2008, Dr. Graham presented a letter to Dr. Sood in which he proposed taking Dr. Sood's clinical privileges away. That same day, Dr. Graham instructed hospital administrators to remove Dr. Sood's clinical privileges.

On November 1, 2008, Dr. Sood received a letter informing him that his clinical privileges had been removed as of October 31, 2008. Until this point, Dr. Sood had only been aware that the revocation of his clinical privileges had been *proposed*, and he had no idea that in the hours after receipt of this proposal that Dr. Graham had effectuated that career-damaging change.

After receipt of the letter informing him that his privileges were unilaterally revoked, Dr. Sood reapplied for those privileges. That application was granted, and his privileges were reinstated in January 2009, and remained intact until his tenure at UIHC ended on June 30, 2009. Unfortunately, Dr. Sood was

led to believe that UIHC would report that he had one continuous period of clinical privileges. However, during a job application process in late June 2008, Dr. Sood learned that, as a consequence of Dr. Graham's unilateral action, UIHC was reporting a gap in Dr. Sood's privileges to potential employers. This has caused a red flag to follow Dr. Sood's career, and as a consequence, he has not practiced in nuclear medicine since his time at UIHC.

Dr. Sood filed suit in state court against UIHC and Dr. Graham, alleging a deprivation of procedural due process and breach of contract. Summary judgment was granted on the breach of contract claim against UIHC, and the procedural due process claim against Dr. Graham was tried before a jury in the Iowa District Court for Johnson County from April 30, 2013 to May 7, 2013. During trial, the jury heard evidence about the elaborate procedures that UIHC required before a physician's clinical privileges could be revoked. Dr. Graham did not contest that he failed to abide by these procedures. Moreover, the jury learned that any post-deprivation process would have been fruitless, as UIHC's own Clinical Staff Office Administrator testified that, with respect to the reporting gap in Dr. Sood's clinical privileges, nothing could be done to remedy Dr. Graham's unilateral action that created the reporting gap, because "you can't change history."

At the close of the presentation of evidence, Dr. Graham moved for a directed verdict on the basis that Dr. Sood had failed to exhaust the administrative

remedies described in UIHC's bylaws. The motion was denied.

In light of the fact that he was afforded no pre-deprivation process, and only illusory post-deprivation process, the jury determined that Dr. Sood's procedural due process rights had been violated by Dr. Graham's unilateral revocation of his clinical privileges, and awarded him damages in the amount of $37,000.00. The trial court subsequently entered an award of $120,000 in attorney's fees plus costs. In post-trial motions, Dr. Graham again argued that Dr. Sood's claim was not cognizable because he had not exhausted administrative remedies. That motion was denied, and an appeal to the Iowa Court of Appeals followed.

III. The Appeal

On Appeal to the Iowa Court of Appeals, Dr. Graham argued, *inter alia*, that Dr. Sood's procedural due process claim had been waived because he did not exhaust the administrative remedies outlined in UIHC's bylaws. In response, Dr. Sood cited *Patsy v. Board of Regents*, 457 U.S. 496 (1982), which held that exhaustion of administrative remedies was not required before a plaintiff could file suit pursuant to § 1983. Relying on *Wax n' Works v. City of St. Paul*, 213 F.3d 1016 (8th Cir. 2000), the Iowa Court of Appeals held that Dr. Sood had waived his due process claim by failing to exhaust his administrative

remedies. On April 6, 2015, the Iowa Supreme Court affirmed the Court of Appeals. This petition followed.

REASONS FOR GRANTING THE PETITION

A compelling reason to grant the instant petition exists because the Iowa appellate courts, through the application of Eighth Circuit precedent, have decided an important federal question in a way that conflicts with relevant decisions of this Court. *See*, Sup. Ct. R. 10(c). This Court has settled the question about whether a § 1983 plaintiff must exhaust state administrative remedies before filing suit. He must not. Despite this well-established precedent, the Eighth Circuit Court of Appeals, and other Circuits, have carved out an exception for procedural due process cases. This carve-out runs contrary to this Court's precedent. The unfair result reached in the instant case demonstrates the wisdom of this Court's precedent and the folly of the Eighth Circuit's and other Circuits' approach.

I. This Court's Precedent

In *Patsy*, a state employee brought an action against the university that employed her under 42 U.S.C. § 1983, claiming that she had been denied employment opportunities based on her race and sex. The district court granted the employer's motion to dismiss, and the appellate court remanded for a determination of whether the employee could be

required to exhaust administrative remedies. This Court reversed, holding that exhaustion of administrative remedies was not a prerequisite to a § 1983 action because Congress assigned to the courts the role of protecting constitutional rights and did not intend for civil rights claims to be initially addressed through state administrative procedures. "Based on the legislative histories of both § 1983 and § 1997e,[2] we conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983. We decline to overturn our prior decisions holding that such exhaustion is not required." *Patsy*, 457 U.S. at 516.

Six years later, in *Felder v. Casey*, 487 U.S. 131 (1988), this Court addressed the question of whether exhaustion of administrative remedies was a prerequisite to filing a § 1983 action in state court. Felder was beaten by police officers and filed suit in state court alleging, *inter alia*, a § 1983 claim. The officers moved to dismiss based on Felder's failure to comply with Wisconsin's notice of claim statute, which purported to provide an administrative remedy. Relying on *Patsy*, this Court reiterated that exhaustion of administrative remedies was not required before bringing a § 1983 suit. In rejecting the officers' argument that the states are empowered to design the manner and method by which claims may be brought

[2] Section 1997e specifically and narrowly requires prisoners pursuing civil rights claims to first exhaust available administrative remedies.

in state courts, this Court held that such state-level administrative exhaustion requirements were pre-empted by federal law in the form of § 1983:

> "In enacting § 1983, Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations. A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of the federal legislation, is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law. Principles of federalism, as well as the Supremacy Clause, dictate that such a state law must give way to vindication of the federal right when that right is asserted in state court."

Felder, 487 U.S. at 153.

Patsy and *Felder* thus clearly, and unequivocally reject the notion that Dr. Sood was required to exhaust administrative remedies prior to filing suit in this case.

II. The Eighth Circuit's Approach

The Iowa Appellate courts relied on *Wax n' Works* – where the Eighth Circuit stated:

> "Under federal law, a litigant asserting a deprivation of procedural due process must exhaust state remedies before such an

> allegation states a claim under § 1983. *See, e.g., Flint Electric Membership Corp. v. Whitworth*, 68 F.3d 1309, 1313 (11th Cir. 1995) (*per curiam*), *modified*, 77 F.3d 1321 (11th Cir. 1996) (*per curiam*); *Perez-Ruiz v. Crespo-Guillen*, 25 F.3d 40, 43 (1st Cir. 1994); *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1480 (7th Cir. 1990); and *Brady v. Town of Colchester*, 863 F.2d 205, 211 (2d Cir. 1998).

The cases cited by the *Wax n' Works* Court invariably cite to *Parratt v. Taylor*, 451 U.S. 527 (1981), where this Court held that the negligent deprivation of a prisoner's property was not a due process violation where the prisoner could have pursued state level remedies. *Parratt* is inapplicable because it pre-dated *Patsy* and *Felder*; because it deals with negligent conduct, unlike in the instant matter where Dr. Graham's intentional conduct was at issue; and because Parratt's claim was not held to be waived, but rather, unproven.

The cases cited by the *Wax n' Works* Court demonstrate that some Circuits currently refuse to apply *Patsy* and *Felder*. Those Circuits hold that the mere existence of supposed administrative remedies requires a plaintiff to plead that he exercised those remedies, and if he has not, then his § 1983 claim is waived. *See*, *Wax n' Works*, 213 F.3d at 1019 (8th Cir. 2000) (affirming dismissal of procedural due process claim on the pleadings for failing to exhaust administrative remedies); *New Burnham Prairie Homes, Inc. v. Burnham*, 910 F.2d 1474, 1480 (7th Cir. 1990)

(same); *Perez-Ruiz v. Crespo-Guillen*, 25 F.3d 40, 43 (1st Cir. 1994) (same).[3] According to the law in these Circuits, a § 1983 plaintiff will be barred from court as having waived his claim even in circumstances where "available" administrative "remedies" are purely illusory.

III. Other Circuits Examine Exhaustion in the Context of the Proof Required for a Procedural Due Process Claim.

The better approach is found in the Circuits where the exhaustion of administrative remedies is left for the fact finder to resolve in the context of whether a § 1983 plaintiff has *proven* his procedural due process claim. For example, in *Elsmere Park Club, LP v. Town of Elsmere*, 542 F.3d 412 (3d Cir. 2008), the Third Circuit observed:

> "[t]hus, it is not that the Club lost its claim because it failed to litigate it fully through local procedures before seeking federal relief. Rather, because the constitutional injury alleged is the Town's failure to provide

[3] The other cases cited by the *Wax n' Works* Court do not support the waiver-at-the-pleadings-stage rule it espoused. *See*, *Brady v. Colchester*, 863 F.2d 205 (2d Cir. 1988) (affirming summary judgment after evidence could not sustain due process claim in light of available administrative remedies); *Flint Elecric Membership Corp. v. Whitworth*, 68 F.3d 1309 (11th Cir. 1995) (per curiam) (ordering that summary judgment was proper where plaintiff could not prove due process violation because he did not exhaust administrative remedies).

> adequate procedures to the Club, no such injury could have occurred where the Club has failed to take advantage of the procedures actually offered, at least not absent a showing that the process offered was 'patently inadequate.'"[4]

Thus, in the Third Circuit, § 1983 plaintiffs are afforded the opportunity, through discovery, to demonstrate that the administrative remedies in place are "patently inadequate." This approach strikes an appropriate balance between this Court's precedent that eschews exhaustion as a prerequisite to filing a § 1983 action, and the reality that part of the procedural due process analysis requires an examination of the overall "process" available to the plaintiff. Other Circuits have endorsed this approach. *See*, *Vicory v. Walton*, 721 F.2d 1062, 1064 n.3 (6th Cir. 1983) ("*Patsy* was concerned with the issue of exhaustion, not with what is necessary to state a procedural due process claim under § 1983"); *Fetner v. Roanoke*, 813 F.2d 1183, 1185 (11th Cir. 1987) (applying *Patsy*, distinguishing *Parratt*, and observing that exhaustion is distinct from proof of elements of procedural due process claim); *Daniels v. Williams*, 720 F.2d 792, 794 n.1 (4th Cir. 1983) ("[u]nlike an exhaustion requirement, which is based upon principles of comity, the *Parratt* analysis is based upon the concept

[4] The Third Circuit observed that "exhaustion . . . is analytically distinct from the requirement that the harm alleged has occurred." *Id.* at 423.

that there is no constitutional violation if a plaintiff has not been deprived of a protected interest without due process of law"); *Rivera-Powell v. N.Y. City Bd. of Elections*, 470 F.3d 458, 468 (2d Cir. 2006) ("[w]hen § 1983 claims allege procedural due process violations, we nonetheless evaluate whether state remedies exist because that inquiry goes to whether a constitutional violation has occurred at all").

IV. Application to this Case

The Iowa Court of Appeals held that, as a matter of law, Dr. Sood's § 1983 procedural due process claim "must be dismissed for failure to exhaust administrative remedies." *See*, App. 10-11. But these "administrative remedies" were put to the jury. The jury was specifically instructed to consider the pre-deprivation process "available" to Dr. Sood, and it was never contested that he was not provided notice, a hearing, and a chance to defend himself before his clinical privileges were unilaterally taken away from him by Dr. Graham. Moreover, given testimony from UIHC personnel that "you can't change history," any supposed "post deprivation process" was utterly illusory.

This case thus presents a classic deprivation of procedural due process, and the jury rightly concluded that Dr. Sood's rights were violated by Dr. Graham. The Iowa Appellate courts have nullified that jury's verdict based on the idea that exhaustion of administrative remedies was required before a § 1983 suit could be brought. This holding, and the Circuits

that have held similarly, improperly fails to account for this Court's decisions in *Patsy* and *Felder*, and erroneously applies precedent that effectively requires the opposite of what *Patsy* and *Felder* stand for. This Court should therefore hear this matter in order to reaffirm *Patsy* and *Felder*, and to endorse the approach taken by Circuits that have clarified that exhaustion of administrative remedies is not a mechanism by which to dismiss § 1983 claims as waived, but rather is a question properly considered in the context of whether a claimant has proven his procedural due process claim.

In this case, Dr. Sood proved to a jury that Dr. Graham's actions violated procedural due process, particularly because no pre- or post-deprivation process was adequate to correct Dr. Graham's unilateral action. Review and reversal is therefore warranted.

CONCLUSION

The Petition for a Writ of Certiorari to the Iowa Supreme Court should be granted.

Respectfully submitted,

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IN THE COURT OF APPEALS OF IOWA

No. 13-1911
Filed February 11, 2015

RAVI SOOD, M.D.,
Plaintiff-Appellee/Cross-Appellant,

vs.

MICHAEL M. GRAHAM, Ph.D., M.D., Director of Nuclear Medicine for the University of Iowa Carver College of Medicine and Individually,
Defendant-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Johnson County, Carl Baker, Judge.

A state employee appeals from a judgment that he violated the due process rights of another employee. The prevailing employee appeals from the order granting attorney's fees and costs. **REVERSED AND REMANDED AS TO APPEAL; CROSS-APPEAL DISMISSED.**

Thomas J. Miller, Attorney General, and George A. Carroll and Jordan G. Esbrook, Assistant Attorneys General, for appellant.

Chad A. Swanson and Laura J. Folkerts of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellee.

Heard by Mullins, P.J., and Bower and McDonald, JJ.

MULLINS, P.J.

Michael Graham, Director of Nuclear Medicine for the University of Iowa Carver College of Medicine, appeals from a district court ruling that he violated the due process rights of Ravi Sood when he revoked Sood's clinical privileges at the University of Iowa Hospitals and Clinics. Graham contends that Sood's due process claim fails as a matter of law; that Graham was entitled to qualified immunity; and that the district court awarded fees that are not statutorily compensable. Sood cross-appeals contending the district court erred in its award of attorney fees. We reverse the ruling of the district court, vacate the fees award, and remand for further proceedings.

I. BACKGROUND FACTS AND PROCEEDINGS.

This court previously heard this case on appeal from a grant of partial summary judgment in the case of *Sood v. University of Iowa,* No. 13-0870, 2014 WL 1234210 (Iowa Ct. App. March 26, 2014). In deciding that appeal, we made the following findings of fact:

> In a letter dated July 14, 2008, the department of radiology of the University of Iowa Carver College of Medicine offered Ravi Sood a "full-time non tenure-track appointment as a Visiting Associate for the period of one year beginning July 14, 2008" with an annual salary of $100,000. The letter also stated, "You will have full clinical privileges in Nuclear Medicine," and "your

appointment may be renewed for one additional year." Sood accepted the offer on July 17, 2008.

On June 28, 2008, Sood applied for "initial" clinical privileges for University of Iowa Hospitals and Clinics' (UIHC) radiology department. He began working at the University as a visiting associate in July 2008. On October 1, 2008, the University Hospital Advisory Committee granted Sood full clinical privileges "subject to the conditions specified in the Bylaws, Rules and Regulations of the University of Iowa Hospitals and Clinics and its Clinical Staff." According to the Bylaws, "[a]ll initial clinical privileges shall be provisional for the first three months"; and "[i]f . . . termination[ ] of clinical privileges is recommended, the recommendation shall be handled as provided in Section 6."

On October 28, 2008, Sood was informed by a letter authored by Michael M. Graham, Ph.D., M.D. (Director of Nuclear Medicine for the Carver College of Medicine at the University of Iowa) that Graham "propose[d] that we reduce your status to that of fellow without clinical privileges, although you will retain the title of 'clinical fellow' and current salary." The letter noted, "[W]e will not be renewing your appointment after June 30, 2009."

Also on October 28, Dr. Graham told Nancy Harney of human resources that he no longer wanted Sood to have clinical

privileges. Harney emailed Graham's request to Deb Strabala in the clinical staff office, July Harland in [the] business office, and Tyler Artz, the director of the radiology department, that they "need[ed] to make a change in the status of Ravi Sood, M.D., effective immediately."

In a letter dated November 3, Sood was informed that his "appointment in the Department of Radiology ended on October 31, 2008. In accord with the 'Bylaws of the [UIHC] and its Clinical Staff,' your clinical staff membership and privileges at the [UIHC] also end on the same date."

On November 26, 2008, Sood again applied for "initial" clinical privileges for the UIHC radiology department, which were granted by the University Hospital Advisory Committee on January 7, 2009. Sood's employment with the University ended June 30, 2009. Sometime in June 2009, Sood learned that an application he had submitted for employment elsewhere was no longer being processed due to a "gap" in his privileges.

On January 22, 2010, Sood filed a petition against the University of Iowa, the Board of Regents, and Dr. Graham, alleging

> . . . breach of contract [and] violation of procedural due process.[1]

The UIHC Bylaws, Rules, and Regulations Article IV, sections 4-6 govern clinical privileges including application for, reduction of, and corrective action in relation to such privileges. The Bylaws outline the procedure for corrective action, which includes provisions for notice, a hearing, and appellate review. Both Graham and Sood were aware of the Bylaws and their obligation to abide by them.

The University Operations Manual Chapter 29 provides a grievance procedure for faculty members wishing to challenge the legitimacy of university action.[2] Chapter 31 of the operations manual provides for review of any final decision of an adjudicative or rule-making body at the university by the board of regents. This chapter also provides that, following a decision by the board of regents, the employee may seek judicial review.

The University of Iowa, the board of regents, and Graham filed a motion for partial summary judgment on Sood's claims arguing, among other things, that they were entitled to qualified immunity against the

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[1] A third claim for violation of Iowa Code section 91A.6 (2009), a provision of the Iowa Wage Payment Collection Law, was dismissed prior to the motion for summary judgment.

[2] We note that the UIHC Bylaws specifically exclude actions concerning clinical privileges from the procedures under the Chapter 29 of the Operations Manual.

procedural due process claim. The district court granted the motion, finding the university and the board were entitled to qualified immunity, and Graham was entitled to qualified immunity in his official capacity. However, it denied partial summary judgment on the question of whether Graham was entitled to qualified immunity in his individual capacity. It found there were genuine issues of material fact remaining as to whether Graham intended to have Sood's clinical privileges terminated.

On a second motion for summary judgment, the court dismissed the breach-of-contract claim against all parties due to Sood's failure to exhaust available administrative remedies. In the previous appeal before us, we affirmed the district court's grant of summary judgment on Sood's breach-of-contract claim. *Sood,* 2014 WL 1234210 at *7.

Sood's due process claim against Graham in his individual capacity proceeded to trial. At the close of evidence, Graham moved for directed verdict on multiple grounds, including that Sood failed to pursue available administrative remedies. The court denied this motion. The court submitted special verdict questions to the jury, and the jury concluded Graham had violated Sood's constitutional due process rights and awarded Sood $37,000 in damages. The court entered judgment accordingly. Graham next filed a combined motion for judgment notwithstanding the verdict (pursuant to Iowa Rule of Civil Procedure 1.1003(2)) and new trial (pursuant to Iowa Rule of Civil Procedure 1.1004(8)). This motion raised

numerous issues, including again that Sood failed to pursue available administrative remedies. The district court denied this motion. Graham appeals from this ruling.

Following the judgment in his favor, Sood submitted a motion for attorney fees, including itemized bills and affidavits in support of the claim. Sood requested the court enter judgment against Graham for $242,648.25 in attorney fees and $35,828.92 in costs and expenses. The court awarded Sood $120,000 in attorney fees and $25,283.03 in expenses. Sood cross-appeals from this award.

Following entry of all post-trial rulings, this court filed its opinion in the appeal taken from denial of the motion for partial summary judgment. *Sood,* 2014 WL 1234210. With respect to the breach-of-contract claim, we found that Sood failed to exhaust the administrative remedies available to him and denied the appeal. *Sood,* 2014 WL 1234210 at *7.

II. ANALYSIS.

A. Procedural Due Process Claim.

Graham contends Sood's procedural due process claim fails as a matter of law. He asserts Sood waived his due process claim by failing to seek administrative remedies. He suggests Sood could have used the administrative procedures set out in Iowa Code chapter 17A (2007), or the internal University procedures

set out in the bylaws and the university operations manual.

We review the denial of a motion for new trial based on the grounds asserted in the motion. *Roling v. Daily,* 596 N.W.2d 72, 76 (Iowa 1999). If the motion is based on a discretionary ground, we review it for an abuse of discretion. *Id.* If the motion is based on a legal ground, our review is for correction of errors at law. *Id.* Graham contends Sood's claim failed as a matter of law, therefore, we review for correction of errors at law.

Generally, "a litigant asserting a deprivation of procedural due process must exhaust state remedies before such an allegation states such a claim under § 1983." *Wax n' Works v. City of St. Paul,* 213 F.3d 1016, 1019 (8th Cir. 2000). In *Christiansen v. West Branch Community School District,* 674 F.3d 927, 935 (8th Cir. 2012), the Eighth Circuit Court of Appeals explained that "a government employee who chooses not to pursue available post-termination remedies cannot later claim, via a § 1983 suit in federal district court, that he was denied post-termination due process." However, "it is not necessary for the litigant to have exhausted available *postdeprivation* remedies when the litigant contends that he was entitled to *predeprivation* process." *Christiansen,* 674 F.3d at 936 (internal quotation omitted). Sood claims he was denied *predeprivation* process when Graham ordered the termination of his clinical privileges without notice or a hearing. As such, he asserts he was not

required to exhaust administrative remedies prior to bringing the section-1983 action.

Sood insists that although he received the letter from Graham on October 28 informing him of the corrective action that would take place, he did not know his clinical privileges had been terminated on October 31 until he was informed in writing on November 3. Sood understood or should have understood, upon receipt of the October 28th letter, that a termination of his privileges was being proposed. The UIHC bylaws govern corrective actions related to clinical privileges and provide for notice, a hearing, and review. He had time and opportunity between October 28 and the termination on October 31 to invoke – or at least attempt to invoke – the administrative procedures provided in the university's bylaws. We find there was adequate pre-deprivation process available of which Sood did not avail himself.

Even if we were to determine Sood did not have access to pre-deprivation process, "[d]ue process does not require elaborate pre-termination procedures, especially where meaningful post-termination process is available." *Christiansen,* 674 F.3d at 934. The record before us discloses that there was extensive post-termination process available to Sood including the procedure regarding clinical privileges outlined in the UIHC bylaws, article IV, sections 4-6. Sood then had the right to grieve under the university operations manual chapter 31. He had the right to appeal to the board of regents and still later to petition

for judicial review. Sood never invoked any post-deprivation administrative procedures.

Sood insists the predeprivation procedures were inadequate because they do not provide a remedy for a gap in clinical privileges. In our earlier case, we affirmed a district court ruling that Sood's breach-of-contract claim failed because he had not exhausted administrative remedies. With regard to the gap issue, we explained:

> [Sood] contends for example, that there is no remedy to the reporting gap of his privileges. His attempt is to no avail. Any alleged breach of the contract must be measured by all of the facts. *If Sood had administratively challenged the University's revocation of his clinical privileges, and if successful in that challenge, we know of no reason why his work history would reflect a gap in his privileges or the full salary not paid.*

Sood, 2014 WL 1234210 at *7 (emphasis added).

We are constrained by our ruling in the breach-of-contract case. The remedy sought in the due process claim is for damages arising out of the gap in privileges. That is the same gap we already determined was subject to remediation through an administrative appeal. Accordingly, the due process claim must be dismissed for failure to exhaust administrative remedies. Therefore, we need not address any of the remaining issues on appeal barring the fees and expenses award.

B. Attorney Fees and Expenses Award.

Because we find Sood's due process claim is dismissed, we need not address the parties' arguments regarding the attorney fees and expenses award. We vacate the order awarding fees and expenses and dismiss the cross appeal.

III. CONCLUSION.

We conclude, consistent with our prior opinion in this case, that Sood's claim is dismissed for failure to exhaust both predeprivation and postdeprivation administrative remedies. Consequently, we do not address the parties' other arguments. We vacate the order awarding fees and expenses and dismiss the cross-appeal. We remand to the district court.

REVERSED AND REMANDED AS TO APPEAL; CROSS-APPEAL DISMISSED.

IN THE IOWA DISTRICT COURT
IN AND FOR JOHNSON COUNTY

RAVI SOOD, M.D.,

Plaintiff,

vs.

MICHAEL M. GRAHAM, Ph.D.,M.D.

Defendant.

No. LACV071587

RULING ON POST-TRIAL MOTIONS

(Filed Nov. 8, 2013)

This case is before the Court on post-trial motions filed by the parties. Jury trial was held on Plaintiff's claim under 42 U.S.C., 1983 for violation of the Plaintiff's due process rights, with respect to the termination/suspension of his clinical privileges in the Nuclear Medicine Department at University of Iowa Hospitals and Clinics. The plaintiff's claim for breach of contract was dismissed prior to trial on the defendant's motion for summary judgment.

The due process claim proceeded to trial May 30 – June 7, 2013. The jury returned a verdict for the Plaintiff in the amount of $37,000.

The post-trial motions are as follows:

1. Defendant's challenge to district court jurisdiction to rule on post-trial motions based upon the plaintiff's separate appeal from the dismissal of the breach of contract claim.

2. Defendant's motion for new trial/motion for judgment notwithstanding the verdict.

3. Plaintiff's motion for additur or new trial on damages.

4. Plaintiff's motion for attorney fees and reimbursement of expenses and costs.

Defendant's Jurisdictional Challenge

In his petition, the Plaintiff brought claims for (1) breach of contract, and (2) violation of his due process rights pursuant to 42 U.S.C. 1983. The breach of contract claim was dismissed on the Defendant's motion for summary judgment.

The case proceeded to trial on the due process claim which resulted in a verdict for the Plaintiff. Plaintiff filed a notice of appeal from the summary judgment order. Both parties then filed post-trial motions.

Defendant contends that the appeal of the ruling on the motion for summary judgment divested the District Court of jurisdiction over all claims prohibiting a ruling on the post-trial motions.

The Plaintiff asserts that the ruling on the motion for summary judgment is a collateral issue unrelated to the due process claims submitted to the jury. Therefore, the District Court can address the post-trial motions.

"It is the general rule that the trial court loses jurisdiction over the merits of a controversy once an appeal is perfected." *Shedlock v. Iowa Dist. Court for*

Polk County, 534 N.W. 2d 656, 658 (Iowa 1995). "Our rules of appellate procedure provide for restoration of jurisdiction to the district court in only two circumstances: upon the litigants' stipulation for an order of dismissal or upon the appellate court's order for limited remand." *Id.* (Citing Iowa R. App. P. 12(3) and (g).

"An exception to the general rule, however, permits the trial court to retain jurisdiction over disputes between the parties which are collateral to the subject matter of the appeal." *Id.* The exception serves to expedite the resolution of disputes, particularly in probate and domestic relations cases where many matters collateral to those on appeal may surface." *Id.* "It is axiomatic that the power of a court to enforce its orders, in the absence of a stay, is essential to the discharge of its duties." *Id* at 658-59.

"Courts of other jurisdictions, when considering issues similar to that herein, have permitted further proceedings in the same case at the trial court level following appeal when the subject matter of appeal would not be affected by such proceedings." *Tollefsrud Estate*, 275 N.W. 2d 412, 417 (Iowa 1979). "In such jurisdictions, the trial court is restrained from entering any order which would change or modify the judgment on appeal, and from entering any order which would have the effect of interfering with review of the judgment." *Id.* "The district or trial court retains jurisdiction to act on matters between the parties collateral to the appeal." *Id.*

"In considering the appeal of post-appeal rulings on collateral issues, we have held such rulings 'are separately appealable as final judgments.'" *Iowa State Bank & Trust Co. v. Michel*, 683 N.W. 2d 95, 110 (Iowa 2004).

The United States Court of Appeals for the Sixth Circuit held in a recent case:

> But the test of whether an issue is collateral to a claim on appeal, and therefore whether a district court may retain jurisdiction, runs in the other direction: it considers whether the action by the district court would "alter the status of the case as it rests before the Court of Appeals." *Dayton Indep. Sch. Dist. V. U.S. Mineral Prods. Co.*, 906 F. 2d 1059, 1063 (5th Cir. 1990).U.S.v.Gallion,No.12-6119,2013 WL 3968777,*7 (6th Cir.2013).

The burden of proof and the elements of a claim for breach of contract are distinct from those necessary to sustain a claim brought under 42 U.S.C. 1983. The contract claim was not presented to the jury. The court concludes that a ruling on the post-trial motions related to the due process claims will not alter the status of the pending appeal of the summary judgment ruling.

The Defendant's challenge to the jurisdiction of the district court to rule on post-trial motions is denied.

DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND MOTION FOR NEW TRIAL

Dr. Graham's Motion for Judgment Notwithstanding the Verdict is filed pursuant to Iowa R.C.P. 1.1003(2), which states as follows:

"Rule 1.1003 *Judgment Notwithstanding Verdict.* On motion, any party may have judgment in that party's favor despite an adverse verdict, for the jury's failure to return a verdict under any of the following circumstances:

1.1003(1). It the pleadings of the adverse party fail to allege some material fact necessary to constitute a complete claim or defense and the motion clearly specifies such failure.

1.1003(2). If a movant was entitled to a directed verdict at the close of all the evidence, and moved therefore, and the jury did not return such verdict, the court may then either grant a new trial or enter judgment as though it had directed a verdict for the movant.

Dr. Graham's Motion for New Trial is filed pursuant to Iowa R.C.P. 1.1004 through 1.1004(9). The rule has been set out in another section of this order ruling on post-trial motions.

Dr. Graham's motions raise the following issues:

(1) The Court should have granted the Defendant's Motion for Directed Verdict because the

evidence was not sufficient to enter a verdict against Dr. Graham. The Motion for Directed Verdict was denied at the time it was made as reflected in the record. This ground of the combined Motion for Judgment Notwithstanding the Verdict and Motion for New Trial is denied.

(2) Dr. Sood failed to pursue and follow the administrative remedies available to him through the Board of Regents, the University, and the Administrative Procedure Act, Chapter 17A, The Code. As a result of these failures, Dr. Sood waived his due process claim. This ground of the combined Motion for Judgment Notwithstanding the Verdict and Motion for New Trial is denied.

(3) Dr. Graham asserts that the evidence at trial only established that he was negligent, which is not sufficient to state a claim for a violation of due process rights. The jury was instructed that the proof presented by Dr. Sood concerning the actions of Dr. Graham must rise to the level of gross negligence – simple negligence was not sufficient to sustain the due process claim. In connection with the burden of proof, Dr. Graham contends he did not revoke Dr. Sood's clinical privileges. That action was taken by the clinical staff office at the hospital. Therefore, Dr. Graham did not cause any damage to Dr. Sood. However, the evidence in trial revealed that the suspension of clinical privileges was initiated by Dr. Graham through the clinical staff office.

The United States Supreme Court has held that simple negligence is insufficient to support a due process claim. *Daniels v. Williams*, 474 U.S. 327, 328 (1986) (holding "the due process clause is not implicated by a state official's negligent act causing unintended loss of or injury to life, liberty or property.") "The circuit courts have responded accordingly in requiring a state of mind such as recklessness or gross negligence." *Brown v. Montoya*, 662 F.3d 1152, 1170 (10th Cir. 2011) (citing *Chambers v. School District of Philadelphia Board of Education*, 587 F.3d 176, 196 (3d Cir. 2009)) (requiring that, for a procedural due process claim, a plaintiff, at a minimum, prove recklessness or gross negligence"). *Howard v. Grinage*, 82 F.3d 1343, 1350 (6th Cir. 1996) (requiring "conduct undertaken with something more than negligence").

This ground of the Motion for Judgment Notwithstanding the Verdict and Motion for New Trial is denied.

(4) Dr. Graham was entitled to qualified immunity on Dr. Sood's due process claim. Dr. Graham, as the chair of the Nuclear Medicine Department at University of Iowa Hospitals and Clinics, extended the contract of employment to Dr. Sood. The evidence at trial established that Dr. Graham initiated the process that resulted in the suspension of Dr. Sood's clinical privileges. The hospital by-laws delineate the procedure to be followed in suspending clinical privileges. Dr. Graham did not follow those clearly-defined procedures. At trial this Court concluded that Dr.

Graham is not entitled to qualified immunity and that ruling is confirmed by this order.

"Qualified immunity shields government officials from suit unless their conduct violated a clearly established constitutional or statutory right of which a reasonable person would have known." *Littrel v. Franklin*, 388 F.3d 578, 582 (8th Cir. 2004).

Courts employ a two-part inquiry to determines whether a lawsuit against a public official can proceed in the face of the official's assertion of qualified immunity. *See Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) (other citations omitted). . . . First, courts must consider whether, "taken in the light most favorable to the party asserting injury, . . . the facts alleged must show the officer's conduct violated a constitutional right." *Id.* at 201, 2121 S.Ct. 2151.

The second step of the qualified immunity analysis requires courts "to ask whether the right was clearly established." *Id.* This is a fact-intensive inquiry that "must be undertaken in light of the specific context of the case, not as a general proposition." *Id.*

"For a right to be deemed clearly established, the 'contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " (citations omitted)

The by-laws of the hospital set out the procedure to be followed when action is taken to reduce or suspend clinical privileges. Dr. Sood had clear procedural

due process rights that were not followed by Dr. Graham. Dr. Graham knew that he had violated those rights as evidenced by a subsequent reinstatement of Dr. Sood's clinical privileges. Dr. Sood's procedureal due process rights were clearly violated and the evidence supports the conclusion that Dr. Graham knew he had violated those rights. In *Daly v. Sprague*, 675 F.2d 716, 727 (5th Cir. 1982), the court recognized that clinical privileges constitute a property interest. The court stated: "Employment as a university faculty member when accompanied by regulations prohibiting discharge except for good cause and under certain procedures gives rise to a property interest. (citation omitted). Possession of medical staff privileges, under certain circumstances, may also constitute such a property interest. *Daly* at 727.

This Court concludes that Dr. Sood met his burden of proof with respect to both steps of the qualified immunity analysis. This ground of the combined Motion for Judgment Notwithstanding the Verdict and Motion for New Trial is denied.

The Motion for Judgment Notwithstanding the Verdict and the Motion for New Trial and each ground thereof are denied.

PLAINTIFF'S MOTION FOR ADDITUR OR MOTION FOR NEW TRIAL ON DAMAGES

Sood contends that damages awarded by the jury were inadequate given the evidence presented at trial

and the findings made by the jury as reflected on the verdict form.

Iowa R.C.P. 1.1004 provides as follows:

"On motion, the aggrieved party may have an adverse verdict, decision or report or some portion thereof vacated and a new trial granted if any of the following causes materially affected movant's substantial rights:

1.1004(1). Irregularity in the proceedings of the court, jury, master, or prevailing party, or any order of the court or master or abuse of discretion which prevented the movant from having a fair trial.

1.1004(2). Misconduct of the jury or prevailing party.

1.1004(3). Accident or surprise which ordinary prudence could not have guarded against.

1.1004(4). Excessive or inadequate damages appearing to have been influenced by passion or prejudice.

1.1004(5). Error in fixing the amount of the recovery, whether too large or too small, in an action upon contract or for entry (???) to or detention of property.

1.1004(6). That the verdict, reported decision is not sustained by sufficient evidence, or is contrary to law.

1.1004(7). Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at the trial.

1.1004(8). Errors of law occurring in the proceedings, or mistakes of act by the court.

1.1004(9). On any ground stated in Rule 1.1003, the motion specifying the defect or cause giving rise thereto.

"An inadequate award merits a new trial as much as an excessive one." *Kerndt v. Rolling Hills Nat. Bank*, 558 N.W.2d 410, 417 (Iowa 1997). "Whether the damages awarded are inadequate in a particular case depends on the facts of that case." *Id.* "If uncontroverted facts show the amount of the verdict bears no reasonable relationship to the loss suffered, the verdict is inadequate." *Id.* (citing *Meltose v. Physician and Clinic Serv., Inc.*, 548 N.W.2d 158, 162 (Iowa App. 1996)). "In such a case, refusal by a district court to grant either an additur or a new trial is an abuse of discretion." *Id.* "In cases involving undisputed or liquidated damages or damages reasonably susceptible to precise calculation, additur is appropriate." *Id.* (citing 58 Am.Jur.2d, New Trials Section 585 at 512 (1989)).

"The inadequacy of damages may be cause for setting aside a jury verdict and granting a new trial in a proper case." Household v. Town of Clayton, 221 N.W.2d 488, 492 (Iowa 1974). "The trial court has considerable discretion in ruling on a motion for new trial on the ground of the inadequacy of a verdict." *Id.*

at 493. "Whether damages are so inadequate as to warrant a new trial is usually left for the trial court to decide, and its discretion in granting or refusing to giant a new trial will not ordinarily be disturbed on appeal unless an abuse of discretion is shown." *Id.* "The question as to whether damages awarded in a given case are inadequate must be determined on the peculiar facts of that case." *Id.* "The comparison of damages awarded in a given case with awards of damages in other cases is not a satisfactory procedure for determining adequacy." *Id.* "Courts have devised various tests for determining adequacy in the usual case." *Id.* "Generally, damages should be commensurate with the injury, and be sufficient to right the wrong done to the injured party." *Id.* "The test of adequacy is for the court to determine what will fairly and reasonably compensate an injured party for the injuries sustained." *Id.*

On the special verdict form submitted with the jury instructions, the jury found as follows: (1) Dr. Graham violated Dr. Sood's constitutional right to due process of law; (2) Dr. Graham acted under color of state law; and (3) Dr. Graham's conduct was a cause of damage to Dr. Sood.

The jury awarded Dr. Sood damages in the amount of $37,000.

Dr. Sood cites I.R.C.P. 1.1004(4), (5), (6) in support of his Motion for Additur or, alternatively, Motion for New Trial on damages.

Dr. Sood offered evidence at trial that he could have been hired as a physician in nuclear medicine at a Veterans Administration Hospital in Shreveport, Louisiana, but for the gap in clinical privileges. He could have worked on a fee basis in 2009 and on a salary basis in 2010. Dr. Sood asserted that he would have earned $114,000 for the balance of 2009. From 2010 until trial commenced on April 30, 2013, he would have earned $700,000 in salary. Dr. Sood contends Dr. Graham offered no testimony to the contrary, and that $37,000 as damages is not commensurate with the injury and is insufficient to right the wrong done to Dr. Sood. In addition, the verdict was inadequate with respect to the future earning capacity of Dr. Sood. If, as he asserts, he would have made $215,000 per year at a V.A. hospital, his loss of future incapacity is $86,759 per year. (Dr. Sood was employed at a federal corrections facility in Fort Dix, New Jersey, at the time of trial, earning $128,241 per year.)

Dr. Graham, in resisting the Motion for Additur/ Motion for New Trial on damages, contends that based on Dr. Sood's background, education, and employability, the verdict does justice between the parties. In addition, Dr. Graham asserts:

(1) The verdict should not be disturbed because a jury may award only nominal damages in a case alleging a constitutional violation. Dr. Graham contends that the jury could have awarded Dr. Sood as little as $1.00. *Dean v. Civiletti*, 670 F.2d 99, 101 (8th Cir. 1982).

(2) Damages in a case alleging a constitutional violation are not easily measurable and lie within the jury's sound discretion. Dr. Graham asserts the damages in this case were not readily calculable in economic terms given Dr. Sood's perceived lack of ability to maintain a busy nuclear medicine practice. *Stafford v. Neurological Medicine, Inc.*, 811 F.2d 470, 475 (8th Cir. 1987).

(3) The cause and extend of Dr. Sood's damage was in dispute. The claim for damages relied on Dr. Sood obtaining employment in which he would earn $215,000 per year. Dr. Graham argues that assumed earnings of $215,000 per year is problematic given Dr. Sood's performance in the Nuclear Medicine Department at University of Iowa Hospitals and Clinics in 2009. In addition, Dr. Graham asserts that in applying for other jobs, Dr. Sood did not reveal the gap in his clinical privileges. The contention is that it is reasonably debatable whether or not Dr. Sood would have found employment as a physician in nuclear medicine.

(4) The verdict is in fact related to the evidence presented at trial in that Dr. Sood had a contract with University of Iowa Hospitals and Clinics that would have paid him $100,000 in 2009. When his clinical privileges were suspended, his salary was reduced by approximately one-third. Therefore, the jury, in effect, decided Dr. Sood should receive the balance of his initial salary or $37,000 with no additional compensation.

This Court concludes that under the evidence presented at trial, the Motion for Additur/Motion for New Trial on damages should be and is denied.

Plaintiff's Motion for Attorney Fees

The Plaintiff seeks attorney fees for services rendered in their case since the filing of the petition on January 22, 2010. 42 U.S.C. 1988(b) allows the court to award attorney fees and expert witness fees as part of the costs taxed to the Defendant.

Plaintiff has set out his claim for attorney fees as follows:

a) drafting pleadings, motions and briefs – 54.35 hours

b) legal research – 37.1 hours

c) discovery and investigation – 150 hours

d) interviewing – 19.75 hours

e) trial preparation – 648.8 hours

f) trial – 152.4 hours

g) other 122.9 hours

Trial preparation was undertaken by four attorneys. The fees claimed are as follows:

(1) David J. Dutton – 107.40 hours at $265/hr $28,461.00

(2) Chad Swanson – 308.65 hours at $230/hr $70,290.00

(3) Farl Greene, associate – 396.45 hours at $200/hr $79,290

(4) Laura Folkerts, associate – 271 hours $200/hr $54,200.00

These fees total $232.241.00. Other attorney fees total $3,024.75. Legal assistant services total $6,682.50.The case was tried by Laura Folkerts and Chad Swanson.

The Plaintiff also seeks reimbursement for research, postage, hotel and meal expense, mileage, deposition expenses, copies, phone and consultation fees. These disbursements total $36,018.07.

The motion for attorney fees is resisted by the Defendant on the following grounds.

(1) The Plaintiff should not be awarded fees incurred for the breach of contract claim since that cause of action claim was dismissed on summary judgment. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

(2) The Plaintiff is not entitled to overhead expenses over and above attorney fees. Charges for copies, computer research, postage, supplies and telephone charges should be included in counsel's hourly rate. *Am. Atheists, Inc. v. City of Starke*, 509 F. Supp. 1229 (M.D. Fla. 2007); *Heiar v. Crawford Co. Wis.*, 746 F2d 1190, 1203 (7th Cir. 1984).

(3) Plaintiff is not entitled to witness fees or costs as follows:

(a) Dr. Clark – $1,750.00

(b) Elizabeth Snelson – $16,450.00

(c) Kent Jayne – $2,764.00

(d) $180 for transportation to and from airport

(e) Dr. Craig E. Clark, P.L.C. – no fee should be charged because Dr. Clark stated he did not charge for his testimony.

Defendant asserts that non-testimonial fees are not allowed under 42 U.S.C. 1988; and testimonial fees are limited to $40/day and travel time. Citing 28 U.S.C. 1821(b); 28 U.S.C. 1920.

(4) Plaintiff cannot claim mediation costs.

(5) The overall claim for fees is excessive.

(a) The fees requested by David Dutton – 107.4 hours – are excessive given his non-participation in the trial.

(b) Counsel cannot claim meals, hotels, and mileage. If awarded, these charges should be limited to the state rate for each of these these items: $.35/mile; breakfast, lunch and dinner – $5.00, $8.00, and $15.00 respectively; hotel/motel – $55.00/night.

(6) Too many lawyers (9). Defendant contends that the number of lawyers claiming fees is unnecessary and excessive. *Hensler*, 461 U.S. at 434.

(7) Change of counsel. Defendant contends Plaintiff's counsel would not charge their client for duplicative legal services, i.e. different lawyers preparing the case for trial each time it was scheduled. (The trial was continued twice, each time within days of the trial date.)

> David Dutton and Farl Greene have billed for 503.8 hours in the amount of $107,751.Neither of them were involved in the trial.
>
> Chad Swanson and Laura Folkerts, who tried the case, have billed for 579.65 hours in the amount of $124,490.

(8) Counsel for Defendant, George Carroll, asserts he spent 125 hours in preparing for and trying this case. Co-counsel for the Defendant, Jordan Esbrook, spent 115 hours on the case. The Defendant should not pay for additional fees generated due to a change of counsel for the Plaintiff.

(9) The Court must consider the Plaintiff's level of success. Plaintiff sought nearly $2,000,000 in damages and the jury awarded $37,000. The fee award should be reduced in recognition of the jury verdict. *Hensley v. City of Davenport*, 790 N.W. 2d 569, 589 (Iowa 2010).

The amount of attorney fees to be awarded in a case brought under 42 U.S.C.1983 must be determined on the facts of each case. *Hensler v. Eckerhart*, 461 U.S. 424, 429.

Generally, the factors bearing on the amount of attorney fees in civil rights cases are:

(1) time and labor required;

(2) novelty and difficulty of the issues;

(3) the skill requisite to perform the legal service properly;

(4) preclusion of other employment due to work in this case;

(5) customary fee;

(6) whether fee is fixed or contingent;

(7) time limitations imposed by the client or circumstances;

(8) amount involved and result obtained;

(9) experience, reputation and ability of attorneys;

(10) "undesirability" of the case;

(11) nature and length of the professional relationship with client; and

(12) awards in similar cases.

Hensley v. Eckerhart, 461 U.S. at p. 430.

The hours for drafting documents, legal research, discovery and investigations, and interviewing total 261.20. Farl Greene, our associate of the law firm representing Plaintiff, performed many of the pretrial functions, along with Chad Swanson and Laura Folkerts, also an associate of the law firm.

The factors bearing on the amount of attorney fees in this case are:

(1) time and labor required;

(2) novelty and difficulty of the issues;

(3) the skill requisite to perform the legal services properly;

(4) customary fee;

(5) amount involved and result obtained; and

(6) experience, reputation and ability of attorneys.

The Plaintiff requests attorney fees totaling $232,241. The claims brought in this case were for breach of contract and violation of civil rights pursuant to 42 U.S.C. 1983. These issues clearly required time and effort to investigate the facts, research the legal issues, prepare the case for trial and conduct a 7-8 day jury trial. The Defendant's objection that there was a duplication of services in trial preparation has some merit. Neither David Dutton nor Farl Greene participated in the trial. Mr. Greene was extensively involved in pretrial preparation. He left the law firm in 2012. Other lawyers then stepped in to the case.

The proof required for each claim is distinctly different. The legal and factual issues required research and investigation. Counsel for Plaintiff possessed the skill to perform the legal services required.

The Plaintiff has presented evidence of the customary fee for the legal services provided.

The Plaintiff requested that the jury enter a substantial verdict against the Defendant, $1.8 million. The jury returned a verdict for the Plaintiff in the amount of $37,000, 2 percent of the amount requested.

With respect to the experience, reputation and ability of the attorneys, the Plaintiff was ably represented at all stages of the case.

After considering the foregoing factors, the Court concludes that Plaintiff shall be awarded attorney fees in the amount of $120,000.00.

DISBURSEMENTS

The breakdown of disbursements is as follows:

(a) Copies – $814.28
(b) Mileage – $1,360.02
(c) Postage – $130.09
(d) Legal research – $1,483.93
(e) Deposition expense – $1,812.50
(f) Mediation fees – $1,012.50
(g) Hotel, meals, airplane, etc. – $3,366.87
(h) Consultation fees – $19,007.56
(i) Worklife Resources 0 $5,322.50
(j) Other – $1,807.72

Disbursements total $36,018.07.

The Defendant objects to charges for copies, mileage, postage, legal research, telephone charges and mediation fees. This Court concludes that these disbursements are included in counsel's hourly rate, with the exception that Defendant should be responsible for one-half of the mediation fees. Consultation fees are subsumed under expert witness fees and should be reimbursed. It is unclear what issue the disbursement to worklife resources addressed. One-half of the cost shall be deducted from the disbursement total.

The court concludes that Plaintiff shall be reimbursed for expenses in the amount of $25,283.03

PLAINTIFF'S BILL OF COSTS

The Plaintiff's bill of costs is granted in the amount of $1,201.65.

IT IS ORDERED THAT JUDGMENT IS ENTERED ON ALL POST-TRIAL MOTIONS ACCORDINGLY.THE JUDGMENT FOR ATTORNEY FEES,REIMBURSEMENT OF EXPENSES,AND COSTS SHALL ACCRUE INTEREST AT 2.12 PERCENT PER ANNUM FROM THE DATE OF THIS ORDER.CLERK TO NOTIFY COUNSEL.

DATED: November 8, 2013.

/s/ Carl D. Baker
CARL D. BAKER, Judge of
the sixth judicial district

Date: 11-12-13

Mailed To: C. SWANSON
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L. FOLKERTS
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IN THE SUPREME COURT OF IOWA

No. 13-1911

Johnson County No. LACV071587

ORDER

(Filed Apr. 6, 2015)

RAVI SOOD,
Plaintiff-Appellee/Cross-Appellant-Applicant,

vs.

MICHAEL M. GRAHAM, Director of Nuclear Medicine for the University of Iowa Carver College of Medicine and Individually,
Defendant-Appellant/Cross-Appellee-Resister.

After consideration by this court, en banc, further review of the above-captioned case is denied.

Dated this 6th day of April, 2015.

THE SUPREME COURT
OF IOWA

By /s/ Mark S. Cady
Mark S. Cady, Chief Justice

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