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DEBRA K. HAMEL
PROTHONOTARY
CENTRE COUNTY, PA

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

Michael J. McQueary,

Plaintiff,

vs.

The Pennsylvania State University,

Defendant.

Docket No. 2012-1804

Type of Case:
Whistleblower

___Medical Professional Liability Action (check if applicable)

Type of Pleading:
Defendant's Bench Brief in Opposition to Plaintiff's Petition for Costs of Litigation

Filed on Behalf of:
Defendant, The Pennsylvania State University

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DEFENDANT'S BENCH BRIEF IN OPPOSITION TO PLAINTIFF'S PETITION FOR COSTS OF LITIGATION

AND NOW comes Defendant, The Pennsylvania State University (the "University"), by and through its counsel of record, White and Williams LLP, and files this Bench Brief in Opposition to Plaintiff's Petition for Costs of Litigation. In support thereof, the University asserts the following.

I. OBJECTIONS TO PLAINTIFF'S PETITION FOR COSTS OF LITIGATION

The University incorporates herein, as if more fully set forth at length, those Objections to Plaintiff's Petition for Costs of Litigation that it has previously raised. The remainder of the University's analysis, below, is made subject, and in the alternative, to these Objections.

II. THE LODESTAR IS THE REQUIRED METHOD FOR CALCULATING ATTORNEY'S FEES UNDER A FEE- SHIFTING STATUTE

Section 1425 of the Pennsylvania Whistleblower Law (43 Pa.C.S. §1425) provides:

> Enforcement. A court, in rendering a judgment in an action brought under this act, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages or any combination of these remedies. A court shall also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, if the complainant prevails in the civil action.

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Prior to the enactment of Act 2014-87, amending 43 Pa.C.S. §1425 effective on or about September 2, 2014, the text of 43 Pa.C.S. §1425 provided:

> Enforcement. A court, in rendering a judgment in an action brought under this act, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages or any combination of these remedies. A court ***may*** also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, if the court determines that the award is appropriate.

Under either version of the text of 43 Pa.C.S. §1425, the General Assembly proscribed that only "all or a portion of" a plaintiff's "costs of litigation" -- including his or her "reasonable attorney fees" -- can be awarded.

A. *Krebs v. United Ref. Co.* supports application of the lodestar.

Plaintiff attempts to claim that *Krebs v. United Ref. Co.*, 2006 PA Super 31, 893 A.2d 776 (Pa.Super. 2006) should somehow be read to support the notion that, when considering the amount of attorney's fees that Plaintiff should be permitted to recover, this Honorable Court should reject the lodestar method and, instead, allow Plaintiff to recover an amount calculated by applying a 1/3 contingency fee to the award rendered in connection with Plaintiff's Whistleblower Law claim (yielding an attorney's fee of approximately $1,658,000.00).

This attempt must be rejected. First, *Krebs* was decided on appeal within the factual context of a case where the trial court had denied ***any*** attorney's fees to the plaintiff, in spite of the fact that the plaintiff was successful in prosecuting a claim

under a fee-shifting statute (Pennsylvania's Storage Tank and Spill Prevention Act, 35 Pa.C.S. §6021.1305(f)). The Superior Court considered and opined upon the "discretionary" aspects of calculating the amount of an attorney's fee award under a fee-shifting statute in order to explain that, while a trial court had ***some*** discretion to calculate the amount of attorney's fees, it did not have so much discretion as to award a prevailing litigant ***no*** attorney's fee ("such discretion is 'not limitless', and attorney's fees should be awarded in appropriate circumstances"). *Krebs*, at 791.

Second, *Krebs*, involved an attempt by the plaintiff to recover attorney's fees totaling $275,378 – ***based upon the lodestar method*** and with reference to the actual attorney's fees that the Plaintiff's attorneys itemized as having been incurred. *Id.*, at 791-92. *Krebs* reiterated that, when considering its seventh articulated principal, "the manner by which attorneys' fees are determined in this Commonwealth, under fee-shifting provisions, is ***the lodestar approach***." *Id.*, at 792-93 (emphasis added).

To claim that, somehow, *Krebs* can be read to support Plaintiff's position that this Court can reject the lodestar method, and instead simply apply a 1/3 contingency fee, is illogical. In reality, what Plaintiff is asking this Court to do is what, as discussed below, the United States Supreme Court has said should not be done: permit a plaintiff to resort to the contingent-fee model to increase an attorney's fee award but not to reduce it.

B. Pennsylvania Courts have recognized United States Supreme Court precedent which prohibits the application of "contingency multipliers" to the lodestar.

As Pennsylvania Courts have noted, the United States Supreme Court's analysis -- in *City of Burlington v. Dague*, 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992) -- of why a "contingency multiplier" is not consistent with the calculation of a "reasonable" attorney's fee in a statutory fee-shifting case was as follows:

> [W]e see a number of reasons for concluding that no contingency enhancement whatever is compatible with the fee-shifting statutes at issue. First, just as the statutory language limiting fees to prevailing (or substantially prevailing) parties bars a prevailing plaintiff from recovering fees relating to claims on which he lost, so should it bar a prevailing plaintiff from recovering for the risk of loss. An attorney operating on a contingency-fee basis pools the risks presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not. To award a contingency enhancement under a fee-shifting statute would in effect pay for the attorney's time (or anticipated time) in cases where his client does not prevail.
>
> Second, ...we have generally turned away from the contingent-fee model -- which would make the fee award a percentage of the value of the relief awarded in the primary action -- to the lodestar model. We have done so, it must be noted, even though the lodestar model often (perhaps, generally) results in a larger fee award than the contingent-fee model. See, e.g., Report of the Federal Courts Study Committee 104 (Apr. 2, 1990) (lodestar method may "give lawyers incentives to run up hours unnecessarily, which can lead to overcompensation"). . . . Contingency enhancement is a feature inherent in the contingent-fee model (since attorneys factor in the particular risks of a case in negotiating their fee and in deciding whether to accept the case). ***To engraft this feature onto the lodestar model would be to concoct a hybrid scheme that resorts to the contingent-fee model to increase a fee award but not to reduce it***. Contingency enhancement is therefore

> not consistent with our general rejection of the contingent-fee model for fee awards, nor is it necessary to the determination of a reasonable fee.

Id. at 565, 122 S. Ct. at 2643, 120 L. Ed. 2d at 458 (emphasis added). *See, e.g., Samuel-Bassett v. Kia Motors Am., Inc.*, 613 Pa. 371, 34 A.3d 1(Pa., 2011)(applying Federal statutory law). The Pennsylvania Supreme Court has further noted that the United States Supreme Court has cautioned that using contingency multipliers to calculate attorney's fees under fee-shifting statute "unduly rewards attorneys" -- given that fee-shifting "statutes were not designed as a form of economic relief to improve the financial lot of lawyers". *See, e.g., Stair v. Trutzo, Spry, Sbrocchi, Faul & LaBarre*, 768 A.2d 299 (Pa. 2001)(applying Federal statutory law).

As the Superior Court noted in *Samuel-Bassett*, "[t]here is nothing inherently unjust about limiting [attorney's fees recovered under a fee-shifting statute] to actual costs". *Samuel-Bassett*, 34 A.3d at 42.

C. Cases involving the award of attorney's fees under fee-shifting statues within the context of class actions are not instructive.

Plaintiff further cites to *Signora v. Liberty Tra*vel, 886 A.2d 284 (Pa.Super. 2001) for the proposition that a "contingency multiplier" is appropriately applied to the calculation of attorney's fees under a fee-shifting statute. But, Plaintiff fails to articulate what the *Signora* Court made clear in the context of the ***class action*** that was before it: "Pa.R.C.P. 1716, pertaining to the award of counsel fees in class

actions, explicitly permits the court to consider the contingent nature of the receipt of a fee in its calculation of an appropriate fee". *Signora*, at 293. Since no Rule of Civil Procedure similar to Rule 1716 applies in this – non-class action – case, *Signora* cannot be used to support Plaintiff's argument.[1]

D. Contrary to Plaintiff's claim, rejection of the lodestar in favor of awarding a contingency fee is not the "only way" for a Whistleblower plaintiff to obtain legal representation.

Plaintiff contends that a "contingency fee is the only way, for all practical intents and purposes, for a Whistleblower to obtain legal representation against a large defendant with enormous financial resources." However, this claim is belied by: (a) the fact that 43 Pa.C.S. §1925's fee-shifting provision provides a mechanism for a complainant to "obtain legal counsel" separate and apart from a "contingency fee"; (b) the fact that Plaintiff's counsel continued to keep track of the number of hours spent devoted to the prosecution of Plaintiff's case throughout this litigation; and (c) the contingency agreement between Plaintiff and his counsel implicitly recognized that the Court would not be required to award attorney's fees equal to one-third of any award. *See* Petition at ¶ 21.

Just as the federal bar on referencing a contingency fee when calculating a reasonable attorney does not prevent plaintiffs from obtaining counsel to prosecute claims under federal fee-shifting statutes, not awarding Plaintiff a contingency fee

[1] It should also be noted that the *Signora* Court applied a "contingency multiplier" authorized by Rule 1716 in that case of 1.5x the lodestar – not the multiplier of roughly 8x the lodestar that Plaintiff would have the Court apply in this case.

in this case is not related to the ability to obtain legal representation to prosecute Whistleblower claims under Pennsylvania law.

E. The Whistleblower Law does not, on its face, contemplate an upward departure from the lodestar.

Section 1425 of the Whistleblower Law only allows for the granting of the "costs" of litigation – with "reasonable" attorney's fees being one subset of those "costs." 43 Pa.C.S. §1425. Even then, only "all or a portion" of the "cost" category of "reasonable" attorney's fee may be awarded to Plaintiff.

In crafting Section 1425, the General Assembly saw fit to: (a) expressly define "reasonable" attorney fees as a "cost"; and (b) expressly authorize a departure ***downward*** from ("or a portion of") what was being sought as a "reasonable" attorney's fee -- without commensurately authorizing a departure ***upward***. The choice of language used (and not used) by the General Assembly is clear evidence of its intent: (a) to peg attorney fees that are awarded under Section 1425 to those "costs" that can be actually itemized as having been incurred by plaintiff's counsel in the representation of a plaintiff during litigation – not by reference to the "fee" that a plaintiff and his counsel agree to; and (b) not to allow the type of ***upward*** "enhancement" of attorney's fees that Plaintiff seeks this Honorable Court to sanction.

Section 1425 of the Whistleblower Law does not expressly authorize a "risk multiplier" or "contingency multiplier" – nor, in any manner or respect, does it

even impliedly sanction the awarding of "more than" a "reasonable" attorney's fee as calculated by reference to the lodestar. 43 Pa.C.S. §1425. While Pa.R.C.P. 1716 -- concerning class action cases -- authorizes a Court in ***those*** cases to factor into its analysis of the amount of any award of attorney's fees that it is authorized to grant the question of "whether the receipt of a fee was contingent on success", this Rule is inapplicable to Plaintiff's suit under 43 Pa.C.S. §1425. As noted in *Samuel-Bassett, supra,* "Rule 1716 is a rule of procedure prescribed by this Court that does not purport to create any substantive right to a contingency multiplier in all cases." *Samuel-Bassett*, 34 A.3d at 56.

III. ONLY THOSE ATTORNEY'S FEE CHARGES CONTAINED IN PLAINTIFF'S ATTORNEYS' ITEMIZED FEE SHEETS THAT HAVE BEEN DEMONSTRATED BY PLAINTIFF TO HAVE BEEN INCURRED IN CONNECTION WITH PLAINTIFF'S WHISTLEBLOWER CLAIM ARE RECOVERABLE.

In cases involving a mixture of (a) one or more claims governed by the "American Rule" (i.e. that attorney's fees are not recoverable), and (b) one or more claims governed by an exception to the "American Rule", courts must carefully delineate between fees incurred in connection with a claim that is excepted from the "American Rule" (which may be shifted) and fees incurred in connection with other claims in that lawsuit that are not excepted from the "American Rule" (which may not be shifted). See e.g. *Klipper Constr. Assocos. v. Warwick Twp. Water & Sewer Auth.*, 105 A.3d 856, 2014 Pa. Commw. Unpub. LEXIS 718, *35-*39

(Pa.Cmwlth. 2014)(Trial court awarded 9% of the attorney fees that a litigant sought based upon the fact that the litigant litigated eleven claims; Commonwealth Court held that a trial court may properly consider the number of legal claims pursued that are not subject to the right to attorney fees and the percentage of damages attributable to such claims in determining a reasonable attorney fee under a statute that provides for attorney fees); *Ambrose v. Citizens National Bank of Evans City*, 2010 PA Super 172, 5 A.3d 413 (Pa. Super. 2010)(the lodestar "does not require that fees be awarded without reduction for other claims that the plaintiff chooses to litigate simply because they involve overlapping or intertwined evidence"); *Neal v. Bavarian Motors, Inc.*, 882 A.2d 1022, 1031-32 (Pa. Super. 2005) (where multiple claims are litigated and only some are under a statute authorizing recovery of attorney fees, attorney fees award must be limited to fees incurred in pursuing claims brought under fee-shifting statute).

A. Fee entries entirely related to claims other than Plaintiff's Whistleblower claim, or which Plaintiff could not demonstrate were related to the Whistleblower claim, cannot be recovered.

Plaintiff has conceded that, assuming the lodestar analysis is applied, he may only recover those itemized attorney's fees and costs that relate to his Whistleblower claim. At the hearing on this matter, Defendant spent considerable time having Plaintiff's counsel review their itemized fee sheets in order to segregate out which itemized fee entries related to: (a) Plaintiff's defamation

claim, only; (b) Plaintiff's misrepresentation claim, only; (c) Plaintiff's jury trial claims, only; (d) other legal matters unrelated to Plaintiff's Whistleblower claim, only; and (e) legal matters that, because of the fee entry's lack of specificity (i.e. vagueness)[2], cannot be attributable to Plaintiff's Whistleblower claim.

During Defendant's examination of Plaintiff's attorneys at the hearing on this matter, Plaintiff's attorneys conceded that specified time entries on their itemized fee sheets fit within each of the excludable categories set forth above. This Honorable Court informed the parties that, as the hearing progressed, it had been keeping track of those time entries that Plaintiff's attorneys conceded cannot be recovered because they do not relate to, or cannot be proven to be related to, Plaintiff's Whistleblower claim. Accordingly, when this Honorable Court is calculating the lodestar, those time entries that Plaintiff's attorneys conceded relate to one of the above five categories of non-compensable time must be removed from the Court's lodestar analysis.

[2] While this type of vague time entry represents only a limited portion of Attorney Strokoff's entries, the vast majority of Attorney Fleming's time entries have been acknowledged by him to be vague, and, thus, not capable of being attributable to Plaintiff's Whistleblower claim. This position is consistent with the University's original objection to Attorney Fleming's attempt to "reconstruct" time entries after trial – because they were not contemporaneously maintained, they are simply too speculative to support a fee-shifting request. While Attorney Fleming testified at the hearing that he followed the "Court's suggestion" when he attempted to "reconstruct" time entries in a non-contemporaneous fashion after trial, Attorney Fleming's vague time entries do not constitute sufficient lodestar evidence to meet Plaintiff's burden of proof.

B. Fee entries that, because of their being "block-billed", or because of their lack of specificity, are attributable to the defamation and/or misrepresentation claims, and the Whistleblower claim, must be reduced by 66%.

A separate category of fee entries on Plaintiffs' attorneys' itemized fee sheet that must be taken into account when this Honorable Court is calculating the lodestar are the numerous time entries that Plaintiff's attorneys conceded at the hearing are "mixed" – because they relate to Plaintiff's two non-shifting tort (i.e. defamation and misrepresentation) claims, and to Plaintiff's one shifting Whistleblower claim.

Plaintiff has conceded that, in the case of the many "mixed" fee entries on his attorneys' itemized fee sheets, he is only entitled to recover a percentage of the time itemized – i.e. the time that relates to his Whistleblower claim, and not to his two tort claims. This Honorable Court informed the parties that, as the hearing progressed, it had kept track of the time entries that Plaintiff's attorneys have conceded are "mixed" in nature and, accordingly, must be reduced.

The next issue to be addressed is the amount of the "mixed" time entry on Plaintiff's itemized fee sheets that must be reduced. As set forth in *Klipper* and *Neal*, supra., courts in the Commonwealth have handled this type of "mixed" case by reducing the fee in one of two ways:

i. Reduce each "mixed" fee entry by the ratio of non-shifting claims in the case to shifting claims in the case:

[2 non-shifting tort claims] to [1 shifting Whistleblower claim] = **a 66% reduction** of each "mixed" fee entry

OR

ii. Reduce each "mixed" fee entry by the percentage of the total verdict amount not attributable to the Whistleblower claim:

[$4,974,048 Whistleblower claim award] out of [$12,300,000 total award] = a **60% reduction** of each "mixed" fee entry

In this case, either method yields a roughly similar result. The consistency of results under either methodology is solid evidence of the reasonableness of using this type of methodology for reducing "mixed" fee entries in a case involving both shifting and non-shifting claims.

The University believes that, based upon the relative complexity of Plaintiff's two non-shifting tort claims, and the distinct nature of the two tort claims (with each having its own non-overlapping elements of proof), the most appropriate method of reducing Plaintiff's "mixed" time entries is by applying the ratio equal to the number of non-shifting claims to the number of shifting claims. Under that methodology, Plaintiff's "mixed" time entries should be reduced by 66% when it is calculating the lodestar.

IV. CONCLUSION

For all of the above reasons, The Pennsylvania State University respectfully requests that this Honorable Court deny and dismiss Plaintiff's Application for Costs of Litigation or, in the alternative only, calculate Plaintiff's entitlement to

attorney's fees and costs by reference to the lodestar, and in light of all of the considerations set forth above.

Respectfully submitted,

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MICHAEL J. MCQUEARY, Plaintiff, v. THE PENNSYLVANIA STATE UNIVERISTY, Defendant.	IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY CIVIL ACTION NO. 2012-1804 HON. THOMAS G. GAVIN

CERTIFICATE OF SERVICE

I, Andrew H. Ralston ,Jr., Esquire, hereby certify that on this 10th day of March, 2017, a true and correct copy of the foregoing Defendant's Bench Brief in Opposition to Plaintiff's Petition for Costs of Litigation was served upon the following persons via First Class Mail, postage prepaid as follows:

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