

ARGUMENT DOCKET

500 Virginia Street East, Suite 600 • P.O. Box 3710
Charleston, West Virginia 25337-3710
T: (304) 345-4222 • F: (304) 343-3133
www.baileywyant.com

Charles R. Bailey, Esq.
Email: cbailey@baileywyant.com
Direct Dial: (304) 720-0703

Rory L. Perry, II, Clerk
West Virginia Supreme Court of Appeals
State Capitol, Room E-317
1900 Kanawha Blvd., E.
Charleston, WV 25305-0831

April 14, 2015

**Re: James Campbell and Steven Foster v. Hon. David H. Sanders, Judge, et al.,
No. 15-0033
Our File No.: 6500-2207**

Dear Mr. Perry:

Pursuant to Rule 10(i) of the West Virginia Appellate Rules of Civil Procedure, please find enclosed the following authority that bears on the issue before this Honorable Court at oral argument on April 22, 2015: (1) *Ray Haluch Gravel Co. v. Cent. Pension Fund*, decided January 15, 2014; and (2) *Rodrique v. Morehouse*, decided by United States District Court for the Western District of Louisiana on June 23, 2014, applying the mandate of *Ray Haluch Gravel Co.*

Respondent Poe and the Circuit Court of Jefferson County assert that jurisdiction continues generally so long as an attorney fee claim is pending. Specifically, at the urging of Mr. Poe this is how the Jefferson County Circuit Court described its continuing jurisdiction from the bench on January 5, 2015:

Having considered all the argument that the parties have put forward here today...it appears to this Court that in a case that is the enforcement of a promissory note, a fee shifting case, that it is uniquely part of that case that fees and expenses, since they are anticipated by contract, are a calculation for the Court to make, a calculation that the Court doesn't lose jurisdiction for until it is done. *January 5, 2015 Transcript, p. 27, lines 12-13 and 18-24.*

The United States Supreme Court in *Ray Haluch Gravel Co. v. Cent. Pension Fund*, 134 S.Ct. 773 (2014) rejected the theory of continuing jurisdiction for the award of attorney's fees given the plain language of the Federal Rules of Civil Procedure, which in relevant part are nearly identical to the West Virginia Rules of Civil Procedure.

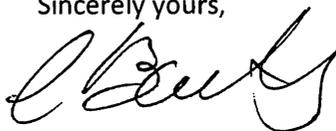
In *Ray Haluch Gravel Co.*, the United States Supreme Court held that a judgment on the merits becomes final, even if a claim for attorney's fees is pending. The rule is not dependent on whether the pending attorney's fees award is based on a contract or statute, or both. *See id.* at 777.

In a case very similar to the issues before this Court, the Western District of Louisiana in *Rodrique v. Morehouse Det. Ctr.*, 2014 U.S. Dist. LEXIS 86707 applied the mandate of *Ray Haluch Gravel*

Co. In *Rodrique*, the plaintiff was awarded damages, and moved the court for an award of attorney's fees after the conclusion of an unsuccessful appeal by defendants, nearly a year-and-a half after the judgment was entered. The *Rodrique* court noted that a separate, timely Rule 59 motion is the proper procedure by which to request attorney's fees. *See id.* at *7. The *Rodrique* court found that an attorney fee motion was untimely because a motion to alter or amend a judgment must be filed no later than twenty-eight days after the entry of the judgment under the Federal Rules. West Virginia Rule 59 requires the filing of a motion within ten (10) days.

Ray Haluch Gravel Co. and *Rodrique* make it clear that an outstanding issue of attorney's fees did not toll any time requirements under the Rules of Civil Procedure. As a result, Poe's Motion for entry of a specific judgment amount and for attorney's fees 1 year and 11 eleven months after the "final order" was untimely, and the Circuit Court of Jefferson County lacked jurisdiction to award the same.

Sincerely yours,



Charles R. Bailey

Enclosures

cc: David M. Hammer, Esq.
Robert J. Schiavoni, Esquire

Caution

As of: April 3, 2015 2:29 PM EDT

Ray Haluch Gravel Co. v. Cent. Pension Fund of the Int'l Union of Operating Eng'rs

Supreme Court of the United States

December 9, 2013, Argued; January 15, 2014, Decided

No. 12-992.

Reporter

134 S. Ct. 773; 187 L. Ed. 2d 669; 2014 U.S. LEXIS 646; 82 U.S.L.W. 4061; 198 L.R.R.M. 2129; 87 Fed. R. Serv. 3d (Callaghan) 1079; 24 Fla. L. Weekly Fed. S 517; 2014 WL 127952

RAY HALUCH GRAVEL COMPANY, et al.,
Petitioners v. CENTRAL PENSION FUND OF
THE INTERNATIONAL UNION OF
OPERATING ENGINEERS AND
PARTICIPATING EMPLOYERS, et al.

of appeal, prevailing, unresolved, piecemeal,
expenses, audit, costs

Case Summary

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: On remand at, Decision reached on appeal by *Cent. Pension Fund of the Int'l Union v. Ray Haluch Gravel Co.*, 745 F.3d 1, 2014 U.S. App. LEXIS 4485 (1st Cir. Mass., Mar. 11, 2014)

Prior History: [***1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Cent. Pension Fund of the Int'l Union of Operating Eng'rs v. Ray Haluch Gravel Co., 695 F.3d 1, 2012 U.S. App. LEXIS 19189 (1st Cir. Mass., 2012)

Disposition: *695 F.3d 1*, reversed and remanded.

Core Terms

attorney's, Funds, merits, district court, fees and costs, purposes, contractual, damages, unresolved issue, provides, final decision, provisions, court of appeals, fee claim, appeals, parties, cases, notice

Procedural Posture

Respondent pension funds sued petitioner employer, claiming that the employer had not made payments it owed the funds. The district court entered judgment on June 17, 2011, which awarded damages, and entered judgment on July 25, 2011, which awarded the funds costs and attorney's fees. The U.S. Court of Appeals for the First Circuit held that an appeal the funds filed on August 15, 2011, was timely, and the U.S. Supreme Court granted certiorari.

Overview

Following trial on the funds' claims that the employer violated the Employee Retirement Income Security Act of 1974 and the Labor Management Relations Act of 1947, the district court entered judgment on June 17, 2011, which ordered the employer to pay the funds \$26,897. The funds asked for an award of attorney's fees, auditor's fees, and costs under *29 U.S.C.S. § 1132(g)(2)(D)* and a collective bargaining agreement the employer entered, and on July 25, 2011, the district court entered judgment awarding the funds \$34,688. The funds appealed both judgments on August 15, 2011, and the First

Circuit found that the appeal was timely under *Fed. R. App. P. 4*. The Supreme Court held that the funds' appeal was not timely because it was filed more than 30 days after the district court issued its judgment on June 17, 2011. The Court held in *Budinich v. Becton Dickinson & Co.* that a decision on the merits was a "final decision" under 28 U.S.C.S. § 1291 even if an award or an amount of attorney's fees remained to be determined, and that rule applied regardless of whether an award of attorney's fees was based on statute or contract.

Outcome

The Supreme Court reversed the First Circuit's decision and remanded the case for further proceedings. 9-0 Decision.

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN1 Federal courts of appeals have jurisdiction of appeals from "final decisions" of United States district courts. 28 U.S.C.S. § 1291. In *Budinich v. Becton Dickinson & Co.*, the United States Supreme Court held that a decision on the merits is a "final decision" under § 1291 even if the award or amount of attorney's fees for the litigation remains to be determined. Whether a claim for attorney's fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Appeals > Notice of Appeal

HN2 28 U.S.C.S. § 1291 provides that the courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. The timely filing of a notice of

appeal in a civil case is a jurisdictional requirement. *Fed. R. App. P. 4* provides, as a general matter and subject to specific qualifications set out in later parts of *Rule 4*, that in a civil case the notice of appeal must be filed within 30 days after entry of the judgment or order appealed from. *Fed. R. App. P. 4(a)(1)(A)*.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN3 In the ordinary course, a "final decision" is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN4 The United States Supreme Court, in *Budinich v. Becton Dickinson & Co.*, observed that as a general matter, at least, a claim for attorney's fees is not part of the merits of the action to which the fees pertain. The Court noted that awards of attorney's fees do not remedy the injury giving rise to the action, are often available to the party defending the action, and were regarded at common law as an element of "costs" awarded to a prevailing party, which are generally not treated as part of the merits judgment. Though the Court acknowledged that the statutory or decisional law authorizing fees might sometimes treat the fees as part of the merits, it held that considerations of operational consistency and predictability in the overall application of 28 U.S.C.S. § 1291 favored a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

HN5 The premise that contractual attorney's fees provisions are always a measure of damages is

unpersuasive, for contractual fee provisions often provide attorney's fees to prevailing defendants.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN6 The United States Supreme Court's decision in *Budinich v. Becton Dickinson & Co.* made it clear that the uniform rule there announced did not depend on whether the statutory or decisional law authorizing a particular fee claim treated the fees as part of the merits. The Court acknowledged that not all statutory or decisional law authorizing attorney's fees treats those fees as part of "costs" or otherwise not part of the merits; and the Court even accepted for purposes of argument that the Colorado statute in that case made plain that the fees it authorized were to be part of the merits judgment. But that did not matter. As the Court explained, the issue of attorney's fees was still collateral for finality purposes under 28 U.S.C.S. § 1291. The Court was not then, nor is it now, inclined to adopt a disposition that requires the merits or nonmerits status of each attorney's fee provision to be clearly established before the time to appeal can be clearly known.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN7 Were the jurisdictional effect of an unresolved issue of attorney's fees to depend on whether the entitlement to fees is asserted under a statute, as distinct from a contract, the operational consistency and predictability the United States Supreme Court stressed in *Budinich v. Becton Dickinson & Co.* would be compromised in many instances. Operational consistency is not promoted by providing for different jurisdictional effect to district court decisions that leave unresolved otherwise identical fee claims based solely on

whether the asserted right to fees is based on a contract or a statute.

Civil Procedure > Judgments > Entry of Judgments > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Appeals > Notice of Appeal

HN8 The Federal Rules of Civil Procedure provide a means to avoid a piecemeal approach in the ordinary run of cases where circumstances warrant delaying the time to appeal. Fed. R. Civ. P. 54(d)(2) provides for motions claiming attorney's fees and related nontaxable expenses. Fed. R. Civ. P. 58(e), in turn, provides that the entry of judgment ordinarily may not be delayed, nor may the time for appeal be extended, in order to tax costs or award fees. This accords with the United States Supreme Court's decision in *Budinich v. Becton Dickinson & Co.*, and confirms the general practice of treating fees and costs as collateral for finality purposes. Having recognized this premise, Rule 58(e) further provides that if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and becomes effective to order that the motion have the same effect as a timely motion under Fed. R. Civ. P. 59 for purposes of Fed. R. App. P. 4(a)(4). This delays the running of the time to file an appeal until the entry of an order disposing of the fee motion. Fed. R. App. P. 4(a)(4)(A)(iii).

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

HN9 Fed. R. Civ. P. 54(d)(2) provides that a claim for attorney's fees and related nontaxable expenses

must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages. The Advisory Committee Notes to Rule 54(d)(2) state that the procedure outlined in Rule 54 does not apply to fees recoverable as an element of damages, as when sought under the terms of a contract; such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury. Fed. R. Civ. P. 54 advisory committee's note. The rules eliminate concerns over undue piecemeal appeals in the vast range of cases where a claim for attorney's fees is made by motion under Rule 54(d)(2). That includes some cases in which the fees are authorized by contract.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN10 The complex variations in statutory and contractual fee-shifting provisions counsel against making a distinction between treating orders awarding attorney's fees under a statute and orders awarding attorney's fees under contracts differently for purposes of finality. Some fee-shifting provisions treat fees as part of the merits; some do not. Some are bilateral, authorizing fees either to plaintiffs or defendants; some are unilateral. Some depend on prevailing party status; some do not. Some may be unclear on these points. The rule the United States Supreme Court adopted in *Budinich v. Becton Dickinson & Co.* ignores these distinctions in favor of an approach that looks solely to the character of the issue that remains open after a court has otherwise ruled on the merits of the case.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN11 Statutory fee claims are not always limited to attorney's fees per se. Many fee-shifting statutes authorize courts to award additional litigation expenses, such as expert fees. Where those types of fees are claimed and awarded incidental to attorney's fees, there is no apparent reason why parties or courts would find it difficult to tell that the United States Supreme Court's decision in *Budinich v. Becton Dickinson & Co.* remains applicable.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > General Overview

Civil Procedure > ... > Costs & Attorney Fees > Costs > General Overview

HN12 Some of the services performed before a lawsuit is formally commenced by the filing of a complaint are performed "on the litigation." The most obvious examples include the drafting of the initial pleadings and the work associated with the development of the theory of the case. More generally, pre-filing tasks may be for the litigation if they are both useful and of a type ordinarily necessary to advance the litigation in question.

Lawyers' Edition Display

Decision

[**669] Appeal--filed by benefits funds more than 30 days after judgment awarding damages to funds, but fewer than 30 days after judgment awarding contractual attorneys' fees--held to be untimely, as judgment awarding damages was final judgment under 28 U.S.C.S. § 1291.

Summary

Procedural posture: Respondent pension funds sued petitioner employer, claiming that the employer had not made payments it owed the funds. The District Court entered judgment on

June 17, 2011, which awarded damages, and entered judgment on July 25, 2011, which awarded the funds costs and attorney's fees. The U.S. Court of Appeals for the First Circuit held that an appeal the funds filed on August 15, 2011, was timely, and the U.S. Supreme Court granted certiorari.

Overview: Following trial on the funds' claims that the employer violated the Employee Retirement Income Security Act of 1974 and the Labor Management Relations Act of 1947, the District Court entered judgment on June 17, 2011, which ordered the employer to pay the funds \$26,897. The funds asked for an award of attorney's fees, auditor's fees, and costs under 29 U.S.C.S. § 1132(g)(2)(D) and a collective bargaining agreement the employer entered, and on July 25, 2011, the District Court entered judgment awarding the funds \$34,688. The funds appealed both judgments on August 15, 2011, and the First Circuit found that the appeal was timely under Fed. R. App. P. 4. The Supreme Court held that the funds' appeal was not timely because it was filed more than 30 days after the District Court issued its judgment on June 17, 2011. The Court held in *Budinich v. Becton Dickinson & Co.* that a decision on the merits was a "final decision" under 28 U.S.C.S. § 1291 even if an award or an amount of attorney's fees remained to be determined, and that rule applied regardless of whether an award of attorney's fees was based on statute or contract.

Outcome: The Supreme Court reversed the First Circuit's decision and remanded the case for further proceedings. 9-0 Decision.

Headnotes

APPEAL §23; > FINAL DECISION -- MERITS -- ATTORNEYS' FEES ; > Headnote:

[1]

Federal Courts of Appeals have jurisdiction of appeals from "final decisions" of United States

District Courts. 28 U.S.C.S. § 1291. In *Budinich v. Becton Dickinson & Co.*, the United States Supreme Court held that a decision on the merits is a "final decision" under § 1291 even if the award or amount of attorney's fees for the litigation remains to be determined. Whether a claim for attorney's fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal.

APPEAL §875; > NOTICE -- TIMELY FILING ; > Headnote:

LEdHN[2] [2]

28 U.S.C.S. § 1291 provides that the Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States. The timely filing of a notice of appeal in a civil case is a jurisdictional requirement. Fed. R. App. P. 4 provides, as a general matter and subject to specific qualifications set out in later parts of Rule 4, that in a civil case the notice of appeal must be filed within 30 days after entry of the judgment or order appealed from. Fed. R. App. P. 4(a)(1)(A).

APPEAL §26; > FINAL DECISION ; > Headnote:

LEdHN[3] [3]

In the ordinary course, a "final decision" is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.

APPEAL §23; > JUDGMENT ON MERITS -- FINALITY -- ATTORNEYS' FEES ; > Headnote:

LEdHN[4] [4]

The United States Supreme Court, in *Budinich v. Becton Dickinson & Co.*, observed that as a general matter, at least, a claim for attorney's fees is not part of the merits of the action to which the

fees pertain. The Court noted that awards of attorney's fees do not remedy the injury giving rise to the action, are often available to the party defending the action, and were regarded at common law as an element of "costs" awarded to a prevailing party, which are generally not treated as part of the merits judgment. Though the Court acknowledged that the statutory or decisional law authorizing fees might sometimes treat the fees as part of the merits, it held that considerations of operational consistency and predictability in the overall application of 28 U.S.C.S. § 1291 favored a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final.

DAMAGES §40; > MEASURE --
CONTRACTUAL ATTORNEYS' FEES
; > Headnote:

LEdHN[5] [5]

The premise that contractual attorney's fees provisions are always a measure of damages is unpersuasive, for contractual fee provisions often provide attorney's fees to prevailing defendants.

APPEAL §23.5; > FINALITY OF JUDGMENT --
ATTORNEYS' FEES -- COLLATERAL ISSUE
; > Headnote:

LEdHN[6] [6]

The United States Supreme Court's decision in *Budinich v. Becton Dickinson & Co.* made it clear that the uniform rule there announced did not depend on whether the statutory or decisional law authorizing a particular fee claim treated the fees as part of the merits. The Court acknowledged that not all statutory or decisional law authorizing attorney's fees treats those fees as part of "costs" or otherwise not part of the merits; and the Court even accepted for purposes of argument that the Colorado statute in that case made plain that the fees it authorized were to be part of the merits

judgment. But that did not matter. As the Court explained, the issue of attorney's fees was still collateral for finality purposes under 28 U.S.C.S. § 1291. The Court was not then, nor is it now, inclined to adopt a disposition that requires the merits or nonmerits status of each attorney's fee provision to be clearly established before the time to appeal can be clearly known.

APPEAL §881; > TIME TO FILE --
UNRESOLVED ISSUE -- ATTORNEYS' FEES
; > Headnote:

LEdHN[7] [7]

Were the jurisdictional effect of an unresolved issue of attorney's fees to depend on whether the entitlement to fees is asserted under a statute, as distinct from a contract, the operational consistency and predictability the United States Supreme Court stressed in *Budinich v. Becton Dickinson & Co.* would be compromised in many instances. Operational consistency is not promoted by providing for different jurisdictional effect to District Court decisions that leave unresolved otherwise identical fee claims based solely on whether the asserted right to fees is based on a contract or a statute.

APPEAL §882.4; COURTS §538.16; > TIME TO
APPEAL -- MOTION FOR ATTORNEYS' FEES
; > Headnote:

LEdHN[8] [8]

The Federal Rules of Civil Procedure provide a means to avoid a piecemeal approach in the ordinary run of cases where circumstances warrant delaying the time to appeal. Fed. R. Civ. P. 54(d)(2) provides for motions claiming attorney's fees and related nontaxable expenses. Fed. R. Civ. P. 58(e), in turn, provides that the entry of judgment ordinarily may not be delayed, nor may the time for appeal be extended, in order to tax costs or award fees. This accords with the United States Supreme Court's decision in *Budinich v.*

Becton Dickinson & Co., and confirms the general practice of treating fees and costs as collateral for finality purposes. Having recognized this premise, Rule 58(e) further provides that if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and becomes effective to order that the motion have the same effect as a timely motion under Fed. R. Civ. P. 59 for purposes of Fed. R. App. P. 4(a)(4). This delays the running of the time to file an appeal until the entry of an order disposing of the fee motion. Fed. R. App. P. 4(a)(4)(A)(iii).

COURTS §538.16; > ATTORNEYS' FEES --
ELEMENT OF DAMAGES -- APPEAL
; > Headnote:

LEdHN[9] [9]

Fed. R. Civ. P. 54(d)(2) provides that a claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages. The Advisory Committee Notes to Rule 54(d)(2) state that the procedure outlined in Rule 54 does not apply to fees recoverable as an element of damages, as when sought under the terms of a contract; such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury. Fed. R. Civ. P. 54 advisory committee's note. The rules eliminate concerns over undue piecemeal appeals in the vast range of cases where a claim for attorney's fees is made by motion under Rule 54(d)(2). That includes some cases in which the fees are authorized by contract.

APPEAL §23; > ATTORNEYS' FEES --
FINALITY OF ORDER ; > Headnote:

LEdHN[10] [10]

The complex variations in statutory and contractual fee-shifting provisions counsel against making a distinction between treating orders awarding

attorney's fees under a statute and orders awarding attorney's fees under contracts differently for purposes of finality. Some fee-shifting provisions treat fees as part of the merits; some do not. Some are bilateral, authorizing fees either to plaintiffs or defendants; some are unilateral. Some depend on prevailing party status; some do not. Some may be unclear on these points. The rule the United States Supreme Court adopted in *Budinich v. Becton Dickinson & Co.* ignores these distinctions in favor of an approach that looks solely to the character of the issue that remains open after a court has otherwise ruled on the merits of the case.

APPEAL §23; > FEES AWARD -- FINALITY OF
JUDGMENT ; > Headnote:

LEdHN[11] [11]

Statutory fee claims are not always limited to attorney's fees per se. Many fee-shifting statutes authorize courts to award additional litigation expenses, such as expert fees. Where those types of fees are claimed and awarded incidental to attorney's fees, there is no apparent reason why parties or courts would find it difficult to tell that the United States Supreme Court's decision in *Budinich v. Becton Dickinson & Co.* remains applicable.

COSTS AND FEES §32; > PRIOR TO
COMMENCEMENT OF SUIT ; > Headnote:

LEdHN[12] [12]

Some of the services performed before a lawsuit is formally commenced by the filing of a complaint are performed "on the litigation." The most obvious examples include the drafting of the initial pleadings and the work associated with the development of the theory of the case. More generally, pre-filing tasks may be for the litigation if they are both useful and of a type ordinarily necessary to advance the litigation in question.

Syllabus

[**673] [*775] Respondents, various union-affiliated benefit funds (Funds), sued petitioner Ray Haluch Gravel Co. (Haluch) in Federal District Court to collect benefits contributions required to be paid under federal law. The Funds also sought attorney’s fees and costs, which were obligations under both a federal statute and the parties’ collective bargaining agreement (CBA). The District Court issued an order on June 17, 2011, on the merits of the contribution claim and a separate ruling on July 25 on the Funds’ motion for fees and costs. The Funds appealed both decisions on August 15. Haluch argued that the June 17 order was a final decision pursuant to 28 U. S. C. §1291, and thus, the Funds’ notice of appeal was untimely since it was not filed within the Federal Rules of Appellate Procedure’s 30-day deadline. The Funds disagreed, arguing that there was no final decision until July 25. The First Circuit acknowledged that an unresolved attorney’s fees issue generally does not prevent judgment on the merits from being final, but held that no final decision was rendered until July 25 [***2] since the entitlement to fees and costs provided for in the CBA was an element of damages and thus part of the merits. Accordingly, the First Circuit addressed the appeal with respect to both the unpaid contributions and the fees and costs.

Held: The appeal of the June 17 decision was untimely. Pp. - , 187 L. Ed. 2d, at 677-681.

(a) This case has instructive similarities to *Budinich v. Becton Dickinson & Co.*, 486 U. S. 196, 108 S. Ct. 1717, 100 L. Ed. 2d 178. There, this Court held a district court judgment to be a “final decision” for §1291 purposes despite an unresolved motion for statutory-based attorney’s fees, noting that fee awards do not remedy the injury giving rise to the action, are often available to the defending party, and were, at common law,

an element of “costs” awarded to a prevailing party, not a part of the merits judgment. *Id.*, at 200, 108 S. Ct. 1717, 100 L. Ed. 2d 178. Even if laws authorizing fees might sometimes treat them as part of the merits, [**674] considerations of “operational consistency and predictability in the overall application of §1291” favored a “uniform rule.” *Id.*, at 202, 108 S. Ct. 1717, 100 L. Ed. 2d 178. Pp. - , 187 L. Ed. 2d. at 677-678.

(b) The Funds’ attempts to distinguish *Budinich* fail. Pp. - , 187 L. Ed. 2d. at 678-681.

(1) Their claim that contractual attorney’s fees provisions are always a measure of damages is unpersuasive, [***3] for such provisions [**776] often provide attorney’s fees to prevailing defendants. More basic, *Budinich*’s uniform rule did not depend on whether the law authorizing a particular fee claim treated the fees as part of the merits, 486 U. S. at 201, 108 S. Ct. 1717, 100 L. Ed. 2d 178, and there is no reason to depart from that sound reasoning here. The operational consistency stressed in *Budinich* is not promoted by providing for different jurisdictional effect based solely on whether an asserted right to fees is based on contract or statute. Nor is predictability promoted since it is not always clear whether and to what extent a fee claim is contractual rather than statutory. The Funds urge the importance of avoiding piecemeal litigation, but the *Budinich* Court was aware of such concerns when it adopted a uniform rule, and it suffices to say that those concerns are counterbalanced by the interest in determining with promptness and clarity whether the ruling on the merits will be appealed, especially given the complexity and amount of time it may take to resolve attorney’s fees claims. Furthermore, the Federal Rules of Civil Procedure provide a means to avoid a piecemeal approach in many cases. See, e.g., *Rules 54(d)(2), 58(e).* [***4] Complex variations in statutory and contractual ee-shifting provisions also counsel against treating attorney’s fees claims authorized by contract and statute differently for finality

purposes. The *Budinich* rule looks solely to the character of the issue that remains open after the court has otherwise ruled on the merits. The Funds suggest that it is unclear whether *Budinich* applies where, as here, nonattorney professional fees are included in a motion for attorney's fees and costs. They are mistaken to the extent that they suggest that such fees will be claimed only where a contractual fee claim is involved. Many fee-shifting statutes authorize courts to award related litigation expenses like expert fees, see *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 89, n. 4, 111 S. Ct. 1138, 113 L. Ed. 2d 68, and there is no apparent reason why parties or courts would find it difficult to tell that *Budinich* remains applicable where such fees are claimed and awarded incidental to attorney's fees. Pp. _____, 187 L. Ed. 2d, at 678-681.

(2) The Funds' claim that fees accrued prior to the commencement of litigation fall outside the scope of *Budinich* is also unpersuasive. *Budinich* referred to fees "for the litigation in question," 486 U.S. at 202, 108 S. Ct. 1717, 100 L. Ed. 2d 178, [***5] or "attributable to the case," *id.* at 203, 108 S. Ct. 1717, 100 L. Ed. 2d 178, but this Court has observed that "some of the services performed before a lawsuit is formally commenced by the filing of a complaint are performed 'on the litigation,' " *Webb v. Dyer County Bd. of Ed.*, 471 U.S. 234, 243, 105 S. Ct. 1923, 85 L. Ed. 2d 233. Here, the fees for investigation, preliminary legal research, drafting of demand letters, [**675] and working on the initial complaint fit the description of standard preliminary steps toward litigation. Pp. _____, 187 L. Ed. 2d, at 681.

695 F. 3d 1, reversed and remanded.

Counsel: Dan Himmelfarb argued the cause for petitioners.

James A. Feldman argued the cause for respondents.

Judges: Kennedy, J., delivered the opinion for a unanimous Court.

Opinion by: KENNEDY

Opinion

Justice Kennedy delivered the opinion of the Court.

[*777] *HNI [I]* [1] Federal courts of appeals have jurisdiction of appeals from "final decisions" of United States district courts. 28 U.S.C. §1291. In *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988), this Court held that a decision on the merits is a "final decision" under §1291 even if the award or amount of attorney's fees for the litigation remains to be determined. The issue in this case is whether a different result obtains if the unresolved claim for attorney's fees is based on a contract rather than, or in addition to, a statute. The answer here, for purposes of §1291 and the [***6] Federal Rules of Civil Procedure, is that the result is not different. Whether the claim for attorney's fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal.

I

Petitioner Ray Haluch Gravel Co. (Haluch) is a landscape supply company. Under a collective-bargaining agreement (CBA) with the International Union of Operating Engineers, Local 98, Haluch was required to pay contributions to union-affiliated benefit funds. Various of those funds are respondents here.

In 2007, respondents (Funds) commissioned an audit to determine whether Haluch was meeting its obligations under the CBA. Based on the audit, the Funds demanded additional contributions. Haluch refused to pay, and the Funds filed a lawsuit in the United States District Court for the District of Massachusetts.

The Funds alleged that Haluch's failure to make the required contributions was a violation of the

Employee Retirement Income Security Act of 1974 (ERISA) and the Labor Management Relations Act, 1947. The Funds also sought attorney's and auditor's fees and costs, under §502(g)(2)(D) of ERISA, [***7] 94 Stat. 1295, 29 U. S. C. §1132(g)(2)(D) (providing for "reasonable attorney's fees and costs of the action, to be paid by the defendant"), and the CBA itself, App. to Pet. for Cert. 52a (providing that "[a]ny costs, including legal fees, of collecting payments due these Funds shall be borne by the defaulting Employer").

At the conclusion of a bench trial, the District Court asked the parties to submit proposed findings of fact and conclusions of law to allow the court "to consider both the possibility of enforcing [a] settlement and a decision on the merits at the same time." Tr. 50 (Feb. 28, 2011). These submissions were due on March 14, 2011. The District Court went on to observe that "[u]nder our rules . . . if there is a judgment for the plaintiffs, typically a motion for attorney's fees can be filed" shortly thereafter. *Id.*, at 51. It also noted that, "[o]n the other hand, attorney's fees is part of the damages potentially here." *Ibid.* It gave the plaintiffs the option to offer a submission with regard to fees along with [**676] their proposed findings of fact and conclusions of law, or to "wait to see if I find in your favor and submit the fee petition later on." *Ibid.*

The Funds initially [***8] chose to submit their fee petition at the same time as their proposed findings of fact and conclusions [**778] of law, but they later changed course. They requested an extension of time to file their "request for reimbursement of attorneys' fees and costs in the above matter." Motion to Extend Time to Submit Request for Attorneys' Fees in No. 09-cv-11607-MAP (D Mass.), p. 1. The District Court agreed; and on April 4, the Funds moved "for an [o]rder awarding the total attorneys' fees and costs incurred . . . in attempting to collect this delinquency, in obtaining the audit, in protecting

Plaintiffs' interests, and in protecting the interests of the participants and beneficiaries." App. 72. The motion alleged that "[t]hose fees and costs . . . amount to \$143,600.44," and stated that "[d]efendants are liable for these monies pursuant to" ERISA, "and for the reasons detailed in the accompanying" affidavit. *Ibid.* The accompanying "affidavit in support of [the] application for attorneys' fees and costs," in turn, cited the parties' agreements (including the CBA, as well as related trust agreements) and §502(g)(2)(D) of ERISA. *Id.*, at 74.

As to the merits of the claim that Haluch had underpaid, on [***9] June 17, 2011, the District Court issued a memorandum and order ruling that the Funds were entitled to certain unpaid contributions, though less than had been requested. International Union of Operating Engineers, Local 98 Health and Welfare, Pension and Annuity Funds v. Ray Haluch Gravel Co., 792 F. Supp. 2d 129 (Mass.). A judgment in favor of the Funds in the amount of \$26,897.41 was issued the same day. App. to Pet. for Cert. 39a-40a. The District Court did not rule on the Funds' motion for attorney's fees and costs until July 25, 2011. On that date it awarded \$18,000 in attorney's fees, plus costs of \$16,688.15, for a total award of \$34,688.15. 792 F. Supp. 2d 139, 143. On August 15, 2011, the Funds appealed from both decisions. Haluch filed a cross-appeal a week later.

In the Court of Appeals Haluch argued that there had been no timely appeal from the June 17 decision on the merits. In its view, the June 17 decision was a final decision under §1291, so that notice of appeal had to be filed within 30 days thereafter, see Fed. Rule App. Proc. 4(a)(1)(A). The Funds disagreed. They argued that there was no final decision until July 25, when the District Court rendered a decision on [***10] their request for attorney's fees and costs. In their view the appeal was timely as to all issues in the case. See Digital Equipment Corp. v. Desktop Direct, Inc., 511 U. S. 863, 868, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994).

The Court of Appeals agreed with the Funds. 695 F.3d 1, 7 (CA1 2012). It acknowledged this Court's holding that an unresolved issue of attorney's fees generally does not prevent judgment on the merits from being final. But it held that this rule does not "mechanically . . . apply to all claims for attorneys' fees, whatever their genesis," and that, instead, "[w]here, as here, an entitlement to attorneys' fees derives from a contract . . . the critical question is whether the claim for attorneys' fees is part of the merits." *Id.*, at 6. Interpreting the CBA in this case as "provid[ing] for the payment of attorneys' fees as an element of damages in the event of a breach," [**677] the Court of Appeals held that the June 17 decision was not final. *Ibid.* Concluding that the appeal was timely as to all issues, the Court of Appeals addressed the merits of the dispute with respect to the amount of unpaid remittances as well as the issue of fees and costs, remanding both aspects of the case to the District Court. [***11] *Id.*, at 11.

Haluch sought review here, and certiorari was granted to resolve a conflict in the Courts of Appeals over whether and when an unresolved issue of attorney's fees based on a contract prevents a judgment [**779] on the merits from being final. 570 U.S. , 133 S. Ct. 2825; 186 L. Ed. 2d 883 (2013). Compare *O & G Industries, Inc. v. National Railroad Passenger Corporation*, 537 F.3d 153, 167, 168, and n. 11 (CA2 2008); *United States ex rel. Familian Northwest, Inc. v. RG & B Contractors, Inc.*, 21 F.3d 952, 954-955 (CA9 1994); *Continental Bank, N. A. v. Everett*, 964 F.2d 701, 702-703 (CA7 1992); and *First Nationwide Bank v. Summer House Joint Venture*, 902 F.2d 1197, 1199-1200 (CA5 1990), with *Carolina Power & Light Co. v. Dynegy Marketing & Trade*, 415 F.3d 354, 356 (CA4 2005); *Brandon, Jones, Sandall, Zeide, Kohn, Chalul & Musso, P. A. v. MedPartners, Inc.*, 312 F.3d 1349, 1355 (CA11 2002) (per curiam); *Gleason v. Norwest Mortgage, Inc.*, 243 F.3d 130, 137-138 (CA3 2001); and *Justine Realty Co. v. American Nat.*

Can Co., 945 F.2d 1044, 1047-1049 (CA8 1991). For the reasons set forth, the decision of the Court of Appeals must be reversed.

II

HN2 LEdHN[2] [2] Title 28 U. S. C. §1291 provides that "[t]he courts of appeals . . . shall [***12] have jurisdiction of appeals from all final decisions of the district courts of the United States . . ." "[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles v. Russell*, 551 U. S. 205, 214, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007). Rule 4 of the Federal Rules of Appellate Procedure provides, as a general matter and subject to specific qualifications set out in later parts of the Rule, that in a civil case "the notice of appeal . . . must be filed . . . within 30 days after entry of the judgment or order appealed from." Rule 4(a)(1)(A). The parties in this case agree that notice of appeal was not given within 30 days of the June 17 decision but that it was given within 30 days of the July 25 decision. The question is whether the June 17 order was a final decision for purposes of §1291.

HN3 LEdHN[3] [3] In the ordinary course a "final decision" is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *Catlin v. United States*, 324 U. S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1945). In *Budinich*, this Court addressed the question whether an unresolved issue of attorney's fees for the litigation prevents a judgment from being final. 486 U. S., at 202, 108 S. Ct. 1717, 100 L. Ed. 2d 178. There, a District [***13] Court in a diversity case had entered a judgment that left unresolved a motion for attorney's fees based on a Colorado statute providing attorney's fees to prevailing parties in certain cases. *Id.*, at 197, 108 S. Ct. 1717, 100 L. Ed. 2d 178. The Court held that the judgment was final for purposes of §1291 despite the unresolved issue of attorney's fees. *Id.*, at 202, 108 S. Ct. 1717, 100 L. Ed. 2d 178.

HN4 LEdHN[4] [4] The Court in *Budinich* began by observing that "[a]s a general matter, at least,

... a claim for attorney’s fees [**678] is not part of the merits of the action to which the fees pertain.” *Id.*, at 200, 108 S. Ct. 1717, 100 L. Ed. 2d 178. The Court noted that awards of attorney’s fees do not remedy the injury giving rise to the action, are often available to the party defending the action, and were regarded at common law as an element of “costs” awarded to a prevailing party, which are generally not treated as part of the merits judgment. *Ibid.* Though the Court acknowledged that the statutory or decisional law authorizing the fees might sometimes treat the fees as part of the merits, it held that considerations of “operational consistency and predictability in the overall application of §1291” favored a “uniform rule that an unresolved issue of attorney’s fees for the litigation in question does not [***14] prevent judgment on the merits from being final.” *Id.*, at 202, 108 S. Ct. 1717, 100 L. Ed. 2d 178.

[*780] The facts of this case have instructive similarities to *Budinich*. In both cases, a plaintiff sought to recover employment-related payments. In both cases, the District Court entered a judgment resolving the claim for unpaid amounts but left outstanding a request for attorney’s fees incurred in the course of litigating the case. Despite these similarities, the Funds offer two arguments to distinguish *Budinich*. First, they contend that unresolved claims for attorney’s fees authorized by contract, unlike those authorized by statute, are not collateral for finality purposes. Second, they argue that the claim left unresolved as of June 17 included fees incurred prior to the commencement of formal litigation and that those fees, at least, fall beyond the scope of the rule announced in *Budinich*. For the reasons given below, the Court rejects these arguments.

III

A

The Funds’ principal argument for the nonfinality of the June 17 decision is that a district court

decision that does not resolve a fee claim authorized by contract is not final for purposes of §1291, because it leaves open a claim for contract damages. They argue that contractual [***15] provisions for attorney’s fees or costs of collection, in contrast to statutory attorney’s fees provisions, are liquidated-damages provisions intended to remedy the injury giving rise to the action.

HN5 LE~~d~~HN[5] [5] The premise that contractual attorney’s fees provisions are always a measure of damages is unpersuasive, for contractual fee provisions often provide attorney’s fees to prevailing defendants. See 1 R. Rossi, *Attorneys’ Fees* §9:25, p. 9-64 (3d ed. 2012); cf. *Gleason*, *supra*, at 137, n. 3. The Funds’ argument fails, however, for a more basic reason, which is that the Court in *Budinich* rejected the very distinction the Funds now attempt to draw.

HN6 LE~~d~~HN[6] [6] The decision in *Budinich* made it clear that the uniform rule there announced did not depend on whether the statutory or decisional law authorizing a particular fee claim treated the fees as part of the merits. *486 U. S.*, at 201, 108 S. Ct. 1717, 100 L. Ed. 2d 178. The Court acknowledged that not all statutory or decisional law authorizing attorney’s fees treats those fees as part of “costs” or otherwise not part of the merits; and the Court even accepted for purposes of argument that the Colorado statute in that case “ma[de] plain” that the fees it authorized “are to be part of the merits [***16] judgment.” *Ibid.* But this did not matter. As the Court explained, the issue of attorney’s fees was still [**679] collateral for finality purposes under §1291. The Court was not then, nor is it now, “inclined to adopt a disposition that requires the merits or nonmerits status of each attorney’s fee provision to be clearly established before the time to appeal can be clearly known.” *Id.*, at 202, 108 S. Ct. 1717, 100 L. Ed. 2d 178. There is no reason to depart here from this sound reasoning. By arguing that a different rule should apply to fee claims authorized by contract because they are

more often a matter of damages and thus part of the merits, the Funds seek in substance to relitigate an issue already decided in *Budinich*.

HN7 LEdHN[7] [7] Were the jurisdictional effect of an unresolved issue of attorney's fees to depend on whether the entitlement to fees is asserted under a statute, as distinct from a contract, the operational consistency and predictability stressed in *Budinich* would be compromised in many instances. Operational consistency is not promoted by providing for different jurisdictional effect to district court decisions that leave unresolved otherwise identical fee claims based solely on whether the asserted right to fees is based [***17] on a contract or a statute.

[*781] The Funds' proposed distinction also does not promote predictability. Although sometimes it may be clear whether and to what extent a fee claim is contractual rather than statutory in nature, that is not always so. This case provides an apt illustration. The Funds' notice of motion itself cited just ERISA; only by consulting the accompanying affidavit, which included an oblique reference to the CBA, could it be discerned that a contractual fee claim was being asserted in that filing. This may explain why the District Court's July 25 decision cited just ERISA, without mention or analysis of the CBA provision or any other contractual provision. *792 F. Supp. 2d, at 140*.

The Funds urge the importance of avoiding piecemeal litigation. The basic point is well taken, yet, in the context of distinguishing between different sources for awards of attorney's fees, quite inapplicable. The Court was aware of piecemeal litigation concerns in *Budinich*, but it still adopted a uniform rule that an unresolved issue of attorney's fees for the litigation does not prevent judgment on the merits from being final. Here it suffices to say that the Funds' concern over piecemeal litigation, [***18] though starting from a legitimate principle, is counterbalanced by the interest in determining with promptness and clarity whether the ruling on the merits will be

appealed. This is especially so because claims for attorney's fees may be complex and require a considerable amount of time to resolve. Indeed, in this rather simple case, the fee-related submissions take up well over 100 pages in the joint appendix. App. 64-198.

HN8 LEdHN[8] [8] The Federal Rules of Civil Procedure, furthermore, provide a means to avoid a piecemeal approach in the ordinary run of cases where circumstances warrant delaying the time to appeal. Rule 54(d)(2) provides for motions claiming attorney's fees and related nontaxable expenses. Rule 58(e), in turn, provides that the entry of judgment ordinarily may not be delayed, nor may the time for appeal be extended, in order to tax costs or award fees. This accords with *Budinich* and confirms the general practice of treating fees and costs as collateral for finality purposes. Having recognized this premise, Rule 58(e) further provides that if a timely motion for attorney's fees is made under [***680] Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective [***19] to order that the motion have the same effect as a timely motion under Rule 59 for purposes of Federal Rule of Appellate Procedure 4(a)(4). This delays the running of the time to file an appeal until the entry of the order disposing of the fee motion. Rule 4(a)(4)(A)(iii).

In their brief in opposition to the petition for certiorari, the Funds argued that in their case this procedure would not have been applicable. Brief in Opposition 34. **HN9 LEdHN[9]** [9] Rule 54(d)(2) provides that "[a] claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages." The Advisory Committee Notes to Rule 54(d)(2) state that the procedure outlined in that Rule "does not . . . apply to fees recoverable as an element of damages, as when sought under the terms of a contract; such damages typically are to be claimed in a pleading and may involve

issues to be resolved by a jury.” Advisory Committee’s 1993 Note on *subd. (d), par. (2) of Fed. Rule Civ. Proc. 54*, 28 U. S. C. App., pp. 240-241.

The Funds no longer rely on their reading of *Rule 54* and the Advisory Committee Notes as a basis for their argument that the [***20] June 17 decision was not final under §1291. And this is not a case in which the parties attempted to invoke [*782] *Rule 58(e)* to delay the time to appeal. Regardless of how the Funds’ fee claims could or should have been litigated, however, the Rules eliminate concerns over undue piecemeal appeals in the vast range of cases where a claim for attorney’s fees is made by motion under *Rule 54(d)(2)*. That includes some cases in which the fees are authorized by contract. See 2 M. Derfner & A. Wolf, *Court Awarded Attorney Fees* ¶18.01[1][c], pp. 18-7 to 18-8 (2013) (remarking that *Rule 54(d)(2)* applies “regardless of the statutory, contractual, or equitable basis of the request for fees,” though noting inapplicability where attorney’s fees are an element of damages under the substantive law governing the action).

HN10 LEdHN[10] [10] The complex variations in statutory and contractual fee-shifting provisions also counsel against making the distinction the Funds suggest for purposes of finality. Some fee-shifting provisions treat the fees as part of the merits; some do not. Some are bilateral, authorizing fees either to plaintiffs or defendants; some are unilateral. Some depend on prevailing party status; some do not. [***21] Some may be unclear on these points. The rule adopted in *Budinich* ignores these distinctions in favor of an approach that looks solely to the character of the issue that remains open after the court has otherwise ruled on the merits of the case.

In support of their argument against treating contractual and statutory fee claims alike the Funds suggest, nevertheless, that it is unclear whether *Budinich* still applies where, as here, auditor’s fees (or other nonattorney professional

fees) are included as an incidental part of a motion for attorney’s fees and costs. (In this case, auditor’s fees accounted for \$6,537 of the \$143,600.44 requested in total.) To the extent the Funds suggest that similar fees will be claimed alongside attorney’s fees only where a contractual fee claim is involved, they are incorrect. **HN11 LEdHN[11]** [11] Statutory fee claims are not always limited [*681] to attorney’s fees *per se*. Many fee-shifting statutes authorize courts to award additional litigation expenses, such as expert fees. See *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U. S. 83, 89, n. 4, 111 S. Ct. 1138, 113 L. Ed. 2d 68 (1991) (listing statutes); cf. *Fed. Rule Civ. Proc. 54(d)(2)(A)* (providing mechanism for claims by motion for “attorney’s fees and related [***22] nontaxable expenses”). Where, as here, those types of fees are claimed and awarded incidental to attorney’s fees, there is no apparent reason why parties or courts would find it difficult to tell that *Budinich* remains applicable.

B

The Funds separately contend that the June 17 decision was not final because their motion claimed some \$8,561.75 in auditor’s and attorney’s fees (plus some modest additional expenses) incurred prior to the commencement of litigation. These included fees for the initial audit to determine whether Haluch was complying with the CBA, as well as attorney’s fees incurred in attempting to obtain records from Haluch, researching fund auditing rights, drafting a letter demanding payment, and working on the initial complaint. Brief for Respondents 4-5; App. 64-67, 81-88. The Funds argue that these fees do not fall within the scope of *Budinich*, because the Court in *Budinich* referred only to fees “for the litigation in question,” 486 U. S., at 202, 108 S. Ct. 1717, 100 L. Ed. 2d 178, or, equivalently, “attributable to the case,” *id.*, at 203, 108 S. Ct. 1717, 100 L. Ed. 2d 178.

The fact that some of the claimed fees accrued before the complaint was filed is inconsequential. As this Court has observed, *HNI2 LEdHN[12]* [12] “some of the services performed before [***23] a lawsuit is formally commenced by [*783] the filing of a complaint are performed ‘on the litigation.’” *Webb v. Dyer County Bd. of Ed.*, 471 U.S. 234, 243, 105 S. Ct. 1923, 85 L. Ed. 2d 233 (1985). “Most obvious examples” include “the drafting of the initial pleadings and the work associated with the development of the theory of the case.” *Ibid.* More generally, pre-filing tasks may be for the litigation if they are “both useful and of a type ordinarily necessary to advance the . . . litigation” in question. *Ibid.*

The fees in this case fit that description. Investigation, preliminary legal research, drafting of demand letters, and working on the initial complaint are standard preliminary steps toward litigation. See *id.*, at 250, 105 S. Ct. 1923, 85 L. Ed. 2d 233 (Brennan, J., concurring in part and dissenting in part) (“[I]t is settled that a prevailing party may recover fees for the time spent before the formal commencement of the litigation on such matters as . . . investigation of the facts of the case, research on the viability of potential legal claims, [and] drafting of the complaint and accompanying documents”); 2 Derfner, *supra*, ¶16.02[2][b], at 16-15 (“[H]ours . . . spent investigating facts specific to the client’s case

should be included in [***24] the lodestar, whether [or not] that time is spent prior to the filing of a complaint”). To be sure, the situation would differ if a party brought a freestanding contract action asserting an entitlement to fees incurred in an effort to collect payments that were not themselves the subject of the litigation. But that is not this case. Here the unresolved issue left open by the June 17 order was a claim for fees for the case being resolved on the merits.

[**682] * * *

There was no timely appeal of the District Court’s June 17 order. The judgment of the Court of Appeals is reversed. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

References

(Matthew Bender 3d ed.)L Ed Digest, Appeal §§23, 882.4L Ed Index, Attorneys’ Fees; Finality or Conclusiveness; Rules of Appellate Procedure--Supreme Court.Supreme Court.What judgment or decree of state court in civil cases is final for purpose of review by United States Supreme Court.Prerequisites of the grant of an extension of [***25] time within which to appeal to United States Court of Appeals.

Rodrigue v. Morehouse Det. Ctr.

United States District Court for the Western District of Louisiana, Monroe Division

June 23, 2014, Decided; June 23, 2014, Filed

CIVIL ACTION NO. 09-985

Reporter

2014 U.S. Dist. LEXIS 86707; 2014 WL 2879751

CALVIN RODRIGUE versus MOREHOUSE
DETENTION CENTER, ET AL

Prior History: *Rodrigue v. Grayson*, 557 Fed. Appx. 341, 2014 U.S. App. LEXIS 3724 (5th Cir. La., Feb. 27, 2014)

Core Terms

attorney's fees, pre judgment interest, damages, excusable neglect, costs, entry of judgment, amended judgment, motion to amend, days

Counsel: [*1] For Calvin Rodrigue, Plaintiff: Ross Stewart Owen, LEAD ATTORNEY, Shreveport, LA; Jeananne Self, Self Law Firm, Bossier City, LA.

For Warden Robert Tapp, Assistant Warden Issaic Brown, Lt Brad Fife, Sgt Clacks, Mike Tubbs, Sheriff of Morehouse Parish also known as John Doe, Defendants: Timothy R Richardson, LEAD ATTORNEY, Freeman R Matthews, Usry Weeks & Matthews (NO), New Orleans, LA.

For Nurse D Grayson, Defendant: Timothy R Richardson, Freeman R Matthews, Usry Weeks & Matthews (NO), New Orleans, LA.

Judges: ELIZABETH ERNY FOOTE, UNITED STATES DISTRICT JUDGE. MAGISTRATE JUDGE KAREN L. HAYES.

Opinion by: ELIZABETH ERNY FOOTE

Opinion

MEMORANDUM RULING

Plaintiff Calvin Rodrigue, a prison inmate, was awarded \$280,000.00 after a bench trial for violations of his Eight Amendment right to be free from cruel and unusual punishment. After trial, the Court found that Lieutenant Brad Fife and Nurse Grayson ("Defendants") acted with deliberate indifference to Rodrigue's serious medical condition and ultimately caused the perforation of his appendix. Rodrigue now moves, approximately a year-and-a-half after entry of judgment and shortly after the conclusion of an unsuccessful appeal by Defendants, for attorneys fees under *42 U.S.C. §§ 1983*, [*2] *1988* and for prejudgment interest. [Record Document 114]. For the following reasons, the Court **DENIES** the motion.

I. Factual and Procedural Background

The facts relating to the Eight Amendment violation are laid out in detail in the Court's September 28, 2012 Memorandum Ruling, [Record Document 107, pp. 5-13], *Rodrigue v. Morehouse Detention Ctr., Civil Action No. 09-985*, 2012 U.S. Dist. LEXIS 141007, 2012 WL 4483438, at *2-6 (W.D. La. Sept. 28, 2012), and in the Fifth Circuit's opinion affirming that ruling, *Rodrigue v. Grayson*, 557 Fed. Appx. 341, 2014 U.S. App. LEXIS 3724, 2014 WL 762451, at *1-2 (5th Cir. 2014). For the purposes of the present motion, only the following procedural background

is necessary. Mr. Rodrigue included a demand for attorneys fees and costs in his original complaint and his proposed pretrial order. [Record Documents 1, p.21, and 72, p.1]. Before entering judgment, the Court requested that the parties submit a proposed final judgment. [See Record Document 108]. The judgment proposed by both parties held Defendants Lt. Brad Fife and Nurse Grayson liable for \$280,000 in general compensatory damages and \$10,000 in court costs, but it did not mention attorney's fees. The Court signed the final judgment on November 28, [*3] 2012, which stated:

IT IS ORDERED, ADJUDGED, AND DECREED that judgment be entered herein against Plaintiff, Calvin Rodrigue, in favor of Defendants, Sgt. Keith Clacks, Assistant Warden Issiac Brown, Warden Robert Tapp, Sheriff Mike Tubbs, and the Morehouse Parish Sheriff's Office, dismissing this action against those parties with prejudice.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that judgment be entered herein in favor of Plaintiff, Calvin Rodrigue, and against Defendants, Lt. Brad Fife and Nurse Grayson, who are jointly and severally liable to Plaintiff Calvin Rodrigue in the amount of \$280,000 in general compensatory damages, \$10,000 in court costs, and interest as allowed by law.

[Record Document 109, p.1] (emphasis in original). Notice of appeal was filed by Defendants on December 10, 2012. [Record Document 110]. On March 24, 2014 the Fifth Circuit mandate affirming this Court's decision was filed in the record. [Record Document 113]. Finally, on April 4, 2014, Mr. Rodrigue moved for attorney fees and prejudgment interest. [Record Document 114].

II. Analysis

A. The Timeliness of the Motion for Attorney's Fees

Defendants oppose the motion for attorney's fees as untimely. They cite [*4] *Federal Rule of Civil Procedure 54(d)(2)*, which provides as follows:

(A) Claim to Be by Motion. A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:

- (i) be filed no later than 14 days after the entry of judgment;

Fed. R. Civ. P. 54(d)(2). *Rule 54(a)* defines the term "judgment" to include "a decree and any order from which an appeal lies." *Fed. R. Civ. P. 54(a)*. There is no question that Mr. Rodrigue's motion for attorney's fees was filed more than fourteen days after the November 28, 2012 final judgment, and therefore it would appear to be time-barred. Mr. Rodrigue, however, attempts to avoid this result by arguing that the November 28, 2012 judgment was not final because it failed to mention attorney's fees, which Mr. Rodrigue contends is an element of his damages, and that therefore it should be amended to include attorney's fees. [Record Document 119, pp. 1-2]. He suggests that "[w]hen this honorable court enters an amended judgment, Counsel for petitioner [*5] will timely file for the approval of attorney fees." *Id.* at 2.

Mr. Rodrigue cites *Carter v. Gen. Motors Corp.* in support; but *Carter*, is easily distinguished. *983 F.2d 40 (5th Cir. 1993)*. The *Carter* panel held that a judgment holding a party liable for fees and costs without specifying the amount of those fees and costs was not final until the respective amounts were fixed. *983 F.2d at 42*. The judgment in the instant case, however, makes no mention of

attorney's fees, and pursuant to the parties' stipulation assesses costs of \$10,000. Carter, therefore, has no bearing on this case.

Neither does Yousuf v. UHS of De La Ronde, Inc. help Mr. Rodrigue. 110 F. Supp. 2d 482 (E.D. La. 1999). Mr. Rodrigue does not discuss or give pin cites for either of the two cases he cites, but the Court assumes that he is referring to the portion of Yousuf that holds that a second motion for attorney's fees filed after entry of an amended judgment was timely. 110 F. Supp. 2d at 487-89. In Yousef, the court granted a Rule 59 motion to amend the judgment in order to correct a double-counting error in the damages calculation. Id. at 483-84. After entry of an amended judgment correcting the error, the plaintiff [*6] moved for attorney's fees, and the court held that this motion was timely because the entry of an amended judgment restarted Rule 54(d)(2)(B)'s fourteen-day clock. Id. at 487-88. In the instant case, however, Mr. Rodrigue moves to amend the judgment to add attorneys fees, not to assess attorney's fees after a separate amended judgment has already been entered. Yousef therefore sheds no light on the instant situation.

Mr. Rodrigue's argument fails for two additional reasons. First, the Supreme Court has held that the finality of a judgment is not compromised by its failure to include attorney's fees. Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Egn'rs and Participating Emp'rs, U.S. , 134 S.Ct. 773, 777, 187 L. Ed. 2d 669 (2014) ("Whether the claim for attorney's fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal."); Budinich v. Becton Dickinson & Co., 486 U.S. 196, 202-03, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988) ("a decision on the merits is a final decision . . . whether or not there remains for adjudication a request for attorney's fees attributable [*7] to the case.") (internal quotation

marks omitted); White v. N.H. Dept. of Emp't Sec., 455 U.S. 445, 451-52, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982) ("Regardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has prevailed") (internal quotation marks omitted). A motion for attorneys fees made when there is no mention of attorney's fees in the judgment itself, then, is not a proper motion to amend the judgment under Rule 59. See White, 455 U.S. at 451-52.

Second, even if Mr. Rodrigue's motion could be construed as a motion to amend the judgment, Rule 59 provides that "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). The judgment was entered on November 28, 2012, so the deadline to file a motion to amend the judgment has long since passed.

Courts have excused the late filing of a motion for attorneys fees, pursuant to Rule 6, when the tardiness was caused by excusable neglect. Fed. R. Civ. P. 6(b); Tex. Mfg'd Housing Ass'n, Inc. v. City of Nederland, 101 F.3d 1095, 1107 (5th Cir. 1996) [*8] (no abuse of discretion when district court allowed untimely motion for attorney's fees after finding excusable neglect); Leidel v. Ameripride Servs., Inc., 322 F. Supp. 2d 1206, 1210 (D. Kan. 2004) (excusable neglect found where there was no prejudice to defendant when the motion was filed two days late); but see Atel Mar Investors, LP v. Sea Mar Mgmt., L.L.C., Civ. Action No. 09-1700, 2014 U.S. Dist. LEXIS 7778, 2014 WL 235441, at *10 (E.D. La. Jan. 22, 2014) (when the rule in question is unambiguous, inadvertence, ignorance of the rules, or mistakes construing the rules are not excusable neglect); Tex. Housing Agency v. Verex Assurance, Inc., 176 F.R.D. 534, 536-37 (N.D.Tex. 1998) (same) (citing Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 391, 113 S. Ct. 1489, 123 L.

Ed. 2d 74 (1993)). Mr. Rodrigue, however, has not argued that the tardiness of his motion was the result of excusable neglect. See *RFAR Grp., LLC v. Epiar, Inc., Civil Action No. 3:11-CV-3432-L, 2013 U.S. Dist. LEXIS 59428, 2013 WL 1743880, at *2 (N.D. Tex., Jan. 9, 2013)* (denying motion for attorneys fees where the motion was filed several months after the deadline and where counsel did not argue excusable neglect). Furthermore, extraordinary mitigating circumstances would be required [*9] to support a finding of excusable neglect in this case, given that the motion was filed approximately a year-and-a-half late and the appeal has already concluded. The motion for attorney's fees and expenses [Record Document 114] must therefore be **DENIED** as untimely.

B. Prejudgment Interest

Mr. Rodrigue also moves for prejudgment interest on the damages award. This motion is untimely, as the Supreme Court has held that a motion for discretionary prejudgment interest is effectively a motion to amend the judgment under *Rule 59*, and as mentioned above, motions to amend the judgment must be brought within twenty-eight days of the judgment. *Osterneck v. Ernst & Whinney, 489 U.S. 169, 175-76, 109 S. Ct. 987, 103 L. Ed. 2d 146 (1989)* (noting that prejudgment interest, unlike attorney's fees, was traditionally considered an element of the plaintiff's compensation).

Even if the request were timely, the Court would not grant prejudgment interest. State law governs the calculation of prejudgment interest in *§ 1983* claims, but the decision whether to award prejudgment interest is discretionary. *Sawyer v. Hickey, 68 F.3d 472, 1995 WL 581989, at *3 (5th Cir. 1995)* (citing *Pressey v. Patterson, 898 F.2d 1018, 1026 (5th Cir. 1990)*); *San Jacinto Sav. v. Kacal, 8 F.3d 21, 1993 WL 455886, at *2 (5th Cir. 1993)* [*10] ("The district court has sound discretion to award prejudgment interest in such

cases. It does not have to award prejudgment interest on *Section 1983* claims.") (citing *Hale v. Fish, 899 F.2d 390, 404 (5th Cir. 1990)*). The Court awarded \$280,000 for pain and suffering and emotional distress but found that Mr. Rodrigue had not proved that he would be liable for any medical expenses. [Record Document 107, pp. 36-38], *Rodrigue, 2012 U.S. Dist. LEXIS 141007, 2012 WL 4483438, at *18*. Prejudgment interest is a measure that "serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *West Virginia v. United States, 479 U.S. 305, 311 n. 2, 107 S. Ct. 702, 93 L. Ed. 2d 639 (1987)*. Prejudgment interest may be appropriate in a *§ 1983* action if it is necessary to make the plaintiff whole. *Pressey, 898 F.2d at 1024-27* (discussing award of prejudgment interest for *§ 1983* damages that included extensive medical expenses); *Blackburn v. Snow, 771 F.2d 556, 573 (1st Cir. 1985)* ("We have held that, in cases brought under *§ 1983*, an award of prejudgment interest, though not mandatory, may be made if necessary to [*11] compensate [the plaintiff] fully.") (quoting *Furtado v. Bishop, 604 F.2d 80, 97 (1st Cir. 1979)*). The calculation of damages for pain and suffering is necessarily an inexact science. Nevertheless, in the instant case, the Court found that \$280,000 was sufficient to compensate Mr. Rodrigue at the time of judgment. The situation is thus unlike *Tesch v. Prudential Ins. Co. of Am.*, the principle case on which Mr. Rodrigue relies, where the plaintiff was owed a certain sum of money at a definite time before entry of judgment and therefore required compensation above the nominal amount owed in order to reflect the time-value of that money while he did not have use of it. *829 F. Supp. 2d 483, 502-03 (W.D. La., 2011)*. Here, the Court determined that at the time of judgment, Mr. Rodrigue's non-economic damages were valued at \$280,000. No adjustment for the fact that Mr. Rodrigue did not have the use of that money between the time he filed suit and

the entry of judgment is therefore required.

/s/ Elizabeth Erny Foote [*12]

III. Conclusion

For the foregoing reasons, Mr. Rodrigue's Motion for Attorney Fees [Record Document 114] is **DENIED.**

ELIZABETH ERNY FOOTE

UNITED STATES DISTRICT JUDGE

THUS DONE AND SIGNED in Shreveport, Louisiana, this 23rd day of June, 2014.