

VERMONT SUPERIOR COURT  
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CIVIL DIVISION  
Case No. 22-CV-04364

Jeffrey Rivard v. Susan Smallheer, et al

## ENTRY REGARDING MOTION

Title: Motion for Attorney's Fees (Motion: 8)  
Filer: Matthew B. Byrne  
Filed Date: September 19, 2023

This matter comes before the court on Defendants' motion for attorney's fees and costs pursuant to V.R.C.P. 54(d)(2), 12 V.S.A. § 1041(f)(1), and 12 V.S.A. § 5771, in connection with the special motion to strike, that was granted in the instant case pursuant to Vermont's Anti-SLAPP statute. 12 V.S.A. § 1041. Plaintiff opposes the motion. The motion is **GRANTED**. Defendants are granted **\$14,741.80** in reasonable attorney's fees.

### I. Procedural History

Plaintiff filed his Complaint in Windham Superior Court on December 4, 2022, alleging libel, defamation, negligence, and false light based on statements made in a newspaper article reporting on a jury trial in which plaintiff was the accused. Plaintiff's Complaint at 1. On January 17, 2023, Defendants filed both a Motion to Dismiss and a Motion to Strike the Complaint pursuant to 12 V.S.A. § 1041(a)(1). On April 30, 2023, this Court granted Defendants' special motion to strike and dismissed Plaintiff's Complaint pursuant to 12 V.S.A. § 1041(a)(1). Entry Regarding Motion dated April 30, 2023. On May 1, 2023, Plaintiff filed a Notice of Appeal, which was docketed by the Vermont Supreme Court as 23-AP-149 on May 2, 2023. On September 15, 2023, the Vermont Supreme Court affirmed the Superior Court's order. *Rivard v. Brattleboro Reformer & Susan Smallheer*, No. 2023-149, 2023 WL 5994216 (Vt. September 15, 2023) (unpublished mem.). On October 2, 2023, the same court also denied Plaintiff's Motion to Reargue. Entry Order in *Rivard v. Brattleboro Reformer & Susan Smallheer*, No. 2023-149, 2023 WL 5994216 (Vt. October 2, 2023) (unpublished mem.). On October 2, Plaintiff filed a motion to reconsider with this court. On October 20, 2023, this court denied the motion. Entry Regarding Motion dated October 20, 2023.

Defendants now move this court to award reasonable attorney's fees pursuant to V.R.C.P. 54(d)(2), 12 V.S.A. § 1041(f)(1), and 12 V.S.A. § 5771, in connection with the special motion to strike. Plaintiff opposes the motion. See Affidavit of Jeffrey Rivard and Plaintiff's Response in Opposition to Award of Attorney Fees.

## II. Standard

In general, Vermont applies the ‘American Rule,’ requiring each party to bear their own fees “in the absence of a statute or agreement to the contrary.” *Perez v. Travelers Ins. ex rel. Ames Dep’t Stores, Inc.*, 2006 VT 123, ¶ 8, 181 Vt. 45. Departure from the ‘American Rule’ is permitted only in exceptional circumstances—for instance, where there is a statutory fee-shifting provision. *Id.* Here, Defendants seek attorney’s fees pursuant to the anti-SLAPP statute, which provides that “[i]f the court grants the special motion to strike, the court shall award costs and reasonable attorney’s fees to the defendant.” 12 V.S.A. § 1041(f)(1). The Vermont Supreme Court interpreted the plain language, “shall award,” of this provision to indicate that “the award of fees is mandatory when a motion to strike is granted.” *Cornelius v. The Chronicle, Inc.*, 2019 VT 4, ¶ 19, 209 Vt. 405; *Kwon v. Eaton*, 2010 VT 73, ¶ 13, 188 Vt. 623 (explaining that when “statute requires an award of attorney’s fees, it is not within the trial court’s discretion to determine whether to award such fees”). See also *Perez*, 2006 VT 123, ¶ 8 (the court having granted the motion to strike, an award of fees was “mandatory”). “The trial court does, however, have discretion in determining the amount of an award....” *Cornelius*, 2019 VT 4, ¶ 19.

The statute governing this case explicitly requires an award of “reasonable attorney’s fees. 12 V.S.A. § 1041(f)(1). Where a party is entitled to statutory attorney’s fees, “it is not within the court’s discretion to determine whether to award such fees, but rather its task is to determine what constitutes *reasonable* fees in each instance.” *L’Esperance v. Benware*, 2003 VT 43, ¶ 21, 175 Vt. 292 (emphasis supplied) (citing *Gramatan Home Investors Corp. v. Starling*, 143 Vt. 527, 535–36, (1983)). Indeed, in calculating attorney’s fees, Vermont courts center their analysis on the reasonableness of the fees—including the rate charged and the time invested—under all of the circumstances. *Perez*, 2006 VT 123, ¶ 13. Generally, in civil cases, Vermont courts employ the ‘lodestar figure’ to determine reasonable fees. *Spooner v. Town of Topsham*, 2010 VT 71, ¶ 8, 188 Vt. 293. The figure is a result of “multiplying the number of hours reasonably expended on the case by a reasonable hourly rate.” *L’Esperance*, 2003 VT 43, ¶ 22. That fee may then be adjusted upward or downward based on various factors, including

(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

*Spooner*, 2010 VT 71, ¶ 8 (citing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974) abrogated on other grounds by *Blanchard v. Bergeron*, 489 U.S. 87 (1989)).

## III. Analysis

In this case, the special motion to strike pursuant to 12 V.S.A. § 1041(a)(1) was granted by this court. Entry Regarding Motion dated April 30, 2023. The order granting the motion was

subsequently affirmed on appeal by the Vermont Supreme Court. *Rivard v. Brattleboro Reformer & Susan Smallheer*, No. 2023-149, 2023 WL 5994216 (Vt. September 15, 2023) (unpublished mem.). Now, Defendants move the court to award \$14,741.80 in attorney's fees. Defendants provide an exhibit and an accompanying affidavit laying out the fees and expenses. Defendants' Exhibit 2 and Affidavit of Matthew B. Byrne. Plaintiff did not request a hearing on the motion, though he generally objects to the award. See Affidavit of Jeffrey Rivard and Plaintiff's Response in Opposition to Award of Attorney Fees.

After having reviewed the hourly rate and the hours billed, the court finds that both the fees and costs of **\$14,741.80** and the hours expended are reasonable. A great majority of work on the case seems to have been done by Attorney Byrne. The court finds counsel's fees at \$435/hour commensurate with his statewide experience, training, reputation, and expertise in this specific area of law. The court also takes into account the sheer number of motions and responses required in this case. Moreover, the fees charged, and hours expended correlate with other awards pursuant to Vermont's Anti-SLAPP statute awarded by Vermont courts in the past. See e.g. *Gibbons v. Gray*, No. 2023-55, 2023 WL 5994062 (September 15, 2023) (unpublished entry order). Therefore, the court grants Defendants' Motion in the amount sought.

#### Order

For the foregoing reasons, Defendants' motion for reasonable attorney's fees is **GRANTED**. The court awards Defendants, Brattleboro Reformer and Susan Smallheer, their reasonable attorney's fees and costs in this matter in the amount of **\$14,741.80**.<sup>1</sup>

Signed electronically October 20, 2023 pursuant to V.R.E.F 9(d).



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**David Barra**  
**Superior Court Judge**

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<sup>1</sup> The court also notes that in the alternative, it would award fees under 12 V.S.A. § 5771 absent its finding that Defendants are entitled to reasonable attorney's fees and costs under 12 V.S.A. § 1041. (12 V.S.A. § 5771 allows the court to award attorney's fees to a defendant who prevails in a defamation action where the court finds that the "action was frivolous and without merit").