

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

TENNESSEANS FOR SENSIBLE)	
ELECTION LAWS,)	
)	
Plaintiff,)	
)	
vs.)	No. 18-821-III
)	
TENNESSEE BUREAU OF ETHICS)	
AND CAMPAIGN FINANCE,)	
REGISTRY OF ELECTION FINANCE,)	
and DAVIDSON COUNTY DISTRICT)	
ATTORNEY GENERAL,)	
)	
Defendants.)	

MEMORANDUM AND ORDER GRANTING IN PART
5/8/2020 PLAINTIFF’S MOTION FOR LEAVE TO SEEK
UPWARD ADJUSTMENT OF ATTORNEY’S FEES AND COSTS

On May 8, 2020, the Plaintiff filed a *Motion For Leave To Seek Upward Adjustment Of Attorney’s Fees And Costs*. On May 21, 2020, Counsel for both parties filed a *Joint Notice Of Waiver of Oral Argument And Submission On The Briefs* notifying the Court of their agreement to waive oral argument and have the *Motion* decided on the papers.

After reviewing the papers submitted in support and in opposition of *Plaintiff’s Motion For Leave To Seek Upward Adjustment Of Attorney’s Fees And Costs*, it is ORDERED that the *Motion* is granted in part and denied in part as follows.

1. It is ORDERED that the Plaintiff is awarded its additional litigation costs and post-judgment interest on the \$25,543.17 judgment issued by this Court on October 24,

2018. The additional litigation costs and post-judgment interest are those identified in Item E, pages 11-12 of the supporting memorandum the Plaintiff filed on May 8, 2020.

The authority for this ruling is Tennessee Civil Procedure Rule 41, Tennessee Code Annotated sections 47-14-121–122, and the numerous federal circuits, including the Sixth Circuit. These cases provide that post-judgment interest accrues and is recoverable on attorney fees awarded pursuant to 42 U.S.C. § 1988. *See, e.g., Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 250 F.3d 482, 484–85 (6th Cir. 2001) (“Initially, we note that this Court has never expressly decided the issue of whether an award of attorney fees awarded pursuant to 42 U.S.C. § 1988 accrues interest under 28 U.S.C. § 1961(a). Section 1961 provides, in pertinent part: “Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment. . . .” 28 U.S.C. § 1961(a). Most of our sister circuits have either expressly or impliedly concluded that the “any money judgment” provision of § 1961 includes a judgment awarding attorney fees. We have found no cases rejecting this rule. Because we see no reason to distinguish between judgments for attorney fees and judgments for other types of damages, we also construe the term “any money judgment” as including a judgment awarding attorney fees.”) (citations omitted).

2. It is ORDERED that recovery of the attorney’s fees incurred by the Plaintiff in connection with the appellate Opinion, Case No. M2018-01967-COA-R3-CV (Dec. 12, 2019), is denied. From the facts that Plaintiff’s Counsel did file a *Motion To Clarify Or, In The Alternative, For Rehearing As To Section III-E Of The Court’s Opinion Regarding*

Appellate Attorney's Fees for rehearing and clarification with the appellate court in which he requested attorney's fees incurred on appeal, and that rehearing was denied, this Court concludes that what the Court of Appeals meant by its denial is that it was denying the Plaintiff recovery of those fees. The Court does not construe the Court of Appeals' decision, in particular page 39 cited by the Plaintiff, as foreclosing that court awarding fees and allowing this Court to determine whether to award fees incurred on appeal.

In making this determination, the Court has applied *Killingsworth v. Ted Russell Ford, Inc.*, 205 S.W.3d 406, 411, FN 2 (Tenn. 2006). This case provides the following with respect to whether the trial court or the appellate court shall determine whether to award attorney's fees incurred on appeal.

As noted by the court below, one of four results may obtain following a party's request to an appellate court for an award of appellate attorney's fees: (1) the request is denied; (2) the request is granted and the appellate court sets the amount; (3) the request is granted with a remand to the trial court to set the amount; or (4) the issue is remanded to the trial court for a determination of whether the award should be made and, if so, in what amount.

This Court concludes that the alternative selected by the Court of Appeals is that it decided that fees incurred on appeal would not be awarded and that matter was not part of the remand of this case. This Court concludes that the combination of "we respectfully decline to award fees on appeal" and denial of the Plaintiff's motion for reconsideration of this issue by the appellate court foreclose this Court from deciding the issue. Thus, Item C, pages 8-10 of the Plaintiff's May 8, 2020 memorandum is denied.

The Plaintiff makes the additional argument at pages 7-8, Item B of the Plaintiff's May 8, 2020 memorandum that the Defendant's concession/stipulation, in the Defendant's

briefing filed with the appellate court, that this Court should be the forum for deciding whether to award fees incurred on appeal, is a judicial admission dispositive of the issue. This Court, however, comes to a different conclusion.

A judicial admission is defined as, “an admission by one’s attorney as a substitute for legal evidence of the facts at trial.” *State v. Demodica*, No. 99, 1990 WL 21233, at *8 (Tenn. Crim. App. Mar. 9, 1990) (citing *Black's Law Dictionary* 68 (4th ed. 1951)). The decision whether to award attorney’s fees for prevailing on appeal, however, is not a fact. As stated in *Killingsworth v. Ted Russell Ford, Inc.*, the alternatives for the award of fees expended on appeal are a decision for the appellate court. Thus, while a judicial admission is binding on the party who makes it and estops that party from taking a contrary position, an admission of counsel is not binding on a discretionary decision to be made by an appellate court. A stipulation by a party on a matter reserved for the discretion of a court cannot usurp the decision-making prerogative of that court.

With respect to the Plaintiffs’ argument that a manifest injustice will occur if this Court does not award the fees incurred on appeal, the Court concludes that none of the “exceptional circumstances” is present in this case to authorize the Court to depart from the Court of Appeal’s discretionary decision to deny the award of attorneys’ fees on appeal. *State v. Williams*, 52 S.W.3d 109, 124 (Tenn. Crim. App. 2001) (“Three exceptional circumstances may justify a departure from the “law of the case”; they are: (1) a significant change in controlling legal authority; (2) substantially different evidence offered after remand; and (3) a clearly erroneous prior decision that, if not corrected, will result in a manifest injustice.”) (citation omitted). While this Court concludes that reasonable minds

can differ in this case on whether to award fees incurred on appeal, there is a rational basis for the Court of Appeals' decision. Accordingly, there is no "manifest injustice," but, instead, a close call on a decision, and that does not qualify for application of the doctrine. Accordingly, Item D pages 9-11 of the Plaintiff's May 8, 2020 memorandum is denied.

3. It is ORDERED that the Plaintiff is awarded additional attorney's fees incurred in connection with its application to the Tennessee Supreme Court to conduct a "reach-down" proceeding (TENN. CODE ANN. § 16-3-201(d)) in this case as identified in Item F pages 12-15 of its May 8, 2020 memorandum. The Court's justification for the award, factually, is that the post-judgment conduct of the Defendant in not complying with the rulings of this Court by the Defendant continuing to post notices on its website contrary to the Court's ruling in this case and the Defendant's shifting position on seeking a stay are a reasonable basis for the Plaintiff filing its reach-down petition with the Tennessee Supreme Court. With respect to the law, this award of fees is authorized because it pertains and arises out of matters which occurred in this trial court and which were outside of and not considered by the Tennessee Court of Appeals in denying recovery of attorney's fees incurred on appeal. In other words, this Court concludes from reading the Court of Appeals decision that it did not rule on this issue, and therefore it remains within the discretion of this Court to rule on the issue, *see, e.g., Killingsworth v. Ted Russell Ford, Inc.*, 205 S.W.3d 406, 411, FN 2 (Tenn. 2006) ("... the issue is remanded to the trial court for a determination of whether the award should be made and, if so, in what amount.") and, as just stated, the facts justify an award of these attorney's fees.

4. It is therefore ORDERED that to quantify the remaining fees and costs, by June 5, 2020, the Plaintiff shall file its application, pursuant to Local Rule § 5.05, for recovery. By June 19, 2020, opposition shall be filed. A reply, if any, shall be filed by June 24, 2020. Following that the Court shall quantify the amount to be paid and issue a ruling, based upon the papers; oral argument shall not be conducted.

5. In addition it is ORDERED that the Court file shall be reopened.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

cc: Due to the pandemic, and as authorized by the April 24, 2020, Tennessee Supreme Court Order *In Re: COVID-19 Pandemic*, through May 31, 2020, copies will be sent only electronically to those whose email addresses are on file with the Court. If you fit into this category but nevertheless require a mailed copy, call 615-862-5719 to request a copy by mail.

For those who do not have an electronic address on file with the Court, your envelope will be hand-addressed and mailed with the court document enclosed, but if you have an email address it would be very helpful if you would provide that to the Docket Clerk by calling 615-862-5719.

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