IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

DR. RACHEL TUDOR, Plaintiff, v. 1. MARIE GALINDO, 2. BRITTANY STEWART, 3. JILLIAN WEISS, 4. EZRA YOUNG, 4. TRANSGENDER LEGAL DEFENSE AND EDUCATION FUND Defendants. 1. EZRA YOUNG, 2. BRITTANY STEWART, Counterclaim Plaintiffs, v. 1. DR. RACHEL TUDOR, 2. JILLIAN WEISS Counterclaim Defendants. 1. EZRA YOUNG, 2. BRITTANY STEWART, Third-party Plaintiffs, v. 1. SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, 2. REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA, Third-Party Defendants.	Case No. 5:22-cv-00480-JD

EZRA YOUNG AND BRITTANY STEWART'S RESPONSE TO SOUTHEASTERN AND RUSO'S MOTION TO DISMISS (ECF No. 36)

INTRODUCTION AND BACKGROUND

Former Counsel find ourselves in a bizarre position. After several years, Dr. Tudor prevailed in her civil rights case against Southeastern and RUSO. *See generally Tudor v. Southeastern et al.*, 5:15-cv-324-C (W.D. Okla. filed Mar. 30, 2015). Rather than facilitate appropriate payment of Former Counsels' fees and costs accrued in the merits case, Tudor settled around our interests with Southeastern and RUSO. She then turned around and filed the instant interpleader case.

The overarching theory of Southeastern and RUSO's motion to dismiss is ostensibly that Former Counsels' only option to be compensated for our work in the merits case is to squabble over a "fund" the merits parties concocted in violation of Oklahoma state law with other attorneys who Tudor also stiffed as well as Weiss whom Former Counsel are also suing for her role in that same sham settlement.

Former Counsel sacrificed years of our lives to hold Southeastern and RUSO to account for violating Dr. Tudor's civil rights. We did the lions' share of the work in Tudor's merits case. We followed Tudor's case through multiple courts and circuits, proved her case to a Western District jury, dipped into our personal savings to keep her case afloat, and ultimately not only preserved critical wins at the trial court on appeal but also secured additional equitable relief including reinstatement with tenure.

The State of Oklahoma insisted on litigating each and every point in the merits case for years on end. That strategy backfired. Having lost on the merits at each and every turn, the bills all came due.

The bulk of Southeastern and RUSO's liability in the merits case lies in what is owed to Tudor's past and present counsel. Because of the way federal civil rights cases are structured, Dr. Tudor was due at most a few hundred thousand dollars for violations of her civil rights. Meanwhile, Former Counsel docketed fees and costs petitions in the seven figures none of which Southeastern and RUSO ever deigned to dispute on the merits.

Rather than pay Former Counsel what we are owed, Southeastern and RUSO invited Tudor to "settle" her merits case for less than it is worth. To sweeten the deal for Tudor, they structured the "settlement" such that Tudor would pocket more than $1,250,000 personally, several times more than what she was owed let alone could get ordered by the Western District.

We trust that the Western District sees full well the true motivations behind Southeastern and RUSO's incredulous attacks on our third party-claims. For all of the reasons set forth herein, it's time for Southeastern and RUSO to face the consequences of their years' long crusade to defy federal civil rights laws. Southeastern and RUSO broke the law. It's long past time that they step up and pay the true price of their recalcitrance.

ARGUMENT

I. FORMER COUNSELS' CLAIMS ARE PROPERLY BROUGHT AGAINST SOUTHEASTERN AND RUSO.

"The lady doth protest too much, me thinks."
– William Shakespeare, HAMLET, act. 3, s. 2.

Southeastern and RUSO proffer a bizarre sampling of out of circuit precedent and state law cases that do not speak to attorneys' liens, whether the parties in the merits case had the capacity to settle around Former Counsel in the first place, let alone what make-whole remedies are available to Former Counsel. These curious omissions are easily explained. Both statutory and common law unequivocally prohibit precisely what the parties in the merits case did *and* deem all of them directly liable for fees and costs due Former Counsel.

Statutory law is resoundingly clear here. The people of Oklahoma do not countenance attempts to settle around counsels' interests in the fruits of their labors. Where counsel is retained and remuneration turns on the adverse party paying attorneys' fees and costs, neither the complainant (Tudor) nor adverse parties have the capacity to "settle around" counsel.

The plain text of 5 Okla. Stat. § 6 expressly prohibits precisely what Southeastern and RUSO, in concert with Tudor, did: "no settlement between the parties without the approval of the attorney shall affect or destroy [an

attorneys'] lien." Another provision, 5 Okla. Stat. § 8 gives teeth to that prohibition. Helpfully titled, "Liability of Adverse Party," Section 8 states,

> Should the party to any action [] whose interest is adverse to the client contracting with an attorney settle or compromise the cause of action, claim or judgment wherein any lien perfected under Sections 6 and 7 of this title is involved and such settlement or compromise is made without the consent of the attorney holding such lien, ***such adverse party shall thereupon become liable to such attorney for the fee due that was due or would have become due under a contract of employment but for the settlement.***

(emphasis added).

Common law in and outside of Oklahoma teaches the same—there's an absolute prohibition on settling around counsels' interests. The remedy is also the same—both the client and the parties adverse to her are on the hook for fees and costs accrued by Former Counsel.

Long ago, the U.S. Supreme Court explained why the precise machinations that brought about the purported "settlement" in Tudor's merits case cannot be countenanced. "[I]n this country the counsellor is regarded as entitled to a fair remuneration for his services, and to recover the same in an action either upon an express or implied contract." *In re Paschal*, 77 U.S. 483, 494–95 (1870). Where both the client and parties adverse to her work in concert to deprive counsel of appropriate compensation for their labors and costs, both are on the hook. Consequently, a "defendant could not safely settle with the plaintiff without paying [her counsel]"). *Id.*

Oklahoma common law also unequivocally recognizes that counsel have an equitable right to be compensated for their labors and costs accrued in this precise situation. As the Oklahoma Supreme Court explains, Oklahoma's statutory framework simply codifies counsel's equitable rights to compensation for fees and costs accrued. Thus, in *Edwards v. Andrews*, counsels' right to compensation is characterized as being

> [F]ounded upon the equitable right of the attorney to be paid his fees and disbursements out of the judgment he has obtained for his client; when [counsels'] skills and service produce a judgment the attorney, by taking appropriate measures, may see that a lien attaches to the fruits of his efforts.

1982 OK 72, 650 P.2d 857, 862. *See also Campanello v. Mason*, 571 P.2d 449 (Okla. 1977) (similar).

The Oklahoma Supreme Court also recognizes that the appropriate remedy here is to hold both the client and the parties adverse to her in the merits case responsible for Former Counsels' fees and costs. As is the situation here, counsel who have been settled around in a contingency matter can either seek the percentage of the settlement called for by the retainer *or* seek payment of the amount that would have been due if counsel had not been settled around. *Herman Const. Co. v. Wood*, 128 P. 309, 312 (Okla. 1912) ("such attorney may prosecute a separate action against the adverse litigant who has settled with notice of the attorney's interest to recover as his fee the sum that he would

have received had the action of his client proceeded to final judgment; and in so doing he may establish the merits of his client's cause of action.").

The Western District also interprets both federal and state common law in precisely the same way. *See, e.g.*, *Jones v. Farmers Ins.*, 112 F.Supp. 952, 955 (W.D. Okla. 1953) ("The Oklahoma law gives an attorney who has been settled around, but who has prior to settlement perfected a statutory lien, the right to sue the adverse party and make proof of his percentage agreement based upon the actual settlement figures, *or* the right to sue the adverse party and make proof of the actual merits of his client's case and let the Court determine the value of the client's claim, had it gone to court instead of being settled.").

II. THERE IS NO PLEADING DEFICIENCY.

Southeastern and RUSO separately argue that because Former Counsel's claims seek compensation for fees and costs accrued in the merits case vis-à-vis claims for enforcement of attorneys' liens, enforcement of contract, or payment *quantum meruit* that we have failed to plead claims against them. Once again, there's no merit to this line of argument.

Former Counsels' claims against Tudor and Southeastern and RUSO are two parts of the same causes of action. A cause of action can be brought against multiple parties simultaneously even if the particular elements applicable to

the parties are somewhat distinct. This is basic Oklahoma law. To wit, "a cause of action has been defined as a group of operative facts giving use to one or more bases for suing; a factual situation entitling one person to obtain a remedy in court from another." *Gibbs v. Geico Gen. Ins.*, 143 P.3d 235, 237 (citing BLACK'S LAW DICTIONARY 214 (7th ed. 1999)).

It thus is of no moment that the elements that make up Former Counsels' causes of action against Tudor do not completely overlap with those elements that capture Southeastern and RUSO. The particulars giving rise to liability are interrelated but somewhat distinct. Tudor is responsible for her failure to abide by her obligations to Former Counsel as our client, whereas Southeastern and RUSO are on the hook because they "went around [Former Counsel] and ma[d]e settlement with [our] irresponsible client." *Stone v. Sullivan*, 147 Okla. 113, 293 P. 232, 234 (1930). Where counsel has been settled around, Oklahoma law provides a cause of action against both one's client and adverse parties in the merits case who acted in concert to deprive counsel of their fees. *Robey v. Shapiro, Marianos & Cejda*, 340 F.Supp.2d 1062, 1065 (N.D. Okla. 2004) (citing *Orwing v. Emerick*, 107 Okla. 134, 231 P. 234, 236 (1924); *Herman Const. v. Wood*, 35 Okla. 103, 128 P. 309, 310 (1912)).

III. SOUTHEASTERN AND RUSO CANNOT AVAIL THEMSELVES OF SOVEREIGN IMMUNITY.

Southeastern and RUSO also error in insisting that Oklahoma law bars Former Counsels' suit against them because they are sub-divisions of Oklahoma. Mot. at 6–7. That argument is premised on the invocation of sovereign immunity, a federal constitutional shield that is totally unavailable to them in the merits case to which Former Counsels' interests attached.

A quick refresher on Constitutional law is in order. The Constitution allocates certain powers to the federal government, reserves some to the states, and reserves others to the people as sovereigns. The Eleventh Amendment, ratified in 1795, endows states with sovereign immunity from suits by individuals. But that allocation is not absolute. Section 5 of the Fourteenth Amendment, ratified in 1868, redistributes powers between the states and federal government such that thereafter Congress is endowed with "the power to enforce, by appropriate legislation, the provisions of this article."

Decades before Oklahoma won statehood, the U.S. Supreme Court held that when Congress acts pursuant to its Fourteenth Amendment powers, it can abrogate state sovereign immunity. As the Court explains,

> The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. . . . [I]n exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. . . . [E]very addition of power to the general government involves a

> corresponding diminution of the governmental powers of the States.

Ex parte State of Virginia, 100 U.S. 339 (1880).

Let us now turn to Title VII, the federal civil rights statute under which Tudor's merits case was prosecuted and by virtue which Former Counsels' interests attached. Title VII of the Civil Rights Act of 1964 is one of several post-Reconstruction Amendments statutes enacted pursuant to Congress' 14-5 power. Oklahoma's sovereign immunity as to Title VII suits was abrogated by Congress as recognized by binding U.S. Supreme Court precedent. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). *See also Nevada Dep't of Human. Res. v. Hibbs*, 538 U.S. 721, 730 (2003) ("The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny; here as in *Fitzpatrick*, the persistence of such unconstitutional discrimination by the State justifies Congress' passage of prophylactic § 5 legislation").

Even if Oklahoma's sovereign immunity were not abrogated by Title VII, Southeastern and RUSO's state law arguments are nonstarters for at least two reasons. First, Southeastern and RUSO's insistence that Oklahoma bars liens against "public property" is a non-starter. Former Counsels' attorneys' liens attached to Tudor's merits case, not "public property."

Second, the sole authority Southeastern and RUSO rely upon is totally distinguishable. *Broadway Medical Center Inc. v. State*, 25 P.3d 311 (2001), is a tort case involving physicians' liens. The Governmental Tort Claims Act does not apply here. Former counsel's interests in Tudor's merits case attached to a federal civil rights case, not a state law tort case. As explained above, Oklahoma and its sub-divisions cannot invoke sovereign immunity as a shield in Title VII cases. *Broadway* is also off point as to the type of interests involved because it narrowly focuses on physicians' liens, which are totally distinct interests under statutory and common law from attorneys' liens.

IV. JURISDICTION CAN AND SHOULD BE EXERCISED OVER FORMER COUNSELS' CLAIMS.

The Western District should refuse Southeastern and RUSO's invitation to dismiss Former Counsels' claims for lack of subject matter jurisdiction.

Former Counsels' claims are properly before the Western District pursuant to its supplemental jurisdiction. As codified in 28 USC § 1367(a), in any civil action in which a district court has original jurisdiction it simultaneously has supplemental jurisdiction over "all other claims that are so related to claims in the action." Under binding Tenth Circuit precedent, "determining the legal fees a party to a lawsuit properly before the court owes its attorney, with respect to the work done in the suit being litigated, easily fits the concept of supplemental jurisdiction." *Jenkins v. Weinshienk*, 670 F.2d

915, 918 (10th Cir. 1982) (cleaned up). *Cf. Edwards v. Doe*, 331 Fed.Appx. 563, 569 (10th Cir. 2009) (characterizing a "dispute between a law firm and a party to the underlying litigation" as being simply determined to be within district court's ancillary jurisdiction).

The fact that Former Counsels' state law claims seek to protect our equitable interests in fees and costs due in the merits case and guard against diminishment in the interpleader case weighs in favor of exercising jurisdiction. "Although attorneys' fee arrangements are contracts under state law, the federal court's interest in fully and fairly resolving the controversies before it requires courts to exercise supplemental jurisdiction over fee disputes that are related to the main action." *Davis v. King*, 560 Fed.Appx. 756, 759 (10th Cir. 2014) (quoting with approval *Kalyawongsa v. Moffett*, 105 F.3d 283, 287–88 (6th Cir. 1997)).

Southeastern and RUSO are wrong to urge dismissal of Former Counsels' state law claims pursuant to §1367(c)(2). Section 1367(c)(2) allows for dismissal (but does not require it) where the district court determines that state law claims "substantially predominate" over original jurisdiction claims. But there is no substantial predomination here. Resolution of all of the parties' claims turns on the same common nucleus of facts and law—the extent of Former Counsels' interests that attached in the merits, the operation of the Young Firm's retainer, what is due Former Counsel in light of Tudor's breach

of the retainer, and what monies the merits parties jointly owe Former Counsel in light of their violation of Oklahoma law.

Lastly, Southeastern and RUSO's contention that Tudor's interpleader suit obviates Former Counsels' need to bring claims against her to obtain the fees and costs we are due from the merits case is wrong for at least three reasons.

First, as we previously explained in our opposition to Tudor's motion to dismiss, the Western District does not have jurisdiction over Tudor's interpleader suit because she has not yet satisfied the jurisdictional requirements for statutory interpleader and she has already dipped into the monies her interpleader complaint purported to offer up for distribution.

Second, Tudor cannot use interpleader to satisfy Former Counsels' interests in her merits case because the "settlement" she brokered was infirm ab initio. Statutory law, common law, and baseline equitable principles governing counsels' interests in cases they prosecute are an absolute limit on Tudor's capacity to settle the merits case around Former Counsel. The fact that Southeastern and RUSO agree with Tudor's theory of her interpleader case is of no moment because they were also without the capacity to settle around Former Counsel without our consent.

Third, the Western District cannot treat the purported "fund" established by the illicit "settlement" as a pool defining and otherwise limiting

the fees Former Counsel may recover for work performed and costs incurred in the merits case. The solution is not to give Tudor, Southeastern, and RUSO the benefit of a bargain they were prohibited from striking in the first place. Quite the opposite in fact. As the Western District recognized is a similar situation, counsel have a right to "come forward and establish the true value of the client's cause of action thereby establishing the resultant value of his contingent fee contract." *Jones v. Farmers Ins.*, 112 F.Supp. 952, 955 (W.D. Okla. 1953).

CONCLUSION

In the immortal words of the venerable Reba McEntire, a proud alumna of Southeastern: "Let's not drag this on." *Consider Me Gone*, KEEP ON LOVING YOU (Starstruck/Valory 2009). For all of the reasons set forth above, Former Counsel respectfully ask that the Court deny Southeastern and RUSO's motion to dismiss.

Dated: March 17, 2023

Respectfully Submitted,

/s/ Ezra Young
Ezra Young (NY Bar No. 5283114)
LAW OFFICE OF EZRA YOUNG
210 North Sunset Drive
Ithaca, NY 14850
P: (949) 291-3185
ezra@ezrayoung.com

/s/ Brittany Stewart
Brittany Stewart (OK Bar No. 20796)
4543 Kady Avenue NE
St. Michael, Minnesota 55376
P: 405-420-5890
brittany.novotny@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2023, I electronically filed a copy of the foregoing with the Clerk of Court by using the CM/ECF system, which will automatically serve all counsel of record.

/s/ Ezra Young

Ezra Young (NY Bar No. 5283114)