STATE OF NEW YORK COUNTY OF MONROE
SUPREME COURT

JIOVON ANONYMOUS AND THOMAS ANONYMOUS,

Plaintiffs,

-vs-

CITY OF ROCHESTER, NEW YORK, HON. ROBERT DUFFY, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF ROCHESTER, DAVID MOORE, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE OF THE CITY OF ROCHESTER,

Defendants.

INDEX NO.: 2006-12869

PLAINTIFFS' POST ARGUMENT MEMORANDUM OF LAW ADDRESSING *Rhodes v. Stewart*, 488 U.S. 1 (1988) AND IN SUPPORT OF AN ATTORNEY'S FEE AWARD PURSUANT TO 42 U.S.C. § 1988

Dated: August 19, 2009
Rochester, New York

Respectfully submitted,
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PRELIMINARY STATEMENT

This memorandum of law is respectfully submitted in response to the Court's inquiry at oral argument this morning regarding Plaintiffs' status as prevailing parties under 42 USC § 1988 and *Rhodes v. Stewart*, 488 U.S. 1 (1988). Plaintiffs are prevailing parties.

DISCUSSION

POINT I

PLAINTIFFS ARE PREVAILING PARTIES

At oral argument today, Your Honor asked Plaintiffs' counsel to address the case of *Rhodes v. Stewart*, 488 U.S. 1 (1988), and its impact, if any, on Plaintiffs' Thomas and Jiovon Anonymous status as "prevailing parties" within the meaning of 42 U.S.C. § 1988.

Plaintiffs are in fact prevailing parties as that term is defined by federal statute and the *Rhodes* case is inapplicable to Plaintiffs' situation because Thomas and Jiovon actually enjoyed and still enjoy the relief granted by the Appellate Division, Fourth Department on October 10, 2008, *Anonymous v. City of Rochester*, 56 A.D.3d 139, 2008 NY Slip Op 7724 (4th Dep't 2008), as affirmed by the Court of Appeals on June 9, 2009. *Anonymous v. City of Rochester*, 2009 NY Slip Op 4697 (June 9, 2009).

In *Rhodes*, two inmates, Mr. Stewart and Mr. Reese, brought a § 1983 action in United States District Court for the Southern District of Ohio against prison officials at the Ohio Department of Rehabilitation and Correction, alleging violations of their Constitutional rights because officials had refused permission for these two inmates to subscribe to a magazine. The District Court ruled in plaintiffs' favor, but not before Mr. Reese had died and Mr. Stewart had been released.

The Supreme Court reversed the Sixth Circuit's affirmance of an attorney fee award holding

that the *Rhodes* plaintiffs were not "prevailing" parties because neither Plaintiff had been in the State's custody *on the date the District Court had entered its underlying judgment* and therefore the court's judgment did not affect the behavior of the defendant prison officials towards these plaintiffs. It was impossible for Mr. Stewart and Mr. Reese to subscribe to or read their magazines in their prison cells and thus they never felt the practical impact of the relief that they had won.

By contrast, Thomas and Jiovon are presently enjoying the restoration of their Constitutional rights, granted by both the Appellate Division, when Jiovon was 16, and the Court of Appeals, shortly after his 17th birthday. As the Court of Appeals specifically recognized in footnote number 4, "this case was not rendered moot when plaintiff Jiovon turned seventeen because he may still be detained under the curfew if, to an officer, he appears to be under 17 and fails to offer proof of his age." *Anonymous v. City of Rochester*, 2009 NY Slip Op 4697, 5 n.4 (2009). The Court of Appeals obviously concluded that its ruling would grant meaningful and immediate relief to Jiovon and his father when it ruled that Jiovon was not subject to arrest under the City's curfew ordinance. The very point of a right is the choice that right represents. That choice has value. It does not matter if Jiovon went outside during curfew hours but rather whether it was his and his father's free choice to do so or not.[1]

Today at oral argument, the City alleged that it only argued that this matter was not moot in the Court of Appeals because it did not want the judgment of the Appellate Division declaring the curfew unconstitutional if the Court of Appeals declined to take the case on mootness grounds. However, at pages 3-5 of the City's pre-briefing submission dated December 22, 2008 to the Court of Appeals on the issue of mootness, and on pages 3-4 of its Reply Brief dated March 11, 2009, the

[1] Nor is it relevant whether or where Plaintiffs raised a particular 1983 challenge. The law is clear that 1983 affords substantive relief and that 1988 fees are available for any vindication of constitutional rights. *Haley v. Pataki*, 106 F.3d 478 (2nd Cir. 1997).

City urged the Court to adopt an alternative course, by declaring the case moot and vacating the opinion of the Appellate Division. All of the Court of Appeals briefing on the mootness issue is before this Court. The parties also briefed the exception to the mootness doctrine for matters capable of repetition yet evading review but the Court of Appeals never needed to reach the question of whether such an exception was applicable because it held that the matter was not moot in the first instance.

Obviously, the Court of Appeals was aware that it had the power to declare the matter moot based upon Jiovon's age, and even to vacate the Appellate Division's decision, but it held as a matter of law that Jiovon and Thomas were in fact still impacted by the curfew, that Plaintiffs' claims were not moot and that a ruling was necessary to resolve the live controversy between the parties.

Thomas and Jiovon secured the relief they sought on October 10, 2008 when the Appellate Division issued an injunction and declared the curfew unconstitutional. Relief is granted when a court awards it, not when a defendant chooses to comply with the court's order. The *Rhodes* case in no way suggests that defendants' compliance with the Court order is a necessary prerequisite to whether or not they prevailed. If the law were otherwise, then a wily defendant could avoid the payment of attorneys' fees by simply failing to comply with the judgment of the Court until Plaintiff was no longer affected.

The fact that the City evidently continued to enforce an unconstitutional law in the face of an appellate court's injunction does not make the grant of relief any less real. The *Rhodes* case does not reference the day that inmates would have actually gotten to subscribe to their magazines, but rather the date that the Court ruled that they could (April 2, 1981). *Rhodes*, at 2 – 3. The test is whether the judicial pronouncement affects the behavior of the defendant toward the plaintiff at a time when the plaintiff may enjoy it, not whether the defendant obeys the court's ruling. *Id.* at 4

("The case was moot before judgment issued, and the judgment therefore afforded the plaintiffs no relief whatsoever."). The Court of Appeals expressly declared that Plaintiffs' case was not moot before the judgment issued. *Anonymous v. City of Rochester*, 2009 NY Slip Op 4697, 5 n.4 (2009). However, even if the Court of Appeals had dismissed the case as moot, the interim relief achieved at the 4th Dep't would still have entitled Plaintiffs to attorney's fees. *Haley v. Pataki*, 106 F.3d 478, 483 (2nd Cir. 1997) ("'If a claim is mooted, interim injunctive relief may be a basis for an award of attorney's fees, if plaintiff has prevailed on the merits at the interim stage.'") (*quoting LaRouche v. Kezer*, 20 F.3d 68, 75 (2d Cir. 1994)).

The City may claim that Plaintiffs did not obtain their relief due to its invocation of a statutory stay of enforcement of the judgment pending appeal pursuant to CPLR § 5519. But the City's violation of the Appellate Division's injunction was not authorized by CPLR § 5519. Rather, a careful reading of CPLR § 5519 indicates that it is a stay against *Plaintiffs commencing proceedings to enforce* the Appellate Division's order. The Court of Appeals merely affirmed the Appellate Division's decision; it granted no new relief. The only thing that changed on June 9, 2009 is that the City began to *comply* with the appellate courts' orders.

The Court of Appeals has already decided that Jiovon and Thomas had a live case and controversy, the outcome of which affected them directly and that same Court issued Jiovon and Thomas relief it evidently deemed meaningful. *Cf. Hearst Corp. v. Clyne*, 50 N.Y.2d 707 (1980) (To rule absent a mootness exception, the Court must be satisfied that "the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment"). The Court of Appeals having held that its judgment provided real and meaningful relief for the Plaintiffs, it is improper for the City to argue otherwise.

The Court of Appeals' holding is dispositive on this issue and law of the case.

CONCLUSION

This matter is ripe for decision on the papers submitted and Plaintiffs respectfully ask the Court to award the full fee award requested.