UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DOUG OPPENHEIMER	:	**Case No.: 1:19-cv-00770**
	:	
v.	:	
	:	**Judge Douglas R. Cole**
CITY OF MADEIRA, OHIO, *et. al.*	:	
	:	**Magistrate Judge Stephanie K. Bowman**
	:	

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR FEES

The attorneys' fees requested by Plaintiff are egregious given the facts and circumstances of this form-based lawsuit and the court's award of nominal damages. Defendant effectively provided Plaintiff's requested declaratory and injunctive relief within four days of receiving notice of the lawsuit. After repealing portions of the sign code identified in Plaintiff's Complaint, Defendant never disputed the unconstitutionality of those provisions. Not once.

Yet Defendant's speedy legislative solution was not enough for Plaintiff. Instead of pursuing a reasonable path of compromise given Defendant's pragmatic litigation posture, Plaintiff's counsel rolled up his sleeves and really got to work on an all-but resolved case: (i) amending the Complaint *after* portions of the sign code were repealed, (ii) adding redundant defendants *after* portions of the sign code were repealed, and (iii) reviving a subsequently-abandoned request for declaratory judgment *after* portions of the sign code were repealed.

To make matters worse, where an opportunity for a sharp-elbowed filing presented itself, Plaintiff filed it. No procedural issue was too small to litigate; no customary civility extended. Plaintiff's counsel churned molehills into fee-accumulating mountains. While courts, communities, attorneys, families, and undersigned counsel's family were struggling to adjust to a

complex and profoundly disruptive global pandemic, Plaintiff's counsel quadrupled down on an all-but resolved lawsuit. No phone calls, minimal collaborative effort at reasonable settlement, no compromise.

If the courts are to play a role in ordering a more reasonable resolution of disputes, Plaintiff's maneuvering in this case is "central casting" for how overzealous motion practice can be deployed to rack up unnecessary fees. In a case in which this court awarded $1,000 in damages, it is manifestly unjust to ask Defendant to foot the bill for Plaintiff's counsel at $610 per hour, for some 143.9 hours, when the case was effectively copied and pasted from counsel's previous cases and pragmatically resolved within days of Defendant's receiving notice.

Moreover, Defendants ask the court to be mindful of sending the wrong policy signals under circumstances like these. As a matter of public policy, the court can *and* should drastically limit the fee award in this case to avoid signaling to other Southern District defendants that responding practically and expeditiously to claims doesn't much matter. With its response to this motion, the court should instead signal that Southern District litigants may pursue claims, but their pursuit should not abandon practicality and civility at the courthouse door. This motion is an opportunity for the court to affirmatively signal that the Southern District reasonably limits fee awards for defendants who – acting in good faith – provide pragmatic resolutions to underlying claims giving rise to lawsuits.

While Plaintiff argues the Defendant "refused to acknowledge" any infringement, Defendant's quick legislative actions speak louder than those words. As noted, Defendants effectively conceded the merit of Plaintiff's constitutional concerns straight out of the gate by (i) administratively declaring a moratorium on enforcement *the day after* receiving notice of the lawsuit (September 20th), and (ii) repealing portions of the sign code that had become outdated

under modern constitutional jurisprudence on the next business day (September 23rd). Simply put, Defendants should not have to pay excessive and unnecessary legal fees in a case in which, as a practical matter, the state of play has remained unchanged since Monday, September 23rd, 2019.

For these reasons and others more fully explained in the attached Memorandum in Support, Defendants ask that Plaintiff's Motion for Fees be denied, and that the award be drastically reduced to a proportionate and reasonable amount in light of the $1,000 damages award and the facts and circumstances of this case.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. PROCEDURAL POSTURE.

Plaintiff filed his Complaint on September 12, 2019, alleging violations of his constitutional rights. (Doc. 1). Specifically, Plaintiff alleged Defendant infringed upon his recent desire to display signs leading up to the general election on November 5, 2019. (Doc. 1 at ¶¶ 46-60). Plaintiff did not formally serve Defendant with his Complaint and Waiver of Service until October 1, 2019. (Doc. 11). However, Plaintiff did serve Defendant with his Motion for Temporary Restraining Order and Preliminary Injunction on Thursday, September 19, 2019, which referenced the Complaint and its allegations. (Doc. 5). In his Complaint, Plaintiff advanced two causes of action against Defendant, the first a request for declaratory judgment and injunctive relief, and the second a request for "damages, including, at a minimum, nominal damages." (Doc. 1 at ¶¶ 61, 82).

On Monday, September 23, 2019, this court heard arguments from counsel regarding Plaintiff's request for injunctive relief, in addition to arguments concerning Defendant's request for a continuance. (Doc. 7). That same evening, City Council passed Ordinance 19-04, which repealed the contested portions of Sections 159.20 and 159.26. (Doc. 8).

In other words, within several days of receiving notice of the lawsuit Defendant passed a legislative solution that cured the alleged constitutional defects. (Doc. 8). In good faith, members of City Council immediately got to work to protect taxpayers from the expense of protracted litigation. (Doc. 6). What's more, Defendant repealed not only the portions of the sign code Plaintiff complained of, but City Council took the extra-constitutionally-cautious step of repealing other portions of Chapter 159 of the Madeira Code of Ordinances which were not the subject of this litigation. (Doc. 8).

During the early pleading stages of this action, this court denied Plaintiff's motions for a temporary restraining order and for preliminary injunctive relief. (Doc. 9, 10). While arguments of counsel and other factors invariably impacted the analysis, Magistrate Judge Bowman's decision was premised on two documents in the record. *(Id.).* First, the City Manager's letter to the Madeira Police Chief requiring a moratorium on Defendant's enforcement of sign code provisions demonstrated injunctive relief was unnecessary. (Doc. 9 at 2; Doc. 6-1). Second, the City Council's formal enactment of Ordinance 19-04, which repealed contested portions of the sign code, further mooted Plaintiff's request for judicial intervention. *(Id.* at 3; see also Doc. 8).

Three months Defendant passed Ordinance 19-04, Plaintiff filed his Amended Complaint on December 23, 2019, effectively copying and pasting the initial Complaint and adding the phrase "September of 2019" as a factual qualifier to a number of allegations, and naming a number of additional defendants, Police Chief David Schaefer and "John Doe" defendants. (Doc. 15). Presumably, Plaintiff added "September of 2019" given Defendant's responsive legislative actions; the so-called "chilling" effect the since-repealed code provisions evidently subsided. In the Amended Complaint, Plaintiff again sought declaratory and injunctive relief, in addition to "damages, including, at a minimum, nominal damages." (Doc. 15 at ¶¶ 87, 93).

From September 23, 2019 to now, there was nothing in the record reasonably indicating repealed portions of the sign code were being enforced in violation of Ordinance 19-04, or that Ordinance 19-04 was improvidently undertaken, notwithstanding Plaintiff's reference to Defendant's web copy in his Amended Complaint. (Doc. 15 at ¶ 20). Defendants supplemented the record with the "Affidavit of Lori Thompson" clarifying that the website no longer displays repealed portions of the sign code. (See generally, Doc. 36, Exhibits A and B). With respect to the Amended Complaint, (i) Plaintiff never filed a second motion requesting injunctive relief after

filing the Amended Complaint, (ii) Plaintiff never pursued or served the "John Doe" defendants, and (iii) Plaintiff abandoned his requests for declaratory and injunctive relief (or conceded the unconstitutional behavior "could not be expected to recur"). (Doc. 51 at pp. 12-13). The record is also clear that Defendant never contested the constitutionality of the repealed provisions of the sign code, only Plaintiff's entitlement to money damages. (*Id*. at p. 8).

On March 19, 2021, Plaintiff filed a motion for summary judgment. (Doc. 43). In response, the court denied, as moot, Plaintiff's claim for declaratory and injunctive relief because Plaintiff abandoned those claims in light of Defendant's legislative response on September 23, 2019. (Doc. 52 at pp. 1, 5). The court further denied Plaintiff's motion for summary judgment against Chief David Schaefer and the "John Doe" defendants, dismissing those defendants as redundant. (*Id*. at p. 1). The court granted Plaintiff's motion for damages in the nominal amount of $1,000, as well as his request for attorneys' fees in an amount to be determined. (*Id*. at p. 5).

Plaintiff filed a motion for attorney fees and cost on February 21, 2022, arguing he is entitled to a recovery of fees and costs in the amount of $97,029.50. (Doc. 55 at p. 20). In the pages that follow, Defendants will address how manifestly unjust Plaintiff's request is in light of the nominal damages award and the facts and circumstances of this lawsuit.

II. LAW & ARGUMENT.

A. STANDARD OF REVIEW.

The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988(b), permits a court in its discretion to award the "prevailing party" in a § 1983 action "reasonable" attorney's fees as part of the costs. Although the technical nature of a nominal damages award does not disqualify a plaintiff from prevailing party status, it does bear on the reasonableness of any attorney's fees award. *Farrar v. Hobby*, 506 U.S. 103, 114, 113 S.Ct. 566, 121 L. Ed. 2d 494 (1992). The most

critical factor in determining the reasonableness of an attorney's fees award is the degree of success obtained. *Id.* In a civil rights action for compensatory and punitive damages, the awarding of only nominal damages highlights the plaintiff's failure to prove actual injury or any basis for awarding punitive damages. *Id.* at 115, 113 S.Ct. 566. "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all." *Id.* (citations omitted) (affirming the Fifth Circuit's reversal of a district court's award of attorney's fees to a plaintiff who won only nominal damages); see also *Cramblit v. Fikse*, 33 F.3d 633, 635 (6th Cir.1994) (affirming a district court's denial of attorney's fees to a plaintiff who won only nominal damages).

After the trial court considers the amount and nature of damages awarded, it may lawfully award low fees or no fees without:

- "reciting the 12 factors bearing on reasonableness," *Hensley v. Eckerhart*, 461 U.S. 424, 430, n. 3, 103 S. Ct. 1933, 1973-1938, 76 L. Ed. 2d 40 (1983);[1] or,
- "multiplying 'the number of hours reasonably expended ... by a reasonable hourly rate,'" *Id.* at 433; *Farrar*, 506 U.S. at 115, 113 S. Ct. at 575.

[1] The *Hensley* factors come from American Bar Association Code of Professional Responsibility, Disciplinary Rule 2–106; see also Rule 1.5(a) of the Ohio Rules for Professional Responsibility:

> A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; (8) whether the fee is fixed or contingent.

Moreover, fee awards under § 1988 were never intended to "produce windfalls to attorneys." *Riverside v. Rivera*, 477 U.S. 561, 580, 106 S.Ct. 2686, 2697, 91 L.Ed.2d 466 (1986) (plurality opinion) (REHNQUIST, J., dissenting) (quoting S.Rep. No. 94–1011, p. 6 (1976) U.S.Code Cong. & Admin.News 1976 pp. 5908, 5913). And where the plaintiff achieved only limited success, the district court should award only that amount of fees that is "reasonable in relation to the results obtained." *Hensley*, 461 U.S. at 440, 103 S. Ct. at 1943.

As the court is likely aware, "[c]ases may be overstaffed, and the skill and experience of lawyers vary widely, so counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Id.*, 461 U.S. at 433–34, 103 S. Ct. at 1939–40. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority." *Copeland v. Marshall*, 205 U.S.App.D.C. 390, 401, 641 F.2d 880, 891 (1980) (en banc). Accordingly, the district court also should exclude from this initial fee calculation hours that were not "reasonably expended." S.Rep. No. 94–1011, p. 6 (1976).

And where, as here:

> a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

Hensley, 461 U.S. at 436, 103 S. Ct. at 1941. By way of example, Joseph Farrar, the plaintiff in *Farrar v. Hobby*, had his constitutional rights vindicated when the jury found that defendant Hobby had deprived Farrar of a civil right and the Fifth Circuit ruled that Farrar was entitled to nominal damages against Hobby. *Farrar*, 506 U.S. at 107. However, the Supreme Court held that the district court had abused its discretion by granting Farrar attorney's fees based on his "technical" victory. *Id.* at 114. The Supreme Court held, "This litigation accomplished little beyond giving petitioners 'the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated' in some unspecified way." *Id*. at 114 (quoting *Hewitt v. Helms*, 482 U.S. 755, 762, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987)). Therefore, in *Farrar*, the Supreme Court held that technical vindication of one's constitutional rights alone is not enough to justify an award of attorney's fees pursuant to § 1988.

B. PLAINTIFF'S REQUEST FOR ATTORNEYS' FEES IS EXCESSIVE.

The doctrinal through-line from the *Farrar* decision and cases relying upon that precedent is that a nominal damages award may not technically disqualify a plaintiff from "prevailing party" status, it should impact the reasonableness of any attorney's fees award. *Farrar*, 506 U.S. at 114. That is especially important in this case.

i. THE REQUEST FOR FEES IS DISPROPORTIONATELY HIGH GIVEN THE NOMINAL DAMAGES AWARD.

This court determined Plaintiff was entitled to nominal damages in the amount of $1,000, which the guide the proportionality of any fees award provided in connection with Plaintiff's motion. Supreme Court precedent is rather settled on this point. In cases where "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Hensley*, 461 U.S. at 436,

103 S. Ct. at 1941; see also *Kidis v. Reid*, 976 F.3d 708, 721 (6th Cir. 2020). Here, that is certainly the case.

Moreover, "even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith[,] Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained." *Hensley*, 461 U.S. at 436, 103 S. Ct. at 1941. Given the degree of success obtained by Plaintiff, his recovery of attorneys' fees should be tethered to the $1,000 nominal damages awarded by this court.

1. FROM RECEIVING NOTICE OF THE LAWSUIT, DEFENDANTS NEVER DISPUTED THE UNCONSTITUTIONALITY OF REPEALED PROVISIONS.

In his motion, Plaintiff repeatedly argues that Defendant "refused to acknowledge" the infringement caused by the repealed portions of the sign code. (Doc. 55 at pp. 2, 9, 17). Constitutional cases, however, do not and should not turn on hollow oral acknowledgements – they should be about resolutions in the public's interest. The record is inarguably clear that Defendant acted without delay to remedy the underlying issue animating Plaintiff's claims. Further, Defendant has never disputed the constitutionality of the repealed portions of the sign code, arguing (narrowly) instead about Plaintiff's entitlement to damages given the circumstances of this case.

2. PLAINTIFF'S POST-SEPTEMBER 23RD AMENDED PLEADINGS AND MOTION PRACTICE MANEUVERING WAS UNNECESSARY AND UNWARRANTED.

Defendant did not receive notice of the lawsuit until it was served with Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction on Thursday, September 19, 2019. (Doc. 5). The very next day – Friday, September 20th, Defendant's City Manager issued a letter

to the Police Chief requiring a moratorium on enforcement of sign code provisions. (Doc. 9 at 2; Doc. 6-1). On the next business day – Monday, September 23rd, Defendant formally enacted Ordinance 19-04, which repealed portions of the sign code. (Doc. 8). Since September 23, 2019, the constitutional state of play within Defendant's jurisdictional boundaries has not changed one bit. The record is clear that Defendant has neither threatened to enforce repealed portions of the sign code nor done anything to suggest repealed provisions were to be reconsidered, let alone reenacted.

Notwithstanding Defendant's pragmatic posture, three months after the September 23rd repeal Plaintiff filed his Amended Complaint making minimal changes and abandoning newly added defendants (dismissed as redundant) and his request for injunctive and declaratory relief. (Doc. 52 at pp. 1, 5). Notably many of those items contained on Plaintiff's invoice are directly attributable to filing the amended complaint or litigating the timeliness of Defendant's response to the same. (Doc. 56-2 at p. 2-3; Doc. 57-5 at pp. 2-3). It is important to note that, contrary to customary civility extended between professional colleagues, Plaintiff's counsel filed more than one sharp-elbowed application for default and blamed Defendant for accelerating fees. (Doc. 55 at p. 15; Doc. 21; Doc. 33).[2]

[2] Plaintiff even argues, in the alternative, he is entitled to fees under 28 USC § 1927. In response, Defendant directs the court to the following from 27A Fed. Proc., L. Ed. § 62:793 (internal citations omitted):

> Sanctions against an attorney for unreasonably and vexatiously multiplying the proceedings in any case are not to be awarded lightly; they require evidence of bad faith, improper motive, or reckless disregard of the duty owed to the court. It has been held that a court may award sanctions against an attorney for the unreasonable and vexatious multiplication of proceedings only upon a finding of bad faith, or conduct akin to bad faith. To impose sanctions under § 1927, a court must find an attorney has (1) multiplied a proceeding; (2) in an unreasonable and vexatious manner; (3) thereby increasing the cost of the proceeding; and (4) doing so in bad faith or by intentional misconduct. A lawyer engages in bad faith by acting recklessly or with indifference to the law, as well as by acting in the teeth of what he or she knows to be the law. A finding of subjective bad faith on the part of the offending attorney will support the imposition of sanctions for unreasonably and vexatiously multiplying proceedings, but such a finding is not

This court's decision made clear that Plaintiff's Amended Complaint introduced redundant defendants and revived injunctive and declaratory relief claims which were, as a practical matter, abandoned. (Doc. 52 at pp. 1, 5). Why did Plaintiff neglect to file a second motion for injunctive relief to prevent Defendant from violating his First Amendment rights? Why was Plaintiff's claim for prospective declaratory relief abandoned? Defendant submits it is because the City responded to Plaintiff's underlying claims in a matter of days, and the constitutional state of play has remained unchanged since September 23, 2019.

ii. PLAINTIFF'S COUNSEL'S HOURLY RATE IS UNREASONABLY HIGH.

In his motion, Plaintiff requests an hourly rate that is unreasonably high. Even Plaintiff's expert concluded his hourly rate of $610 an hour was excessive. (See, Doc. 58 at ¶¶ 7-10). Defendant's expert, attorney Jean Geoppinger McCoy, has 31 years of experience in complex civil litigation and her customary hourly rate is only $440 an hour. See Declaration of Jean Geoppinger McCoy at ¶ 8. As Mrs. Geoppinger McCoy indicates, Plaintiff's counsel's rates are far in excess of what is reasonable. *Id*. at ¶¶ 19-27.

As noted above, fee awards under § 1988 were never intended to "produce windfalls to attorneys." *Riverside*, 477 U.S. at 580. The amount requested by Plaintiff in his motion, especially considering the damages award amount and circumstances of this case, would constitute an unjust windfall to Plaintiff's counsel.

> necessary; objective bad faith will also support a sanctions award. While a court imposing sanctions for vexatiously and unnecessarily multiplying a judicial proceeding must find bad faith, that finding need not be made explicitly; indications of bad faith are findings that the claims advanced were meritless, that counsel knew or should have known this, and that the motive for filing the suit was for an improper purpose such as harassment. However, a court is not required to find that a party's claims are frivolous in order to find its attorney's conduct sanctionable for unreasonably and vexatiously multiplying proceedings.

Clearly sanctions are not warranted under these circumstances.

iii. THE NUMBER OF HOURS BILLED IS UNWARRANTED.

1. THE COMPLAINT, AMENDED COMPLAINT, AND MOTIONS WERE COPIED AND PASTED FROM PREVIOUS SUITS.

As Mrs. Geoppinger McCoy's Declaration outlines, Plaintiff's counsel is well-versed in First Amendment sign cases, and based his pleadings and motions off previous filings. Declaration of Jean Geoppinger McCoy at ¶¶ 10-14. It would be patently unfair to allow Plaintiff to saddle Defendant with fees given the form-based pleadings and motions filed in this case.

2. THE REDUNDANCIES OF CONSULTS BETWEEN LAWYERS ON A COPIED AND PASTED LAWSUIT WERE UNNECESSARY.

Given the copied and pasted pleadings and motions, the duplication of efforts between firms becomes all the more unreasonable. As the *Hensley* court determined, "[c]ases may be overstaffed, and the skill and experience of lawyers vary widely, so counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Id.*, 461 U.S. at 433–34, 103 S. Ct. at 1939–40. Here, the case was overstaffed and the fees requested are exorbitant and far in excess of the value added to Plaintiff's lawsuit and recovery.

III. CONCLUSION.

For the reasons set forth above, Defendant asks that Plaintiff's Motion for Fees be denied, and that the award be drastically reduced to a proportionate and reasonable amount in light of the $1,000 damages award and the facts and circumstances of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Defendant City of Madeira, Ohio's Memorandum in Opposition to Plaintiff Doug Oppenheimer's Motion for Fees was served upon Counsel for Plaintiff, Mr. Curt Hartman, Esq., by electronic mail at 12:01 AM on March 26, 2022 with an explanatory message indicating the undersigned was having difficulties accessing the CM/ECF system. Subseqently, the undersigned, with the help of a colleague, filed Defendant City of Madeira, Ohio's Memorandum in Opposition to Plaintiff Doug Oppenheimer's Motion for Fees electronically with the Clerk of Courts using the CM/ECF system – on March 26, 2022. The CM/ECF system, in turn, will send notification of this filing to all counsel of record.

/s/ Brian W. Fox
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