IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JEFFREY S. HUETTL and
ROCHELLE J. HUETTL, individually
and as the natural parents and general
guardians of ALORA S. HUETTL,

Plaintiffs,

v.

MONICA BECKER,

Defendant.

OPINION AND ORDER

02-C-382-C

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This civil action is before the court on the motion of defendant Monica Becker for an award of attorney fees and costs incurred in the defense of this action pursuant to 42 U.S.C. § 1988. On July 8, 2002, plaintiffs filed a complaint under 42 U.S.C. § 1983, alleging that defendant had deprived them of (1) their liberty and property without procedural or substantive due process of law; (2) their right to family privacy, unity and association; and (3) their right to be free from unreasonable searches and seizures. On February 28, 2003, after defendant had moved for summary judgment, both parties stipulated that plaintiff would request voluntary dismissal of the action with prejudice

pursuant to Fed. R. Civ. P. 41(a)(1)(ii). The case was dismissed with prejudice on March 3, 2003, leaving the question of attorney fees to be resolved by the court. I conclude that plaintiffs' suit was frivolous and vexatious at the time it was filed and that defendant is entitled to attorney fees under § 1988.

The following undisputed facts relevant to the motion for attorney fees and costs are taken from the record.

FACTS

In the complaint, plaintiffs accused defendant, a social worker for the Columbia County Department of Human Services, of "fraudulently," "intentional[ly] and malicious[ly]," "with reckless disregard both for the facts and her proper duties under the law," causing the removal of plaintiff Alora Huettl, a minor, from the home of her parents, plaintiffs Jeffrey and Rochelle Huettl, "without probable cause and a good-faith belief in the legality of her actions." Plaintiffs asserted that defendant's "actions were unconscionable and are of the sort that should shock the conscience of the court." In particular, plaintiffs alleged that in July 1996, defendant caused Alora to be taken into protective custody for approximately two months, when she knew or should have known from official sheriff's office reports that there was no reliable evidence that Alora had been abused by her grandfather or either one of her parents. Plaintiffs alleged that the court's decision to

remove Alora from her home pending trial was the "exclusive result of defendant's false statements under oath and fraud upon the court." Plaintiffs alleged that defendant lied when she averred in an affidavit that there was an urgent problem justifying ex parte removal of Alora from her parents' home, when she knew that the investigating deputy sheriffs had determined there was no problem requiring "outside intervention" and had been unable to verify any other basis justifying the action, and that she lied to the court when she said that Alora lacked emotional attachment to her parents or a desire to be with them. Alora was returned to her parents on September 12, 1996, when a jury determined that Alora was not a child in need of protection or services.

Plaintiffs alleged further that defendant "had a long history of improper attempts to remove Alora from the home of her parents." Plaintiffs alleged that in 1995, defendant had tried to remove Alora from her home in reliance on a pediatrician's report that Alora was underweight, when the pediatrician was not of the belief that Alora's weight was caused by abuse and two expert physicians had evaluated the situation and determined there was no evidence of abuse. Plaintiffs alleged also that in March 1996, defendant lied in an affidavit to the court when she averred that plaintiffs Jeffrey and Rochelle Huettl had failed to comply with a consent decree that had been entered in connection with the 1995 proceeding and that the consent decree had therefore been revoked, when defendant knew this was not true. As a result of defendant's lie, Alora was removed from her home for one night, until the

court found no probable cause for holding Alora in protective custody the next day.

Finally, plaintiffs alleged that after successfully removing Alora from her home, defendant wrongfully and purposefully "meddled in the marriage" of plaintiffs Jeffrey and Rochelle Huettl, "pressuring Jeffrey Huettl to get a divorce from his wife and use the power of a divorce court to wrestle custody and placement of Alora from her mother."

In filing this action on July 8, 2002, plaintiffs' lawyer relied on information he had obtained from plaintiffs Rochelle and Jeffrey Huettl in two April 1996 consultations with them about the March 1996 removal of Alora from plaintiffs' home, a February 12, 1997 meeting at which he interviewed them in-depth and reviewed documentary evidence in their possession, and an interview and "fact investigation session" held with them on May 24, 2002, lasting several hours.

Also, plaintiffs' counsel relied on information he had obtained in October 1996 in a lengthy telephone conversation with Jane Kohlwey, Jeffrey and Rochelle Huettl's lawyer for the July 1996 county court protective custody proceedings. Kohlwey relayed to plaintiffs' counsel her knowledge of the case, the testimony and evidence that had led to the verdict and order to return Alora to the home of her parents, and her "strongly held opinion" that defendant had acted maliciously and intentionally to deprive plaintiffs of the custody of their child and with reckless disregard for plaintiffs' legal rights. Plaintiffs' counsel and Kohlwey discussed "in detail" evidence supporting the conclusion that defendant's July 1996 petition

for removal of Alora from plaintiffs' home contained a number of factual assertions that defendant knew to be false. In particular, counsel learned that the only evidence to suggest that Alora had been abused was the report of a deputy sheriff that Alora had been tied up by her grandfather at a park; that this incident had occurred when neither Jeffrey nor Rochelle Huettl was present; that there was no "reliable evidence" ever presented up to and through trial that plaintiffs had abused their child; and that despite these facts, defendant swore in her affidavit that wrongful actions had occurred while the grandparents and the parents were present with Alora in the park. Kohlwey urged plaintiffs' counsel to prosecute a civil rights action on behalf of plaintiffs.

Defendant moved for summary judgment on January 3, 2003, 20 days before the deadline set by the magistrate judge for doing so. In response, plaintiffs' attorney and his associate, Carousel Andrea Bayrd, attempted to gain access to the juvenile court file of the 1996 C.H.I.P.S. case at the Circuit Court for Columbia County. However, the attempt failed because the juvenile judge who had jurisdiction was not available and no other judge at the courthouse would rule in his absence. Counsel's associate then went through documentary evidence for discovery purposes at the office of defendant's attorney. During the course of discovery, counsel found copies of defendant's handwritten notes from the time she had been working as a social worker on the Huettl case. The evidence demonstrated to counsel that defendant "probably did believe the substance of what she relayed to the court

in the petition." By then, legal research had led counsel to the conclusion "that plaintiffs' only viable cause of action required them to prove liability regarding the alleged fraudulent petition."

Plaintiffs' attorney telephoned defendant's attorney to explain why he would not be filing a response to the motion for summary judgment and to ask defendant to accept a motion for voluntary dismissal without costs to any party. Ultimately both parties agreed to stipulate for voluntary dismissal but defendant did not agree to waive costs or attorney fees. The parties prepared and signed a stipulation and order on February 28, 2003. The court approved the stipulation and entered an order of voluntary dismissal on March 3, 2003.

OPINION

42 U.S.C. § 1988(b) provides that "in any action or proceeding to enforce a provision of [42 U.S.C. § 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Although the language of § 1988 does not distinguish between "prevailing" plaintiffs and defendants regarding their ability to recover fees, "prevailing defendants have never been entitled to the same treatment under the statute as prevailing plaintiffs." Coates v. Bechtel, 811 F.2d 1045, 1048 (7th Cir. 1987) (citing Vandenplas v. City of Muskego, 797 F.2d 425, 428-29 (7th Cir. 1986);

Hershinow v. Bonamarte, 772 F.2d 394, 395 (7th Cir. 1985)); Curry v. A. H. Robins Co., 775 F.2d 212, 219 (7th Cir. 1985). A plaintiff may be deemed a prevailing party, and thus awarded attorney fees, if he or she succeeds on "any significant issue in litigation which achieves some of the benefit [he or she] sought in bringing suit." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). In contrast, a prevailing defendant may not recover fees under § 1988 unless the district court finds that the plaintiff's action was "vexatious, frivolous, or brought to harass or embarrass the defendant," id. at 429 n.2, or "that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Hughes v. Rowe, 449 U.S. 5, 14 (1980) (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978) (same standard for fees under Title VII)). Defendant is not required to show either subjective or objective bad faith on the part of the plaintiff in order to recover § 1988 attorney fees. Hamer v. County of Lake, 819 F.2d 1362, 1366 (7th Cir 1987) (citation omitted). Instead, an award of fees to the defendant is appropriate when the defendant can demonstrate that the plaintiff's action is "meritless in the sense that it is groundless or without foundation." Hughes, 449 U.S. at 14, Munson v. Milwaukee Bd. of School Directors, 969 F.2d 266, 269 (7th Cir. 1992). Defendants must show that "a civil rights suit is lacking in any legal or factual basis." Munson, 969 F.2d at 269 (citing Coates, 811 F.2d at 1050).

In addressing this issue, I am reminded of the Supreme Court's caveat in

Christiansburg Garment Co. not "to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." Id. 434 U.S. at 421-22, see also Hermes v. Hein, 742 F.2d 350, 356-57 (1984). In Christiansburg Garment Co., the Court recognized that, at the time suit is brought, a plaintiff seldom can be sure of ultimate success:

> No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Id. 434 U.S. at 422, see also Hermes, 742 F.2d at 356-57.

I am also mindful of the Seventh Circuit's mandate that "the district court must discuss the specific information that formed the basis for the plaintiffs' suit, and explain why this information did not constitute adequate factual substance for the commencement of a nonfrivolous civil rights case." Coates, 811 F.2d at 1051 (citing Hermes, 742 F.2d at 357, and Munson v. Fiske, 754 F.2d 683, 697 (7th Cir. 1985). The relevant question before this court is whether, given the information available to plaintiffs at the time they initiated their lawsuit, they should have known that the claim was frivolous, groundless or unreasonable. Coates, 811 F.2d at 1051.

I. PREVAILING PARTY

Neither side denies that plaintiffs' dismissal of their claim pursuant to Fed. R. Civ. P. 41(a)(1)(ii) makes defendant the "prevailing party" for the purpose of considering attorney fees award under § 1988. Indeed, plaintiffs' dismissal was with prejudice, leaving defendant free from the risk of ever being held responsible on the same claim. See Szabo Food Service v. Canteen Corporation, 823 F.2d 1073, 1076-77 (7th Cir. 1987) (denying defendant's request for attorney fees from plaintiff who voluntarily dismissed case without prejudice, but noting distinction between a without-prejudice dismissal and with-prejudice dismissal). In addition, after the extended response deadline to defendant's motion for summary judgment, plaintiffs acknowledged that they had no factual basis on which to proceed and asked defendant to accept a motion for voluntary dismissal. In other words, plaintiffs withdrew their complaint voluntarily to escape an unfavorable judicial determination on the merits. See Dean v. Riser, 240 F.3d 505, 511 (5th Cir. 2001) ("a defendant is not a prevailing party within the meaning of § 1988 when a civil rights plaintiff voluntarily dismisses his claim, unless the defendant can demonstrate that the plaintiff withdrew to avoid a disfavorable judgment on the merits"); Marquart v. Lodge 837, International Association of Machinsts and Aerospace Workers, 26 F.3d 842, 852 (8th Cir. 1994) (denying defendant's recovery but emphasizing that "there is no scintilla of evidence" that plaintiff voluntarily withdrew her complaint to escape a unfavorable judicial

determination on the merits).

II. LEGAL BASIS

Plaintiffs' attorney concedes that legal research led him to the conclusion "that plaintiffs' only viable cause of action required them to prove liability regarding the alleged fraudulent petition." Defendant does not object to this conclusion. Although plaintiffs do not explain how they reached this conclusion, I will assume that this proposition is true.

In passing, I note that plaintiffs do not contend that this conclusion was unpredictable at the time he filed the present lawsuit. The case does not involve an issue of first impression that requires judicial resolution. See Reichenberger v. Pritchard, 660 F.2d 280, 288 (7th Cir. 1981); see also Christiansburg Garment Co., 434 U.S. at 423-24. Plaintiffs do not cite any change in the laws of due process, privacy or Fourth Amendment that affected their expectations about the merits of their lawsuit. The course of litigation involved no unpredictable aberration. Defendant filed an answer on August 7, 2002. Defendant filed a motion for summary judgment on January 3, 2003. All the arguments made and affirmative defenses raised were predictable.

III. FACTUAL BASIS

The more difficult issue to be addressed is whether there was any factual basis for the

central contention undergirding plaintiffs' lawsuit, that is, that commencing July 18, 1996, defendant fraudulently caused the removal of plaintiff Alora S. Huettl from the care, custody and control of Jeffrey S. and Rochelle J. Huettl without probable cause and without a good faith belief in the legality of her actions. Plaintiffs state that the initial evidence known to plaintiffs and their counsel before they filed this lawsuit strongly supported the conclusion that defendant intentionally misstated the facts to the court. However, they do not describe this evidence or cite anything in the record to support their statement. As far as the record shows, plaintiffs' only source of outside information was Jane Kohlwey, Jeffrey and Rochelle Huettl's attorney for the July 1996 county court protective custody proceedings. In fact, the statements she allegedly provided to plaintiffs' attorney are reproduced in plaintiffs' complaint almost verbatim. Kohlwey stated, for example, that "the only evidence" to suggest that Alora had been abused was the report of a deputy sheriff that Alora had been tied up by her grandfather at the park. She also stated that there was no "reliable evidence" ever presented up to and through trial that plaintiffs had abused their child. In themselves these conclusory statements do not constitute dispositive evidence. Plaintiffs never attempted to corroborate Kohlwey's information by conducting any further factual investigation before filing their lawsuit. They failed to investigate the court record of the July 1996 petition or to interview people involved in the incident to find evidence that would support or negate those propositions. Although plaintiffs assert that counsel and Kohlwey discussed "in detail"

evidence supporting the conclusion that defendant's July 1996 petition for removal of Alora from plaintiffs' home contained a number of factual assertions that defendant knew to be false, their lack of specific evidence undermines their assertion.

On September 12, 1996, a jury determined that Alora was not a child in need of protection or services. Plaintiffs alleged in their complaint that the court's decision to remove Alora from her home pending trial was the "exclusive result of defendant's false statements under oath and fraud upon the court." Even if a jury verdict in plaintiffs' favor could be held to raise some suspicion about defendant's intent, plaintiffs should not have relied on the verdict to suggest that defendant's intent was evil without first examining the court record. As plaintiffs concede, the juvenile court file of the 1996 C.H.I.P.S. case was an important source for obtaining corroboration of Kohlwey's view that defendant lacked a reasonable basis for petitioning the court and was acting with fraudulent or malicious intent. Although plaintiffs contends that the juvenile court documents were not available to them when they sought access in response to defendant's motion for summary judgment, they had had almost six years in which to obtain access to those documents. Plaintiffs do not explain why they failed to seek access to such an important source of information before filing their lawsuit.

In summary, before they filed this lawsuit, plaintiffs had no specific evidence that would substantiate their claim that defendant had acted with malicious or fraudulent intent

or with even a lack of reasonable cause. They failed to confirm Kohlwey's impression of defendants' motivation, despite the opportunity to view court records or interview medical professionals and law enforcement officials involved in plaintiff's previous child custody proceedings. The failure is particularly difficult to justify because those sources of potential evidence were available to plaintiffs without conducting discovery or waiting for trial.

Plaintiffs contend that a decisive fact was revealed during discovery when they saw defendant's personal notes and files concerning the July 7, 1996 incident. Allegedly, the note convinced them that defendant "probably did believe the substance of what she relayed to the court in the petition." In other words, plaintiffs became convinced that defendant did not lie to the court. Curiously, counsel argues that when plaintiffs discovered defendant probably did not lie, they became convinced she could win on a qualified immunity defense. This makes no sense. The defense of qualified immunity comes into play when it appears that the defendant is *guilty* of committing the wrongful acts alleged in the complaint. The idea of qualified immunity is to shield public officials from liability (and the public purse from depletion) for wrongful acts unless the officials' conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In their complaint, plaintiffs accused defendant of lying to a court and acting maliciously and intentionally to deprive plaintiffs of the custody of their child with a reckless disregard for plaintiffs' legal rights. Defendant would

have been hard-pressed to argue that before she engaged in such conduct, the law was not clear that her acts would be unlawful and in violation of plaintiffs' rights. The fact is that defendant's personal notes and files revealed that she did not need a qualified immunity defense. They revealed that plaintiffs had been wrong about the facts, a matter plaintiffs might have discovered substantially earlier had they conducted a reasonable investigation into the facts before bringing the lawsuit.

III. VEXATIOUS CLAIM

I cannot find that plaintiffs had an "honest" belief in the ultimate success of the lawsuit. See Christiansburg Garment Co., 434 U.S. at 422. In their complaint, plaintiffs accused defendant of acting "fraudulently," "intentional[ly] and malicious[ly]," and "with reckless disregard both for the facts and her proper duties under the law." They even stated that defendant's actions "were unconscionable and are of the sort that should shock the conscience of the court." Before making this accusation, plaintiffs made little effort to corroborate it. Instead, they relied exclusively on one-sided and conclusory allegations from plaintiffs and their former counsel.

Plaintiffs do not attempt to show any basis for their allegation that defendant had "a long history of improper attempts" to remove Alora from the home of her parents. Plaintiffs refer in their complaint to two specific incidents, one that defendant tried to

remove Alora from her home on the basis of a pediatrician's report in 1995 and the other that in March 1996, defendant made false statements in an affidavit concerning the consent decree issued in 1995. Plaintiffs do not suggest that they conducted any factual investigation into the truth of these allegation.

Plaintiffs also alleged that defendant wrongfully and purposefully "meddled in the marriage" of Jeffrey and Rochelle Huettl after she removed Alora. They do not argue that they had any reasonable basis for believing the acts supporting this claim fell outside defendant's authority as a social worker.

Plaintiffs reiterated those accusatory assertions that are not necessarily relevant to their valid allegation without specifying evidence to indicate defendant's wrongful conduct. The gap between this strong accusation and the lack of evidentiary basis strongly indicates that plaintiffs used this court proceeding to avenge their personal annoyance over the family court proceedings.

IV. FINDING OF FRIVOLOUSNESS

I conclude that plaintiffs' § 1983 claim was frivolous in the sense that "it is groundless or without foundation." See Hughes, 449 U.S. at 14, Munson, 969 F.2d at 269. The series of personal accusations in the complaint and the scant evidence to support them provide reasons to believe that the claim was also "vexatious or brought to harass or embarrass the

defendant." See Hensley, 461 at 429 n.2.

Plaintiffs argue that a finding of frivolousness is appropriate only "when the facts alleged rise to the level of the irrational or wholly incredible." Denton v. Hernandez, 504 U.S. 25, 33 (1992). Courts have adopted this construction of "frivolous" under the in forma pauperis statute, codified at 28 U.S.C. § 1915(d), to screen complaints filed by indigent pro se prisoners, where they are entitled to generous reading of the complaint. See Haines v. Kerner, 404 U.S. 519 (1972). Even if plaintiffs' complaint in the present case is not irrational or wholly incredible, plaintiffs represented by counsel are expected to file a better founded claim when they file and pursue a § 1983 claim.

Plaintiffs contend that they dropped the case as soon as they learned that their case had no merit. This contention fails because their case had no merit ab initio. They were too late in acknowledging that their case was meritless.

Plaintiffs' lawyer met with plaintiffs only four times: twice in April 1996, and once each on February 12, 1997 and May 24, 2002. Aside from these meetings, plaintiffs' lawyer relied exclusively on their interview with Kohlwey in October 1996, almost six years before they filed this lawsuit. Defendant was required to respond by filing an answer, a motion for summary judgment and a request for judgment and attorney fees and had to facilitate plaintiffs' belated discovery. She is entitled to an award of attorney fees incurred since the inception of the litigation.

ORDER

IT IS ORDERED that

1. Defendant Monica Becker's request for attorney fees is GRANTED; and

2. Defendant may have until May 21, 2003 in which to submit an itemization of the costs she reasonably incurred in prosecuting this claim; plaintiffs may have until June 6, 2003 in which to respond to defendant's submission. There will be no reply brief.

Entered this 9th day of May, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge