IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SUE MERCIER, ELIZABETH J. ASH,
ANGELA BELCASTER, JANET BOHN,
JULIE CHAMBERLAIN, MAUREEN
FREEDLAND, DAVID GOODE, BETTY
HAMMOND, CURT LEITZ, CONSTANCE R.
LONG, DAVID W. LONG, MYRNA D.
PEACOCK, BECKY POST, JAMES L.
REYNOLDS, ELLEN DODGE SEVERSON,
ERIC SEVERSON, LESLIE SLAUENWHIT,
HERMAN S. WIERSGALLA, HOWARD
WIERSGALLA, JAMES E. WIFFLER,
ROBERT WINGATE, HENRY ZUMACH and
FREEDOM FROM RELIGION FOUNDATION, INC.,

OPINION AND ORDER

Plaintiffs,

02-C-376-C

v.

CITY OF LA CROSSE,

Defendant,

and

FRATERNAL ORDER OF THE EAGLES,
LA CROSSE AERIE 1254,

Intervening Defendant.

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Plaintiffs brought this case in 2002, challenging the City of La Crosse's display and

later sale of a monument of the Ten Commandments. I granted plaintiffs' motion for summary judgment in July 2003, concluding that both the display and the sale violated the establishment clause of the First Amendment. Two months later, I vacated the judgment to allow the intervention of the party that had purchased the monument, the Fraternal Order of the Eagles. In February 2004, I denied the Order's motion for summary judgment and granted summary judgment in favor of plaintiffs, adhering to the conclusion in the July 2003 opinion and order.

Now before the court is plaintiffs' second motion for attorney fees and costs pursuant to 42 U.S.C. § 1988(b) and Fed. R. Civ. P 54(d). (Plaintiffs filed their first motion in August 2003. I denied this motion at the same time I vacated the judgment to allow the Order to intervene, but I advised plaintiffs that they could submit a new motion if they were successful after the second round.) Plaintiffs seek a total of $60,672.50 in fees and $7,693.49 in costs.

The City does not object to the hourly rates charged by plaintiffs' counsel or, for the most part, the time claimed by plaintiffs for the work counsel performed. However, the City does object categorically to five components of the fee claimed by plaintiffs: (1) time spent talking to the media about the case; (2) time spent by attorney James Peterson traveling from Madison to La Crosse to defend depositions of the plaintiffs; (3) any work performed as a result of the Order's intervention; (4) work related to the motion for attorney fees and

costs; (5) work related to appellate issues.

Plaintiffs concede that at this stage of the proceedings, they are not entitled to fees for appellate work. The parties agree that the appellate fees claimed by plaintiffs total $1,000. Accordingly, I will subtract that amount from plaintiffs' award.

Plaintiffs dispute the City's remaining objections. The general standard for awarding attorney fees is whether the activity in question was "reasonably expended on the litigation." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). In the context of determining whether time spent with the media is compensable, some courts have applied this standard by asking whether the activity was "necessary" to accomplish the objectives of litigation. Jenkins v. Missouri, 131 F.3d 716, 721 (8th Cir. 1997); see also Gilbrook v. City of Westminster, 177 F.3d 839 (9th Cir. 1999) (press conferences and public relations work compensable when efforts are "directly and intimately related to the successful representation of a client"). However, other courts have questioned whether it is appropriate to permit recovery for media activities under any circumstances. E.g., Halderman v. Pennhurst State School & Hospital, 49 F.3d 939, 942 (3d Cir. 1995) ("The fact that private lawyers may perform tasks other than legal services for their clients, with their consent and approval, does not justify foisting off such expenses on an adversary under the guise of reimbursable legal fees."); Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 176 (4th Cir. 1994) ("The legitimate goals of litigation are almost always obtained in the courtroom, not in the media.")

I find the reasoning of Halderman and Rum Creek persuasive. Although it may be common for lawyers to field questions from the media about a case, this does not mean that it is time "expended on the *litigation*." Even if I were to adopt the reasoning of the courts in Jenkins or Gilbrook, plaintiffs have failed to show how any time counsel spent speaking with the press advanced the case. I will subtract from plaintiffs' total the $741 that they claimed for media activities.

With respect to the travel time between Madison and La Crosse, it is undisputed that Peterson made the trip in order to defend depositions that the City was taking of plaintiffs. The City provides no authority or even reasoning to support its argument that plaintiffs should not be compensated for this time. As plaintiffs point out, the Court of Appeals for the Seventh Circuit has held that a prevailing party may recover for travel time as part of attorney fees. Henry v. Webermeier, 738 F.2d 188, 194 (7th Cir. 1984); see also Erickson v. City of Topeka, 239 F. Supp. 2d 1202 (D. Kan. 2002); Gay Lesbian Bisexual Alliance v. Sessions, 930 F. Supp. 1492 (M.D. Ala. 1996). The depositions were held in La Crosse at the City's request. The City could not argue successfully that the presence of plaintiffs' counsel was not necessary. Accordingly, I decline to subtract counsel's travel time from the award.

The largest fee dispute between plaintiffs and the City relates to the work performed by plaintiff's counsel as a result of the Order's intervention. Plaintiffs request $3,500 for

their efforts opposing the Order's motion to intervene and $6,500 for opposing the Order's motion for summary judgment. Plaintiffs have not sought to recover these fees from the Order, perhaps assuming that they could not prevail under the standard set forth by the Supreme Court for assessing attorney fees against intervenors under § 1988. Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989) (district courts may award attorney fees against losing intervenors only where intervenor's action was frivolous, unreasonable or without foundation). In any event, the City argues that it should not have to compensate plaintiffs for any of this work. Plaintiffs disagree, citing Love v. Reilly, 924 F.2d 1492, 1495 (9th Cir. 1991), for the proposition that they are entitled to attorney fees incurred in opposing an intervenor's acts if those acts "were made necessary by government opposition to the legitimate claims of the party seeking the award." Plts.' Reply Br., dkt. #133, at 3.

I note first that Love did not involve a plaintiff's opposition to a motion to intervene. Rather, it involved a motion brought by intervenors to stay a preliminary injunction. Although the intervenors lost on their motion, the court of appeals found that it would be unfair to make the government pay the plaintiff's fees incurred opposing the motion because the government had taken no position on it. In this case, plaintiffs' position is even weaker than that of the plaintiffs in Love. Plaintiffs were not successful in opposing the Order's motion to intervene, so it is not clear on what grounds plaintiffs believe they are entitled to

recover any of the $3,500 spent on those futile efforts.

Of course, plaintiffs *were* successful in opposing the Order's motion for summary judgment. It is also true that the Order became a necessary party as a result of the City's sale of the monument. Therefore, I agree with plaintiffs that they are entitled to some compensation for having to fight off the Order's summary judgment motion as well as the City's. The question is how much. If plaintiffs had added the Order as a party as soon as the sale had been made, it might be reasonable to charge the City for all of plaintiffs' efforts against the Order. However, plaintiffs not only failed to amend their complaint to include the Order as a party, but they *opposed* the Order's motion to intervene. It is plaintiffs' failure to bring in the Order sooner and not the City's sale that necessitated a second round of summary judgment motions. Perhaps the court shares some of the blame for overlooking the necessity to add the Order, but it was not the *City's* obligation to bring the Order into the suit. Undoubtedly, plaintiffs would have expended some additional resources even if the Order had been a party from the beginning, but it would have been significantly less if both defendants could have filed their summary judgment motions at the same time. Accordingly, I will award plaintiffs $3000, or slightly less than 1/2 of the claimed amount, for the work they spent opposing the Order's motion for summary judgment.

Finally, with respect to plaintiffs' work on their motions for attorney fees, defendant does not argue that such work is not compensable. Commissioner v. Jean, 496 U.S. 154

(1990). Rather, the City challenges the reasonableness of the 17.45 hours claimed by plaintiffs for work relating to the issue of attorney fees. However, the City appears to base its position on a belief that counsel for plaintiffs spent 17.45 hours attempting to justify recovery of fees for the time they spent talking to the press. As plaintiffs point out, research and preparation in claiming those activities was only one part of plaintiffs' response to the City's objections. Nevertheless, because plaintiffs were successful on only some of the disputed fee issues, I will subtract from the award 10 hours of time at $150 an hour, the rate of attorney Peterson, who performed most of the work on the fee petition.

Because the City does not object to any of the costs claimed by plaintiffs, I will award those in full.

ORDER

IT IS ORDERED that plaintiffs' motion for attorney fees and costs is GRANTED in

part. Plaintiffs are awarded $50,431.50 in fees and $7,693.49 in costs.

Entered this 11th day of June, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge