

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

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CHRISTOPHER J. MCMAHON,  
Plaintiff,

v.

MEMORANDUM and ORDER  
06-C-285-S

JOHN KINDLARKSI, JOHN NIEBUHR,  
RONALD DeBRUYNE, SR., JUDITH DeBRUYNE  
KRISTEN DeBRUYNE and WISCONSIN COUNTY  
MUTUAL INSURANCE COMPANY,

Defendants.

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On November 20, 2006 judgment was entered in the above entitled action in favor of defendants against plaintiff dismissing all federal law claims with prejudice and all state law claims without prejudice.

On November 29, 2006 intervenor Wisconsin County Mutual Insurance Corporation (WCMIC) moved for attorney fees pursuant to 42 U.S.C. § 1988. On December 4, 2006 defendant John Niebuhr moved for attorney fees under 42 U.S.C. § 1988. The same date Ronald DeBruyne moved for attorney fees under 42 U.S.C. § 1988. These motions have been fully briefed and are ready for decision.

BACKGROUND

On October 16, 2006 intervenor Wisconsin County Mutual Insurance Company (WCMIC) filed a motion for summary judgment. On

November 15, 2006 the motion was granted as unopposed. As a matter of law WCMIC had no duty to defend and/or indemnify Ronald DeBruyne because he was not acting in his role as County Supervisor.

On November 20, 2006 the Court granted the motions of defendants John Kindlarski, John Niebuhr, Ron DeBruyne, Judith DeBruyne and Kristen DeBruyne for summary judgment dismissing plaintiff's federal law claims with prejudice and his state law claims without prejudice.

The Court found that plaintiff's due process rights were not violated because he had meaningful state law post-deprivation remedies sufficient to provide the requisite due process protection for any deprivation of liberty or property that he may have suffered. The Court also found that plaintiff's equal protection rights were not violated because he had not presented any evidence that he was treated differently than a similarly situated individual. The Court then stated as follows, "Since plaintiff's constitutional rights were not violated, the Court need not address the issue of whether there was a conspiracy to violate his constitutional rights whether under 42 U.S.C. § 1983 or § 1985."

#### MEMORANDUM

A prevailing defendant can recover attorney fees when the court finds that the action was vexatious, frivolous or brought to harass the defendant, Hensley v. Eckerhart, 461 U.S. 424, 429

(1983), or if the action was meritless in the sense that it was groundless or without foundation. Hughes v. Rowe, 449 U.S. 5, 14 (1980). An intervenor must also show that it contributed to the success obtained in the case with efforts that were not duplicative of the named party. King v. Illinois State Bd. Of Elections, 410 F.3d 404, 417 (7<sup>th</sup> Cir. 2005).

Defendant John Niebuhr moves for attorney fees and costs pursuant to 42 U.S.C. § 1988 and 28 U.S.C. §1927. He argues that the plaintiff's claims against him in his official and individual capacity were meritless and that in addition the claims against any other defendants in their official capacities were also baseless. Defendant Niebuhr argues that he was not personally involved in any alleged deprivation of plaintiff's right nor that such deprivation was done pursuant to any county custom or policy. Although defendants Niebuhr and Kindlarski, employees of the Vilas County Sheriff's department, ultimately prevailed in this action, the Court never reached the issues of personal participation nor county policy. Defendants were granted summary judgment on the merits of plaintiff's federal law claims.

The Court never found as a matter of law that defendant Niebuhr was not personally involved or that the alleged violation was not pursuant to a county custom or policy. In fact the Court found that a genuine factual issue remained as to whether plaintiff was deprived of a protected liberty or property interest but that

he had adequate state court remedies to address any deprivation. Although plaintiff might have difficulty proving that defendant Niehbur was personally involved or that the alleged violation occurred pursuant to a county policy or custom, defendants have not shown that the allegations in plaintiff's amended complaint were completely without foundation or factual support. See Tierney v. Vahle, 304 F. 3d. 734, 739-740 (7<sup>th</sup> Cir. 2002). Neither defendant Niehbur nor any other defendant who was sued in his official capacity is entitled to attorney fees under 42 U.S.C. § 1988.

In the alternative these defendants argue that they are entitled to attorney fees and costs under 28 U.S.C. § 1927 because the plaintiff multiplied the proceedings unreasonably and vexatiously. The Court finds no evidence in the record to support the claim that plaintiff was objectively unreasonable or vexatious.

Defendant Ronald Debruyne claims that he is entitled to attorney fees and costs pursuant to 42 U.S.C. § 1988. He argues that plaintiff's claim that he violated plaintiff's constitutional rights as a member of the Vilas County Board of Supervisors was groundless and without factual basis.

Defendant DeBruyne prevailed on the merits of plaintiff's claims which did have some factual basis. The Court, however, found that plaintiff's claim against Ronald Debruyne as a County Supervisor lacked a factual basis at the time it granted WCMIC's motion for summary judgment.

When plaintiff failed to oppose the motion for summary judgment he knew that defendant Ronald DeBruyne was not acting in his role as County Supervisor. Plaintiff's continuation of his claim against Ronald DeBruyne as a County Supervisor after that date was meritless. Pursuant to 42 U.S.C. §1988 defendant Ronald DeBruyne is entitled to an award of attorney fees and costs that he incurred after November 5, 2006.

Intervenor WCMIC is entitled to its attorney fees as an intervenor if it can show it contributed to the success obtained in the case with efforts that were not duplicative of the named party. Defendant Ronald DeBruyne had to defend himself on the merits of the Constitutional claims. WCMIC, on the other hand, argued that it did not have a duty to defend or indemnify defendant Ronald DeBruyne because he was not acting in his role as a County Supervisor. WCMIC's motion for summary judgment resulted in the Court finding that defendant Ronald DeBruyne was not acting in his role as a County Supervisor. Accordingly, WCMIC contributed to the success obtained in the case without duplicating the efforts of the named party Ronald DeBruyne.

There was, however, a possible claim that defendant Ronald DeBruyne was acting in his role of County Supervisor at least until the time plaintiff chose not to oppose the intervenor's motion for summary judgment. Accordingly, intervenor WCMIC's request for

attorney fees under 42 U.S.C. § 1988 will be partially granted only for work done after November 5, 2006.

Defendant Ronald DeBruyne, Sr. and Intervenor WCMIC may submit itemized lists of fees and costs incurred after November 5, 2006 not later than February 15, 2007. Plaintiff may respond not later than March 1, 2007 and defendant may reply not later than March 12, 2007.

ORDER

IT IS ORDERED that the motion for attorney fees by defendant Niebuhr on claims against him in his individual capacity and all official capacity claims against defendants under 42 U.S.C. § 1988 and 28 U.S.C. § 1927 is DENIED.

IT IS FURTHER ORDERED that the motions for attorney fees by defendant Ronald DeBruyne and intervenor Wisconsin County Mutual Insurance Company are PARTIALLY GRANTED, awarding attorney fees and costs incurred after November 5, 2006.

IT IS FURTHER ORDERED that defendant Ronald DeBruyne and intervenor Wisconsin County Mutual Insurance Company submit itemized lists of fees and costs not later than February 15, 2007; plaintiff to respond not later than March 1, 2007 and replies may be filed not later than March 12, 2007.

Entered this 16<sup>th</sup> day of January, 2007.

BY THE COURT:

S/

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JOHN C. SHABAZ  
District Judge