IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PEARL COTTIER and REBECCA THREE STARS,	)	
	)	No. 07-1628
Plaintiffs-Appellees,	)	
	)	Appeal from the
v.	)	United States District Court for the
	)	
CITY OF MARTIN, et al.,	)	District of South Dakota
	)	
Defendants-Appellants.	)	

APPELLEES' REPLY TO THE APPELLANTS' OPPOSITION TO THE APPELLEES' MOTION FOR ATTORNEYS' FEES AND EXPENSES

Plaintiffs-Appellees Pearl Cottier and Rebecca Three Stars respectfully submit this reply to the Defendants-Appellants' opposition to the Appellees' motion for attorneys' fees and expenses ("Appellants' Opposition"). The Appellants offer no opposition to the requested expenses, and they object only to a fraction of the Appellees' attorneys' fees. Those objections have no merit.

I. The hours requested are reasonable.

A. Time spent on a discovery dispute is reasonable.

The Appellants first object to 18.6 hours spent by the plaintiffs' attorneys in the district court on a discovery dispute that

arose over the plaintiffs' first request for attorneys' fees and expenses in the district court. (Appellants' Opposition 3.) They do not dispute the Appellees' assertion that the plaintiffs prevailed in the dispute. Rather, the Appellants argue only that the time spent was unreasonable merely because the district court did not cite any of the materials obtained in that dispute when it awarded fees to the plaintiffs.

There is, of course, no way for anyone to know how the district court would have ruled if the plaintiffs had not prevailed in the discovery dispute, but the fact that the plaintiffs prevailed is evidence enough that the relatively small number of hours spent on the dispute were reasonable. A review of the district court's record, moreover, shows just how important the dispute was. The plaintiffs used the material obtained in the dispute to refute the defendants' key arguments, citing to it more than 45 times. (*See* Plaintiffs' Reply to the Defendants' Objections to the Plaintiffs' Motion for Attorneys' Fees and Expenses, filed Jan. 11, 2008 (doc. no. 468).) And the plaintiffs recovered for almost all of their attorneys' time.

The Appellants do not specifically claim that the number of hours spent was more than necessary in the dispute, and it is clear from the record that 18.6 hours was indeed reasonable given the scope of the dispute. The plaintiffs' briefing alone covers more than 25 pages.

B. Time spent talking with a witness was not unreasonable.

The Appellants next object to .5 hours spent by the plaintiffs' attorneys on a June 28, 2007, telephone conference with Robert A. Fogg, who had been a witness for the plaintiffs in the district court and who was subsequently elected to the Martin City Council under the court's remedial plan. (Appellants' Opposition 4-5.) The Appellants object on the ground that it was improper for the plaintiffs' attorneys to speak with Fogg once he became a defendant in the case.

This objection has no merit because Fogg did not take office until July 11, 2007. The Appellees seek no time for speaking with Fogg about this case after that point.

C. Time spent corresponding with opposing counsel was not unreasonable.

The Appellants next object to 6.7 hours that they claim were spent researching the issue of whether the plaintiffs' attorneys could speak with Fogg. (Appellants' Opposition 5-6.) Included in this time are entries for time spent corresponding with the defendants' lead attorney about "the privilege issue." They claim that it was unreasonable for the plaintiffs to research their ethical obligations and that all entries referring to the privilege issue are impermissibly vague.

In reality, the plaintiffs' attorneys spent only 2 hours on the "Fogg issue," 1.5 hours of which was spent simply reading and responding to correspondence from the defendants' attorney, and .5 hours of which was spent on a telephone call initiated by Fogg himself. Those hours are not unreasonable.

The remainder of the time to which the Appellants object was spent on the discovery dispute in which the defendants claimed attorney-client privilege with respect to their billing records. These entries should not have struck the Appellants' counsel as vague, moreover, *because the time was spent corresponding with Sara Frankenstein, the Appellants' lead attorney*. Frankenstein could have

checked her own records to confirm the subject matter of the entries at issue before wasting the Court's time with frivolous arguments.

D. Time spent on this appeal was not unreasonable.

The Appellants next object to 48.3 hours spent drafting the Appellees' brief in this appeal and 17.2 hours preparing for oral argument. (Appellants' Opposition 6.) In light of the fact that the text of the Appellees' brief was 49 pages long and that the oral argument lasted well over an hour, this time is not unreasonable.

E. Time spent on insurance issues was not unreasonable.

The Appellants next object to .7 hours spent by the plaintiffs' lead attorney discussing the city's insurance policy with an insurance expert and with local counsel. (Appellants' Opposition 6-7.) They claim, in particular, that it was unreasonable for the plaintiffs' attorneys to spend any time trying to divest the city of insurance coverage.

The plaintiffs' attorneys did no such thing. Once the plaintiffs became aware that an insurance pool was funding the defense of this case, they merely took prudent steps to determine whether the

pool would pay any judgment that might result. Such efforts were not unreasonable.

F. The Appellees' time records are not impermissibly vague.

Finally, the Appellants complain that some of the Appellees' time records are impermissibly vague. (Appellants' Opposition 7.) They are not.

As a general matter, the courts have not required fee claimants to "write a book" or "to describe in excruciating detail the professional services rendered for each hour or fraction of an hour." *Louisiana Power & Light Co. v. Kellstrom,* 50 F.3d 319, 327 (5th Cir. 1995). "Plaintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended," but rather "should identify the general subject matter of his time expenditures." *Hensley v. Eckerhart,* 461 U.S. 424, 437 n.12 (1983). What is required is enough detail to enable a court to determine that hours claimed were reasonably spent. *See id.*

The Appellants have cited several time entries that they claim to be vague, but they don't spend a word explaining *how* they are vague. For example, most of the time entries to which the

Appellants object are described as "drafted and revised appellees' brief," "drafted plaintiffs' reply re: motion for fees," and "prepare for oral argument." There is nothing impermissibly vague about such items, and the Appellees are at a loss to understand the Appellants' assertion to the contrary.

II. The rates requested are reasonable.

The Appellants also object to the requested rate for the Appellees' lead attorney, Bryan Sells. (Appellants' Opposition 8-9.) In so doing, the Appellants do not dispute the evidence attached to the Appellees' motion, which demonstrated that Sells' rates are actually well below market rates in Atlanta, where his office is located. Rather, they argue that South Dakota rates should apply and that, in any event, Sells has increased his rate too quickly.

In support of their first argument, the Appellants point to a 2007 affidavit by a Rapid City attorney, Craig Pfeifle, who asserted that there are attorneys in South Dakota who could have handled this case. The issue, however, is not whether there are in-state attorneys who *could* have handled the case. There are undoubtedly many able attorneys in South Dakota who, given unlimited time

and resources, could have handled this case. Rather, the issue is whether there are any in-state attorneys who *would* have taken this case.

On that issue, there is no dispute. The Appellees have offered unrebutted evidence that, despite diligent and good faith efforts to do so, they were unable to find an in-state attorney to take this case without the assistance, financial and otherwise, of the American Civil Liberties Union. (*See* Declaration of Bryan L. Sells at 3.) That evidence alone is sufficient to justify out-of-state rates. *See Emery v. Hunt,* 272 F.3d 1042, 1048 (8th Cir. 2001). But that evidence isn't alone.

The Appellees' evidence was backed in the district court by the affidavits of two respected in-state attorneys who said that they knew of no in-state attorneys who would have taken this case without the assistance of the American Civil Liberties Union.

The Appellees' evidence is also backed by the proof of time: no local attorney has brought a claim under the Voting Rights Act on behalf of Native Americans in South Dakota without the assistance of out-of-state counsel in at least 20 years. This clearly isn't

because there haven't been cases to bring. The Appellants have not identified a single attorney – not even the attorney who offered an affidavit in support of their objections – who would have been willing to take this case without the assistance American Civil Liberties Union.

The fact is that voting-rights cases are complex, lengthy and expensive. According to a study published by the Federal Judicial Center, voting cases are among the most time-consuming cases that come before the federal courts. *See* Patricia Lombard and Carol Kafka, *2003-2004 District Court Case-Weighting Study* (2005). There simply aren't any plaintiffs' attorneys or law firms in South Dakota who have displayed any interest in taking these cases. Many of them are conflicted out of representing plaintiffs in lawsuits against governmental entities because of their connections with, or hope for future connections with, the state's governmental risk pools, such as the South Dakota Public Assurance Alliance (the carrier involved in this case).

Under these circumstances, out-of-state rates should apply, and there is no dispute as to the reasonableness of Sells' rates in the Atlanta market.

The Appellants do object, however, to any award above the $200 per hour awarded by the district court for time spent between 2001 and 2006. The district court explicitly chose that rate not as the current market rate in Atlanta but as a midpoint between current and historical rates to avoid overcompensating for work performed in 2001, 2002, and 2003. The district court's decision to do that is the subject of a separate appeal, but it would be manifestly unjust to award fees at 2004 rates, as the district court did, for work performed entirely in 2007, 2008, and 2009. Thus, as pointed out in the Appellees' motion, Sells has increased his rates only gradually over the years, and he remains well below the market rate in Atlanta.

III. Conclusion

This Court should grant the Appellees' motion for attorneys' fees and expenses.

I verify that the original of this pleading has been signed and that I will maintain the pleading in accordance with 8th Circuit R. 25A(a).

Dated: January 27, 2009.

Respectfully submitted,

/s/Bryan Sells
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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/Bryan Sells