UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JONATHAN CLARK; ERIC S. CLARK, Plaintiffs-Appellants, v. CITY OF SHAWNEE, KANSAS, Defendant-Appellee.	No. 17-3046 (D.C. No. 5:15-CV-04965-SAC-KGS) (D. Kan.)

ORDER AND JUDGMENT*

(Filed Sep. 1, 2017)

Before **LUCERO, O'BRIEN,** and **MORITZ,** Circuit Judges.

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* Oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). We have decided this case on the briefs.

This order and judgment is an unpublished decision, not binding precedent. 10th Cir. R. 32.1(A). Citation to unpublished decisions is not prohibited. Fed. R. App. 32.1. It is appropriate as it relates to law of the case, issue preclusion and claim preclusion. Unpublished decisions may also be cited for their persuasive value. 10th Cir. R. 32.1(A). Citation to an order and judgment must be accompanied by an appropriate parenthetical notation – (unpublished). *Id.*

Jonathan and Eric Clark seek to appeal from the summary judgment entered in favor of the City of Shawnee, Kansas (City). Their notice of appeal is untimely as to the underlying judgment and did not indicate they were appealing from the denial of their post-judgment motions. We dismiss the appeal for want of jurisdiction.

In December 2013, a City police officer stopped Jonathan's vehicle and found two loaded, un-encased firearms inside. At the time of the stop, the City had an ordinance prohibiting the transportation of a firearm in a vehicle unless it "is unloaded and encased in a container which completely encloses the Firearm."[1] (R. at 53.) The officer cited Jonathan for violating the ordinance.[2]

Jonathan filed a pro se 42 U.S.C. § 1983 complaint against the City alleging violations of the Second and Fourth Amendments. Joining him in the lawsuit was his uncle, Eric Clark. Although Eric had never been cited for violating the ordinance, he claimed there were numerous times he did not carry a firearm within the City (even though he wanted to) due to fear of being prosecuted under the ordinance.

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[1] The ordinance was repealed on August 25, 2014, via a state law which declared null and void all ordinances governing the transportation of firearms or ammunition adopted prior to July 1, 2014.

[2] Jonathan was later convicted in municipal court of violating the firearm ordinance. He appealed to the state district court. The City eventually dismissed the charge.

After protracted proceedings, the district judge granted summary judgment in favor of the City on January 5, 2017. Judgment was entered that same day. In addition to awarding judgment to the City, the judgment allowed the City to recover its costs from the Clarks. The next day, the City submitted its bill of costs. It included its attorney's fees in the bill of costs.

On January 12, 2017, the Clarks filed a motion for review. They objected to the award of costs in the judgment and the City's inclusion of its attorney's fees in the bill of costs. On January 19, the City admitted it had improperly included its attorney's fees as a cost item and filed a separate motion for an award of fees.

The judge denied the motion for review on January 20, 2017. He concluded the judgment correctly awarded the City its costs. However, he directed the Clerk of Court to disregard the request for attorney's fees in the City's bill of costs.

On January 31, 2017, the Clarks filed a motion for additional findings pursuant to Fed. R. Civ. P. 52(b). They asked the judge to make the following additional findings: (1) "the City's regulation appears calculated to incite members of the responsible law-abiding public to obtain a license to carry concealed weapons and to incite the public to view concealed carry of weapons as being a noble defence without any tendency to secret advantages"; and (2) "the evidence before the court showed that carrying of all visible firearms in all vehicles, including rifles mounted in the back window of pickup trucks on one's own private estate, present a

level of concern that such conduct may create untoward and unseemly circumstances that go beyond self-defense." (D. Ct. Doc. 156.) On February 22, 2017, the judge denied the motion because it failed to provide any legal or factual support for the additional findings. Moreover, the Clarks had failed to explain how they satisfied the standards governing relief under Rule 52(b).

Six days later, on February 28, 2017, the Clarks filed their notice of appeal, seeking only to appeal from the January 5, 2017 judgment.

The City moves to dismiss the appeal for lack of jurisdiction because the notice of appeal is untimely. According to the City, the Clarks' Rule 52(b) motion for additional findings was deficient. As a result, it did not toll the time to appeal under Fed. R. App. P. 4(a)(4). We agree with the City that we lack jurisdiction over this appeal, but for different reasons.

"[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles v. Russell*, 551 U.S. 205, 214 (2007). Generally, a notice of appeal in a civil case must be filed in the district court "within 30 days after entry of the judgment or order appealed from." Fed. R. App. P. 4(a)(1)(A). However, certain timely-filed motions, including a motion to make additional factual findings under Fed. R. Civ. P. 52(b) and a motion to alter or amend the judgment under Fed. R. Civ. P. 59, extend the time to appeal until 30 days from the entry of the order disposing of the motion. Fed. R. Civ. P. 4(a)(4)(A).

In this case, the Clarks' motion for review filed on January 12, 2017, although not labeled as such, was a Fed. R. Civ. P. 59(e) motion because it sought to substantively alter or amend the judgment. *See Yost v. Stout*, 607 F.3d 1239, 1243 (10th Cir. 2010) ("Where [a] motion requests a substantive change in the district court's judgment or otherwise questions its substantive correctness, the motion is a Rule 59 motion, regardless of its label."). That motion, which was timely filed within 28 days after entry of judgment, *see* Fed. R. Civ. P. 59(e), extended the time to appeal to February 21, 2017 – thirty days from the entry of the judge's January 20, 2017 order disposing of the motion.[3] Although the Clarks filed a Rule 52(b) motion to make additional findings on January 31, 2017, that motion did not extend the time to appeal beyond the February 21, 2017 deadline because successive post-judgment motions do not toll the time for appealing an underlying judgment. *See Ysais v. Richardson*, 603 F.3d 1175, 1178 (10th Cir. 2010) (a successive post-judgment motion "did *not* extend the time for filing a notice of appeal from the underlying amended final judgment"). Because the Clarks did not file their notice of appeal until February 28, 2017 – a week past the February 21, 2017 deadline

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[3] Thirty days from January 20, 2017, was February 19, 2017. However, February 19, 2017, was a Sunday and February 20, 2017, was a legal holiday. Therefore, the notice of appeal was due Tuesday, February 21, 2017. *See* Fed. R. App. P. 26(a)(1)(C) ("When the [time] period [specified in the appellate rules] is stated in days . . . if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.").

– their appeal is untimely as to the January 5, 2017 judgment and we lack jurisdiction to review it.

Attempting to avoid this result, the Clarks ask us to construe their January 31, 2017, motion to make additional findings as a notice of appeal. "If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal." *Smith v. Barry*, 502 U.S. 244, 248-49 (1992). The notice required by Rule 3 is notice of (1) the party or parties taking the appeal, (2) the judgment or order being appealed, and (3) the court to which the appeal is taken. Fed. R. App. P. 3(c)(1); *see also United States v. Smith*, 182 F.3d 733, 735 (10th Cir. 1999). Although the motion for additional findings was filed within the time to file a notice of appeal, it did not provide the requisite notice. It clearly sought relief solely from the district court; it did not evidence an intent to seek appellate review from this Court. It also did not indicate what judgment or order is being appealed. Indeed, the motion begins by "[r]eserving the right to appeal on all issues. . . ." (D. Ct. Doc. 156.) Far from indicating that they are presently appealing to this Court from the final judgment, this language simply gives notice of an intent to appeal in the future.

Although the notice of appeal is untimely as to the January 5, 2017 order and judgment, it is timely with respect to the judge's denial of the Clarks' Rule 59(e) motion for review and Rule 52(b) motion for additional findings. The judge denied the motion for review on January 20, 2017, but the timely filing of the motion for additional findings on January 31, 2017, tolled the

time to appeal from that denial. *See Ysais*, 603 F.3d at 1178 ("[The] second motion for reconsideration tolled Ysais's time to appeal . . . from the denial of the first motion for reconsideration"). The judge denied the motion for additional findings on February 22, 2017, which gave the Clarks until March 24, 2017, to appeal from the denial of both motions. Again, the notice of appeal was filed February 28, 2017.

But another problem exists. Fed. R. App. P. 3(c)(1)(B) requires a notice of appeal to "designate the judgment, order, or part thereof being appealed." This requirement is jurisdictional. *See Smith v. Barry*, 502 U.S. 244, 248 (1992); *see also Gonzalez v. Thaler*, 565 U.S. 134, 147 (2012); *Williams v. Akers*, 837 F.3d 1075, 1078 (10th Cir. 2016). "Nevertheless, we construe the designation requirement liberally. Thus, a mistake in designating the judgment appealed from is not always fatal, so long as the intent to appeal from a specific ruling can fairly be inferred by probing the notice and the other party was not misled or prejudiced." *Williams*, 837 F.3d at 1078 (citation and quotation marks omitted).

The only intent we can infer from the notice of appeal is an intent to appeal from the January 5, 2017 order and judgment. It states: "Plaintiffs hereby timely appeal[] the **Order** and **Judgment** dated the 5th day of January, 2017 [Dks. 140 & 141]. . . ." (R. at 881.) It not only mentions the date of the order and judgment, it refers to the district court docket numbers.

The notice of appeal mentions the motion for additional findings:

> Pursuant to the Federal Rules of Appellate Procedure, Rule 4(a)(4)(A)(ii) concerning the ***Effect of a Motion on a Notice of Appeal***, if a party files in the district court a timely motion "to amend or make additional factual findings under Rule 52(b), **whether or not granting the motion would alter the judgment**," then the time to file an appeal runs for all parties from the entry of the order disposing of that motion and; Plaintiffs did timely file[] a motion to make additional findings under Rule 52(b) on January 31, 2017 [Dk. 156]; thus, a notice of appeal is timely filed if filed within 30 days of the district court's order disposing of that motion which in the instant case was the order [Dk. 160] filed on February 22, 2017. Thirty days have not yet elapsed from that date and; therefore, **this appeal is timely filed**.

(*Id.*) But that is insufficient.

The Clarks' reference to the order denying their motion for additional findings does not evidence an intent to appeal from it. They referred to the motion believing it tolled the time to appeal from the final judgment. As we have already explained, it did not.

Because we can discern no intent to appeal from the denials of their post-judgment motions, we lack jurisdiction to review those orders.[4]

We **GRANT** the City's Motion to Dismiss and **DISMISS** this appeal for lack of jurisdiction. The Clarks' Motion to Certify a Question of State Law to the Kansas Supreme Court is **DENIED**.

Entered by the Court:

Terrence L. O'Brien
United States Circuit Judge

[4] The City's motion for attorney's fees did not impact the time to appeal because the judge did not extend the time to appeal under Fed. R. Civ. P. 58. *See* Fed. R. App. P. 4(a)(4)(A)(iii) (a timely-filed motion for attorney's fees under Fed. R. Civ. P. 54 extends the time to appeal only "if the district court extends the time to appeal under Rule 58"); *see also Yost*, 607 F.3d a 1242 (the time period to file an appeal in a civil case "may be tolled if . . . a party timely files a motion for attorney's fees under Federal Rule of Civil Procedure 54 *and* 'the district court extends the time to appeal under Rule 58,' Fed. R. App. P. 4(a)(4)(A)(iii)").

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

JUDGMENT IN A CIVIL CASE

JONATHAN CLARK and
ERIC S. CLARK,

Plaintiffs,

v. **CIVIL CASE: 15-4965-SAC**

THE CITY OF SHAWNEE, KANSAS,

Defendant.

( ) **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) **DECISION BY THE COURT.** This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to memorandum & order (Doc. 140), filed January 5, 2017, the defendant's motion for summary judgment (Dk. 108) is granted.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiffs recover nothing, the action be dismissed, and the defendant, City of Shawnee, Kansas, recover costs from the plaintiffs, Jonathan Clark and Eric S. Clark.

Dated: January 5, 2017

TIMOTHY M. O'BRIEN, CLERK

s/M. Barnes

By: Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JONATHAN CLARK
and ERIC S. CLARK,

Plaintiffs,

vs. Case No. 15-4965-SAC

THE CITY OF SHAWNEE, KANSAS,

Defendant.

MEMORANDUM AND ORDER

Upon the court granting the defendant's motion for summary judgment, (Dk. 140), the clerk entered on January 5, 2017, judgment for the defendant City of Shawnee, Kansas ("City") and against the plaintiffs, Jonathan Clark and Eric S. Clark, in this civil rights action. (Dk. 141). The City filed a motion for attorney fees on January 19, 2017 (Dk. 147), and the plaintiffs filed a motion for additional findings (Dk. 156). This order addresses these two pending motions in reverse order.

MOTION FOR ADDITIONAL FILINGS (Dk. 156).

Citing Fed. R. Civ. P. 52(b), the plaintiffs move the court to make two additional findings of fact. The first requested finding is that the City's regulation "appears calculated to incite members of the responsible law-abiding public to obtain a license to carry concealed weapons and to incite the public to view concealed carry of weapons as being a noble defense without any

tendency to secret advantages." (Dk. 156-1, p. 1). The second requested finding is that "the evidence before the court showed that carrying of all visible firearms in all vehicles, including rifles mounted in the back window of pickup trucks on one's own private estate, present a level of concern that such conduct may create untoward and unseemly circumstances that go beyond self-defense." *Id.* The plaintiffs' motion and memorandum fail to provide any legal or factual support for their request. (Dk. 156-1). The plaintiffs' motion does not address the standards governing relief under Fed. R. Civ. P. 52(b). *See May v. Kansas*, 2013 WL 6669093 at *1 (D. Kan. Dec. 18, 2013)("'A motion made pursuant to Rule 52(b) will only be granted when the moving party can show either manifest errors of law or fact, or newly discovered evidence; it is not an opportunity for parties to relitigate old issues or to advance new theories.' *Myers v. Dolgencorp, Inc.*, 2006 WL 839458, *1 (D. Kan. 2006) (citing 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2582 (2d ed.1995)"). The defendant opposes the motion as legally and factually deficient. In reply, the plaintiffs offer for the first time their arguments. "The general rule in this circuit is that a party waives issues and arguments raised for the first time in a reply brief." *See Reedy v. Werholtz*, 660 F.3d 1270, 1274 (10th Cir. 2011). The plaintiffs have waived their arguments, and their motion is summarily denied for failing to provide any legal or factual basis in support of the relief requested.

DEFENDANT'S MOTION FOR ATTORNEY FEES (Dk. 147)

The defendant City filed this motion with a supporting memorandum on January 19, 2017, which was within the required 14 days of the clerk's entry of judgment for the City and against the plaintiffs. (Dks. 147 and 148). The City's motion seeks attorneys' fees pursuant to Fed. R. Civ. P. 54(d)(2) and 42 U.S.C. § 1988 and pursuant to the judgment entered upon the court's summary judgment decision. The defendant's motion complies with Rule 54(d)(2)(B).

The next day, the City promptly filed an amended memorandum that explained:

> AMENDMENT: This Memorandum in Support has been amended to include time records that were inadvertently omitted from the original Memorandum in Support, as well as to include a Statement of Consultation. The remainder of this Memorandum has not been altered, except to include the total amount requested and the assertion that the time entries are reasonable, necessary, and attached.

(Dk. 150, p. 1). The plaintiffs challenge the timeliness and propriety of this amended memorandum. The defendant's amended filing was not untimely. The court's local rule excepts a Rule 54(d)(2) movant from D. Kan. Rule 7.1(a) and permits the supporting memorandum to be filed later than the motion. D. Kan. Rule 54(e). The additional time contemplated by this local rule gives the movant the opportunity to support its filing with time records, affidavits and evidence. The City's

amended filing here included the counsels' time records and brought the City's briefing into compliance with the court's rules. The delayed filing did not arguably prejudice the plaintiffs in filing their response on January 24, 2017. The City's amended memorandum complies with the letter and spirit of D. Kan. Rule 54(e).

Under 42 U.S.C. § 1988(b), a court may award attorney fees to the prevailing party in a civil rights case, including a case brought under 42 U.S.C. § 1983. *See Fox v. Vice*, 563 U.S. 826, 832-33 (2011). When the prevailing party is the defendant, the Supreme Court has applied a standard that is consistent with the "'quite different equitable considerations' at stake." *Fox*, 563 U.S. at 833 (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978)). Because "Congress sought 'to protect defendants from burdensome litigation having no legal or factual basis,'" the Court held that "'upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation,'" an attorney fee award for a defendant was authorized. *Id.* (quoting *Christiansburg*, 434 U.S. at 420-21); *see also Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983) (noting that defendants are entitled to fees under § 1988 "only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant"). In *Christianburg*, the Court emphasized:

> Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable or groundless or that the plaintiff continued to

> litigate after it clearly became so. And, needless to say, if a plaintiff is found to have brought or continued such a claim in *bad faith*, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense.

434 U.S. at 422. "These standards are meant to deter the filing of frivolous lawsuits without discouraging the plaintiffs from pursuing meritorious ones." *Hughes v. Unified School Dist. No. 330*, 872 F. Supp. 882, 889 (D. Kan. 1994) (citing *Eichman v. Linden & Sons, Inc.*, 752 F.2d 1246, 1248 (7th Cir. 1985)).

"A frivolous suit is one 'based on an indisputably meritless legal theory, . . . or whose factual contentions are clearly baseless." *Thorpe v. Ancell*, 367 Fed. Appx. 914, 919 (10th Cir. Feb. 26, 2010) (quoting *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)). This does not mean that a defendant's fee award requires a finding that the suit was "'brought in subjective bad faith.'" *Thorpe*, 367 Fed. Appx. at 919 (quoting *Christiansburg*, 434 U.S. at 421). "'A defendant can recover if the plaintiff violates this standard *at any point during the litigation*, not just as its inception.'" *Thorpe*, 367 Fed. Appx. at 919 (quoting *Galen v. County of Los Angeles*, 477 F.3d 652, 666 (9th Cir. 2007)). In *Fox*, the Supreme Court recognized fee awards for only those frivolous claims:

> Analogous principles indicate that a defendant may deserve fees even if not all the plaintiff's claims were frivolous. In this context, § 1988 serves to relieve a defendant of

> expenses attributable to frivolous charges. The plaintiff acted wrongly in leveling such allegations, and the court may shift to him the reasonable costs that those claims imposed on his adversary. *See Christiansburg*, 434 U.S., at 420-421, 98 S.Ct. 694. That remains true when the plaintiff's suit also includes non-frivolous claims. The defendant, of course, is not entitled to any fees arising from these non-frivolous charges. *See ibid.* But the presence of reasonable allegations in a suit does not immunize the plaintiff against paying for the fees that his frivolous claims imposed.

Fox v. Vice, 563 U.S. at 834.

As the Tenth Circuit has observed, "[t]his is a difficult standard to meet, to the point that rarely will a case be sufficiently frivolous to justify imposing attorney fees on the plaintiff." *Mitchell v. City of Moore, Oklahoma*, 218 F.3d 1190, 1203 (10th Cir. 2000) (citing *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1581 (10th Cir. 1995)); *see Utah Animal Rights Coalition v. Salt Lake County*, 566 F.3d 1236, 1245 (10th Cir. 2009) ("This is a high bar for a prevailing defendant to meet."); *E.E.O.C. v. TriCore Reference Laboratories*, 493 Fed. Appx. 955, 961, 2012 WL 3518580 (10th Cir. Aug. 16, 2012) ("Only in the rare case will this difficult standard be met."). "The dismissal of claims at the summary judgment stage does not automatically meet this stringent standard." *Mitchell*, 218 F.3d at 1203 (citing *Jane L. v. Bangerter*, 61 F.3d 1505, 1513 (10th Cir. 1995)). "In determining if a claim is frivolous, unreasonable, or without foundation, a district court

must not use *post hoc* reasoning to conclude that because the plaintiff did not prevail fees are warranted." *E.E.O.C. v. TriCore Reference*, 493 Fed. Appx. at 961. The Tenth Circuit has said that a "district court should consider the pro se plaintiff's ability to recognize the objective merit of his or her claim." *Houston v. Norton*, 215 F.3d 1172, 1175 (10th Cir. 2000). In his discussion of Tenth Circuit precedent, Judge Lungstrum noted the Tenth Circuit's holding in *Thorpe:*

> On the other hand, in *Thorpe v. Ancell*, attorney's fees were awarded to defendants where the district court concluded that plaintiffs' claims were not only frivolous, but also the factual allegations in their complaint were fantastic" and improperly "concocted" to be publicized in judicial proceedings. 367 F. App'x 914, 924. The plaintiffs had played "fast and loose" with the record in supporting their arguments to the point that their assertions were contradicted by the undisputed facts. *Id.* Furthermore, the plaintiffs refused to concede their claims were frivolous but, instead, filed pages of documents irrelevant to the case in an attempt to discredit the defendants. *Id.* Awarding fees in such a case, according to the district court, provided some compensation to defendants for costs incurred in defending the suit and also deterred plaintiffs from filing "patently frivolous and groundless suits." *Id.*

McGregor v. Shane's Bail Bonds, 2010 WL 4622184, at *2 (D. Kan. Nov. 4, 2010).

In deciding whether the plaintiffs' claims were frivolous, unreasonable or groundless, the court must review their merits in light of its rulings while keeping in mind the plaintiffs' ability to recognize the objective merit of their claims. The defendant City argues the most obvious of the groundless claims is Eric Clark's Second Amendment claim. The district court eventually granted summary judgment for the City and found that Eric Clark did not have standing to bring his claim. (Dk. 140, pp. 5-14). The defendant City filed a motion to dismiss early in this case which challenged Eric Clark's standing. (Dk. 6). The court denied the City's motion, because the complaint facially alleged "an actual injury-in-fact for Eric Clark" and because the defendant had failed "to present a timely and meritorious argument for dismissal based on standing." (Dk. 16, p. 8). Later, the district court denied the plaintiffs' motion for summary judgment on standing and noted that the defendants had "summarily briefed" this issue in their motion to dismiss. (Dk. 26, p. 3). In that order, the district court also laid out for the parties the controlling legal analyses and pointed out the serious factual and legal hurdles that faced Eric Clark. In the parties' subsequent cross motions for summary judgment, they fully presented their legal arguments along with Eric Clark's testimony explaining his alleged injuries and the asserted chilling impact from the challenged ordinance. Eric Clark presented a unique standing theory arguing that "he actually experienced 'a credible imminent threat' of arrest during the relevant period and that this restrained him from exercising his Second Amendment right." (Dk. 140, p.

10). The court addressed this theory at length and concluded that the facts did not support a sufficient imminent threat for standing. While Eric Clark's standing theory became most apparent and understandable at this stage in the litigation, as did its lack of legal and factual merit, the court concludes this claim does not warrant a fee award. This is not one of those "rare cases" in which a *pro se* plaintiff would necessarily recognize the fallacies in his standing theory. For that matter, the defendant's briefing of this issue failed to address Eric Clark's particular standing theory. (Dk. 140, p. 11). The court does not find that Eric Clark's presentation of this standing claim shows that he necessarily understood his theory to be indisputably meritless and his factual allegations to be clearly insufficient and baseless. Thus, the court concludes that the granting of attorney's fees is not warranted on Eric Clark's claim.

The court reaches the same conclusion as to the merits of the plaintiffs' Second Amendment challenge to the municipal ordinance. The defendant is right that the plaintiffs pushed the bounds of reasonableness in fashioning some of their facial challenges and in arguing the ordinance's impact on firearm possession in the home. Nonetheless, the plaintiffs' claims presented substantive legal issues surrounding unsettled constitutional questions that required serious analysis to decide them. The court rejects the defendant's position that the plaintiffs' Second Amendment claims were frivolous and unreasonable. Finally, the defendant points to the plaintiffs having acted in bad faith during

the litigation of this case. The plaintiffs filed excessive pleadings and repeatedly advanced unreasonable arguments in challenging the defendant's counsel's digital signature on discovery requests. Such conduct would have been worthy grounds for a sanctions motion during discovery. This circumstance, however, in this court's discretion, is not so weighty as to transform this into a rare case justifying an award of defendant's attorney's fees. In reaching this decision, the court carefully reviewed the claims and evidence contained in the record, as well as the parties' arguments, and is convinced that attorney's fees should not be awarded against the Clarks.

IT IS THEREFORE ORDERED that the plaintiffs' motion for additional filings (Dk. 156) is denied;

IT IS FURTHER ORDERED that the defendant City's motion for attorney fees (Dk. 147) is denied.

Dated this 22nd day of February, 2017, Topeka, Kansas.

s/Sam A. Crow
Sam A. Crow, U.S. District Senior Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JONATHAN CLARK
and ERIC S. CLARK,

Plaintiffs,

vs. Case No. 15-4965-SAC

THE CITY OF SHAWNEE, KANSAS,

Defendant.

MEMORANDUM AND ORDER

This action culminated in the court's order filed January 5, 2017, which, in part, granted the summary judgment motion filed by the defendant, the City of Shawnee, Kansas, ("City"), and also directed the clerk of the court to "enter judgment for the defendant City." (Dk. 140). In compliance with the court's order and with Fed. R. Civ. P. 54(d)(1) and 58(b), the clerk of the court entered on the same day a judgment that stated the defendant's motion for summary judgment was granted and that "further ordered and adjudged that the plaintiffs recover nothing, the action be dismissed, and the defendant, City of Shawnee, Kansas, recover costs from the plaintiffs, Jonathan Clark and Eric S. Clark." (Dk. 141). The clerk's judgment correctly reflects what Fed. R. Civ. P. 54(d)(1) requires, "[u]nless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney's fees – should be allowed to the prevailing party." The clerk's judgment allows for costs only and does not address attorney's fees.

The next day, January 6, 2017, the defendant City filed a bill of costs that included a line item for "attorneys' fees under 42 U.S.C. § 1988" in the amount of $32,517.50. (Dk. 142). This inclusion of attorneys' fees on its bill of costs contradicts the plain terms of D. Kan. Rule 54.1 which requires a party to "file a bill of costs on a form provided by the clerk." The clerk's form has no line item for attorneys' fees. See D. Kan. website and link to AO Form 133. The reason for this is plain. The rules of this court require any claim for attorneys' fees to be made by separate motion. *See* Fed. R. Civ. P. 54(d)(2) and D. Kan. Rule 54.2. On January 19, 2017, the defendant City filed a response admitting it had improperly included attorneys' fees as an item on the bill of costs. (Dk. 146). The City also has now filed a separate motion for attorneys' fees under 42 U.S.C. § 1988. (Dk 147). Thus, the clerk of the court in considering the bill of costs shall disregard the defendant's line item for attorneys' fees.

On January 12, 2017, the plaintiffs filed a motion asking the court to review the judgment and order its correction by deleting costs and fees. (Dk. 143). The court has reviewed the judgment and finds no error in it. The judgment correctly imposes costs consistent with this court's order and with the rules of the court. The defendant City's motion for attorneys' fees is now filed with the court, and the parties will be expected to comply fully with requirements of D. Kan. Rule 54.2 and Fed. R. Civ. P. 54(d)(2).

IT IS THEREFORE ORDERED that the plaintiffs' motion for review (Dk. 143) is denied, but that the clerk

of the court in considering the bill of costs shall disregard the defendant's line item for attorneys' fees.

Dated this 20th day of January, 2017, Topeka, Kansas.

s/Sam A. Crow
Sam A. Crow, U.S. District Senior Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JONATHAN CLARK, et al., Plaintiffs-Appellants, v. CITY OF SHAWNEE, KANSAS, Defendant-Appellee.	No. 17-3046

ORDER

(Filed Oct. 12, 2017)

Before **LUCERO**, **O'BRIEN**, and **MORITZ**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JONATHAN CLARK and ERIC S. CLARK, Plaintiffs	)	
v.	)	Case No.:
THE CITY OF SHAWNEE, KANSAS, Defendant.	)	5:15-cv-04965-SAC

NOTICE OF APPEAL

(Filed Feb. 28, 2017)

Plaintiffs hereby timely appeals the **Order** and **Judgment** dated the 5th day of January, 2017 [Dks. 140 & 141] by United States District Sam A. Crow and the Court Clerk to the **Court of Appeals for the Tenth Circuit of the United States.**

Pursuant to the Federal Rules of Appellate Procedure, Rule 4(a)(4)(A)(ii) concerning the ***Effect of a Motion on a Notice of Appeal***, if a party files in the district court a timely motion "to amend or make additional factual findings under Rule 52(b), **whether or not granting the motion would alter the judgment**;" then the time to file an appeal runs for all parties from the entry of the order disposing of that motion and; Plaintiffs did timely filed a motion to make additional factual findings under Rule 52(b) on January 31, 2017 [Dk. 156]; thus, a notice of appeal is timely filed if filed within 30 days of the district court's order disposing of that motion which in the instant case was

the order [Dk. 160] filed on February 22, 2017, Thirty days have not yet elapsed from that date and; therefore, **this appeal is timely filed**.

Respectfully submitted,

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/s/ Eric S. Clark

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/s/ Jonathan Clark