

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 06-3635

Bill Wickersham; Maureen Doyle,

Plaintiffs/Appellees,

v.

City of Columbia, Missouri,

Defendant/Appellant,

Memorial Day Weekend Salute to
Veterans Corporation,

Defendant.

*
*
*
*
*
*
*
*
*
*
*
*

No. 06-3637

Appeals from the United States
District Court for the Western
District of Missouri.

Bill Wickersham; Maureen Doyle,

Plaintiffs/Appellees,

v.

City of Columbia, Missouri,

Defendant,

Memorial Day Weekend Salute to
Veterans Corporation,

*
*
*
*
*
*
*
*
*
*
*

[UNPUBLISHED]

Defendant/Appellant.

*
*

Submitted: November 20, 2006
Filed: March 30, 2007

Before MURPHY, ARNOLD, and BENTON, Circuit Judges.

PER CURIAM.

Before the court are appeals filed by the City of Columbia and the Memorial Day Weekend Salute to Veterans Corporation (Salute) from the district court's¹ award of attorney fees and costs to Bill Wickersham and Maureen Doyle. Wickersham and Doyle have moved to dismiss the appeals for lack of a final appealable order.

Appellees filed an action under 42 U.S.C. § 1983 against the City of Columbia and Salute alleging violations of their First Amendment rights. On March 31, 2006 the district court ruled on the merits of their claim, holding both appellants liable for violating appellees' free speech rights. Wickersham v. City of Columbia, 05-4061-CV-C-NKL, 2006 U.S. Dist. LEXIS 15438 (W.D. Mo. March 31, 2006). While Salute's appeal from that judgment was pending in this court, the district court awarded costs and attorneys fees in excess of \$200,000 to appellees as prevailing parties under 42 U.S.C. § 1988.

The court declined to resolve how the fees should be apportioned between appellants, however. It directed the parties to file a motion within 30 days if they

¹The Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri.

could not reach an agreement on fee allocation. Appellees timely filed a motion with the district court to have appellants held jointly and severally liable for fees and costs. Salute opposed the motion and requested that the court stay any further proceedings relating to attorney fees, including any allocation order, until this court had decided its appeal of the judgment. On March 22, 2007 we issued an opinion affirming the judgment and the district court's injunction. Wickersham v. City of Columbia, No. 06-1922, 2007 U.S. App. LEXIS 6600 (8th Cir. March 22, 2007).

A decision is final and appealable under 28 U.S.C. § 1291 if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Borntrager v. Cent. States, Southeast & Southwest Areas Pension Fund, 425 F.3d 1087, 1091 (8th Cir. 2005) (quoting Cunningham v. Hamilton County, 527 U.S. 198, 204 (1999)); see also Gates v. Cent. States Teamsters Pension Fund, 788 F.2d 1341, 1343 (8th Cir. 1986) (award of attorney fees not appealable where amount not quantified).

Here the district court has not yet resolved the apportionment of fees between the two appellants. No final order has been entered on the fees. This issue is not a "mechanical and uncontroversial" one, see St. Mary's Health Ctr. v. Bowen, 821 F.2d 493, 498 (8th Cir. 1987) (noting exception to rule that order not fixing damages is not final), but rather is a matter for the district court's discretion. See Hendrickson v. Branstad, 934 F.2d 158, 162 (8th Cir. 1991). Because a fees motion is still pending before the district court, it cannot be said that the order from which Salute and the City of Columbia appeal disposes of all controverted issues and "leaves nothing for the court to do but execute the judgment." Borntrager, 425 F.3d at 1091.

Since these appeals are premature, we lack jurisdiction over them and therefore dismiss them without prejudice.