BENCHMEMO: MURIEL PATCH, SUSAN KIRKPATRICK, AND SUSAN WELLS v. ENGELS, et al., defendant's motions for dismissal and summary judgment.

ATTORNEYS: Plaintiffs: pro se

Defendants: Joe Rapisarda & Todd Benson (Henrico County Attorney)

Judge, this matter is before you on the defendants' motions for dismissal, Fed. R. Civ. P. 12(b)(6), and in the alternative summary judgment, pursuant to Rule 56(b), Fed. R. Civ. P.

The plaintiffs in this matter are three women who have been picketing the Grove Avenue Baptist Church every Sunday and Wednesday for the last seven years. The defendants are Colonel Engels and Major Stanley, members of the Henrico Police Department; W.F. LaVecchia, the County Manager; Ray Shadwell, Anthony Mehfoud, and David Kaechele, members of the Board of Supervisors; Robert Dahlstedt, the Planning Director; and A.E. Clarke and Stacey Burcin, two zoning inspectors. The dispute arose out of the enforcement of a new sign ordinance. The plaintiffs have filed claims under 42 U.S.C. §§ 1983, 1985(3), 1986 and 1988; 28 U.S.C. §§1343, 2201, and 2202; the First Amendment; and Fourteenth Amendment.

Under the Supreme Court's ruling in Younger v. Harris and the Fourth Circuit's decision in Suggs v. Brannon, you should dismiss the plaintiff Kirkpatrick's claims for injunctive and declaratory relief (§§2201 and 2202) pending the outcome of the county's criminal proceeding and stay her §1983 claim.

As to plaintiffs Patch's and Well's §1983 claim, you should deny the defendants' motion for summary judgment. You should, however, dismiss several of the defendants who are not responsible for enforcing the law. Although the defendants have submitted evidence increasing the likelihood that they will prevail, there remain genuine issues of material fact.

I believe you should grant the defendants' motions to dismiss the §§1985(3) and 1986 claims.

Facts

Plaintiffs Muriel Patch, Susan Kirkpatrick and Susan Wells have been protesting Ms. Patch's expulsion from the Grove Avenue Baptist Church since August 10, 1980. They protest on Sunday mornings and evenings, and Wednesday evenings by carrying signs which they refer to as "tables." Apparently Ms. Patch was expelled from the Church for calling the pastor a liar and for striking a deacon after a service. She denies these charges vehemently and has been picketing ever since.

The statute in question was amended on January 28, 1987 to read in pertinent parts:

> Sign: Any structure, part thereof, or device attached thereto or painted or represented thereon, or any material or thing... which displays or includes any numeral, letter, emblem, insignia, device, trademark or other representation used as, or in the nature of, an announcement, advertisement, direction, or designation of any person, firm, group, organization, place, commodity, product, service, business, profession, enterprise, or industry which is located upon any land or building...
> ...
> Prohibited Signs ... (d) Any sign erected on public land other than those erected at the direction of the duly authorized public

> authority. Any such unlawfully erected sign is subject to immediate removal and disposal.

Henrico Code, Chapter 22, Section 104.

The plaintiffs initially contended that their "tables" did not qualify as signs and are not subject to the ordinance. I believe they do not use this argument here. Basically they argue that the statute violates their First Amendment rights to freedom of religion, press, and speech, and secondly that the sign ordinance has been selectively enforced against them in violation of their equal protection rights. In support of their selective enforcement argument, the plaintiffs assert that officials have ignored other violations while monitoring their activities closely, and that the county has employed unusual methods in enforcing the ordinance against them.

The plaintiffs allege that on September 30, 1987 at 6:30 p.m. as they began to protest defendants Clarke, from the Henrico County Planning Department, and Burcin, a zoning inspector, appeared and photographed their protest. After the signs were placed and pictures taken, Burcin and Clarke wrote out notices advising Patch and Wells that they had violated the sign ordinance. They also gave Kirkpatrick a notice, although she claims she did not post any signs.

After receiving the warning, the plaintiffs sough help from Dahlstedt, other county officials, and Major Stanley of the police department. They did not receive the help they sought, and they filed a complaint with the Henrico police. Subsequently, the county advised them that they should apply for building permits for their signs. The plaintiffs filed for

permits to place signs on private and county property, and paid the County $75. Their applications for building permits were eventually denied.

The plaintifffs argue that the written notices they received violated the informal procedure established by the defendant Dahlstedt, the head of the Henrico Planning Department. They claim that they should have first been given a warning, then a written notice, and 30 days to comply. (Richmond Times Dispatch, Oct. 14, 1987)

They also note that county officials have spent a great deal of time watching their actions. On October 4, 11, 14 and 18, 1987, Bursin again watched the plaintiffs demonstrate but did not approach them. On the 18th, the plaintiffs contend that the police asked them to move their car further from the intersection. They claim the policeman ignored other parking and sign violations. The plaintiffs also photographed more than thirty violations of the sign ordinance in the area where they were protesting. The photographs are included with their complaint. These actions, or lack thereof, they claim, was selective enforcement because of their religous beliefs.

The plaintiffs also cite the extraordinary measures the county persued. Burcin's observations of their activities were made after normal working hours and on Sundays. County Manager LaVecchia, replying to an earlier letter, wrote the plaintiffs stating that the county intended to enforce the ordinance against them. The county surveyed the land immediately adjacent to the Church to determine public right of ways, and requested that the

plaintiff's signs be placed 15 feet behind the county's right of way.

Plaintiffs further contend that the Grove Avenue Baptist Church applied pressure to the Henrico County police department to unfairly enforce the sign ordinance against them. They note the television announcement of Vander Warner, the pastor of the church, that county officials were going to take action against the plaintiffs' signs on county property. Mr. Hamm, the Deacon of the Church, wrote a letter to Mr. Rapisarda mentioning that the Church had persons in "strategic positions" in the county government. The Church called the police on two occassions and two squad cars kept them under surveillance.

After Kirkpatrick received a summons to appear in Henrico County General District Court on November 1 for placing a sign on public land on October 18, 1987, the plaintiffs filed the instant suit. The Henrico criminal action has been stayed pending the outcome of this case.

Count I of the complaint is predicated upon 42 U.S.C. §§1983 and 1985(3) and involves all the defendants except the three board members. It basically sets forth an Equal Protection argument but casted in the context of a First Amendment abridgement of religion, press, and speech. Count II is predicated upon 42 U.S.C. § 1986 and alleges a conspiracy among the Board of Supervisor defendants (Shadwell, Mehfoud, and Kaechele), County Manager LaVecchia, and policemen Engels and Stanley to refuse to prevent an ongoing conspiracy designed to

intimidate, harass and discourage plaintiffs from exercising their First Amendment rights.

Plaintiffs' prayer for relief is expansive. In addition to their claims for compensatory and punitive damages, plaintiffs seek a declaratory judgment that the application of the county's sign ordinance to them is unconstitutional. Plaintiffs also seek injunctive relief in order to restrain and prohibit the defendants from taking any futher action against them until the instant case is heard.

First Amendment Argument

In order to narrow the focus of this benchmemo I will address the plaintiffs' First Amendment arguments first. It is well established that an ordinance prohibiting the posting of signs on public property does not abridge any First Amendment rights. Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984). Such an ordinance is a legitimate time, place, and manner restriction. The plaintiffs are free to still picket and carry signs on public property. Hence, their claims of infringement of their First Amendment freedoms of religon, speech, and press rights fails.

The remainder of this memo addresses the plaintiffs' equal protection arguments.

Application of the Younger Doctrine

Plaintiff Kirkpatrick faces criminal prosecution in Henrico County court on charges of violating the sign ordinance. In her federal suit, she seeks injuctive and declaratory relief which would hold that the criminal behavior for which she is to be

tried is constitutionally protected and that the ordinance cannot be enforced against her. By seeking such relief, Kirkpatrick places herself within the holdings in Younger v. Harris, 401 U.S. 37 (1971) and Samuels v. Mackell, 401 U.S. 77 (1971). In Younger, the Supreme Court held that a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual circusmtances. Id. at 69. In Samuels, the court held that the principles of Younger applied to declaratory judgments as well.

These unusual circumstances included "bad faith, harassment or any other unusual circumstances that would call for equitable relief." Id. at 54. The plaintiffs have alleged bad faith here, but they have not made a strong enough showing for the Court to hurdle the barrier created by Younger and Samuels. "Bad faith" means that a "prosecution has been brought without reasonable expectation of obtaining a valid conviction." Kugler v. Helfront, 421 U.S. 117. In the instant case, there is a reasonable expectation of obtaining a valid conviction. The ordinance is constitutional under the Supreme Court's holding in Members of City Counsel v. Taxpayers for Vincent, 466 U.S. 789 (1984). Ms. Kirkpatrick's best defense is that the statute has been selectively enforced against her in violation of the Equal Protection clause. She can as effectively present that defense at the county trial as she could to a federal court. Hence, there are no unusual circumstances that call for equitable federal relief.

Whether a state action is pending is critical to the application of Younger and Samuels. If a criminal state action is pending when the federal action is commenced, the federal court cannot give either injunctive or declaratory relief and must dismiss the action. Younger leaves open the question as to whether the Court must abstain from hearing Ms. Patch's and Ms. Wells' arguments for injuctive and declaratory relief since only Ms. Kirkpatrick faces criminal county prosecution. Patch and Wells have standing to seek such relief since both have been threatened with criminal prosecution for their activities. Younger at 42; Steffel v. Thompson, 415 U.S. 452 (1974). In Doran v. Salem Inn, Inc., the Supreme Court noted that there may be circumstances in which legally distinct parties are so closely related that they should all be subject to the Younger considerations that govern any one of them. 422 U.S. 922 (1975).

The Supreme Court applied the Doran's test for derivative Younger preclusion in Hicks v. Miranda, 422 U.S. 332 (1975). In Hicks, misdemeanor charges were filed against two employees of the a theater. The theater owner and his corporate alter ego brought a federal action for declaratory and injunctive relief. The Court held the federal action should be dismissed on Younger principles because the parties interests were interwined: "Absent a clear showing that appelles [the owner and his corporation]... could not seek the return of their property in state proceedings and see to it that their federal claims were presented there, the requirements of Younger v. Harris could not be avoided." Id. at 348-49.

In the instant case, the rights are identical but not intertwined. Each plaintiff has an individual equal protection right. Kirkpatrick cannot advance the equal protection arguments of Patch and Wells in her Henrico criminal trial. Although if Kirkpatrick is aquitted on equal protection grounds future prosecutions of Patch and Wells may be difficult on res judicata grounds, Patch's and Wells' constitutional rights still are not presented in the county court. In Steffel v. Thompson, 415 U.S. 449 (1974), without addressing the issue of derivative preclusion, the Supreme Court allowed Steffel to maintain a declaratory judgment suit although the person with whom he had been handing out leaflets faced a state prosecution for violating the ordinance which Steffel contested.

Therefore, I believe you should hear Patch's and Wells' case for declaratory and injunctive relief but dismiss Kirkpatrick's claim because of Younger.

The complaint asks for a prliminary injunction for the enforcement of the ordinance against Patch and Wells. The pro se plaintiffs have not made a motion for a preliminary injunction, but if they did, I think you should deny it. They have made no showing of irreparable harm. Since I believe that Patch's and Wells' §1983 claim survives a motion for summary judgment, I believe you should defer ruling on the merits of their request for declaratory and injunctive relief.

Regarding Kirkpatrick's §1983 claim, you must stay it pending the outcome of her criminal case under the Fourth Circuit's ruling in Suggs v. Branson, 804 F.2d 274, 278 (4th Cir.

1986). In Suggs, the district court dismissed under the holding in Younger the plaintiffs' claim for injunctive relief and their claim for damages under §1983. The Fourths overruled the judge's dismissal of the §1983 claim: "Deferring the appellants' right to institute an action for damages until the conclusion of the criminal cases might cause their claims to be barred by a statute of limitations. Thus, in order to afford the plaintiffs a day in court, they should be allowed to maintain their actions for damages." Id. at 280.

42 U.S.C. §1983

The defendants argue that they have not selectively applied the statute to the plaintiffs. They have neither ignored other violations nor employed unusual methods in enforcing the statutes against the women. The defendants have submitted affidavits in support of their arguments.

The defendants note that Dahlstedt, at the direction of LaVecchia set letters to all political candidates in the last election informing them of the statute and the county's intention to enforce it. Similarly, a letter was sent to the Board of Realtors to seek their compliance with the statute. Dahlestedt also reports that since January 1987, 3,000 illegal signs have been removed, 250 verbal notices given, 200 written notices issued, and 9 misdemeanor prosecutions initiated. The defendants also contend that Burcin and Clarke have each removed other illegal signs when observing the plaintiffs activities.

The defendants also deny that they have engaged in any unusual means to enforce the statute against the plaintiffs.

They argue that it makes little sense to remove and return the signs to the plaintiffs where the plaintiffs' actions and violations are on-going. Furthermore, the plaintiffs have received attention in response to complaints from other citizens. Moreover, the zoning inspectors have showed up after normal work hours becuase that is when the violations are alleged to occur. This is a normal procedure.

All of these facts certainly enhance the defendants' likelihood of success on the merits. However, I don't believe they demonstrate that "there is no genuine issue of any material fact and that [they are] entitled to judgment as a matter of law." Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979). For example, the defendants have not shown that the Planning Commission regularly engages in surveillance to ensure that zoning laws are complied with. Nor have they responded to evidence presented by the plaintiffs that they ignored other violations of the sign ordinance in the neighborhood of the plaintiffs' protest.

Moreover, where the constitutional infringment alleged is denial of equal protection of the law as enforced, it is difficult to settle the matter on summary judgment. The plaintiffs must prove that the defendants intended to selectively enforce the statute against them. "Care is required in deciding whether the evidence presents a genuine issue of motive, for 'summary judgment is seldom appropriate in cases wherein particular states of mind are decisive elements of [a] claim or defense.'" Ross v. Communications Satellite Corp., 759 F.2d 355

(4th Cir. 1985) quoting Charbonnages at 414. Resolution of questions of intent often turn upon the credibility of the witnesses. Credibility can best be determined by observing the demeanor of the witness during direct and cross-examination. For this reason, I think summary judgment is inappropriate for this §1983 claim.

You may want to dismiss some of the defendants in this claim, however. The defendants claim that the police do not enforce this ordinance. If this is true, then defendants Engels and Stanley should be dismissed. Mr. LaVecchia, the county manager, is not responsible for the enforcement of this ordinance. The only action he has taken in this matter was to respond to a letter from the plaintiffs. He too should be dismissed.

The remaining defendants are Dahlstedt, the Planning Director, Clarke and Burcin, two zoning inspectors. Clarke and Burcin appear to be the two parties responsible for enforcement of the ordinance against the plaintiffs. Hence, they should remain as defendants. Dahlstedt, the supervising official, may not be held liable under §1983 without showing that he personally participated in the alleged constitutional deprivation. Vinnedge v. Gibbs, 550 F.2d 926, 928 (1977). I don't believe the plaintiffs have made such a showing, and he too should be dismissed as a defendant on the §1983 claim.

42 U.S.C. §1985(3)

The plaintiffs' §1985(3) claim alleging a conspiracy to deprive them of a constitutional right fails in several respects, and the defendants' dismissal motion should be granted.

A §1985(3) claim must allege racially discriminatory animus. Griffen v. Breckenridge, 402 U.S. 88, 102-103 (1971). Under emerging case law, only blacks and those protecting blacks' civil rights are protected under §1985(3). United Brotherhood of Carpenters, etc. v. Scott, 463 U.S. 825 (1983). Harrison v. KVAT Food Management, Inc., 766 F.2d 155, 159 (4th Cir. 1985)(The courts should abide by the congressional intent of §1985(3)--to protect blacks from KKK activities.)

Additionally, under §1985(3), even if the class is enlarged to include non-blacks,the conspiracy must be based upon a class based animus. The plaintiffs do not qualify as a class for the purposes of §1985(3). Rodgers v. Toleson, 582 F.2d 315 (4th Cir. 1978); Eggleston v. Prince Edward Volunteer Rescue Squad, 568 F.Supp. 1344, 1352 (E.D. Va. 1983)("In the United States, at least, people who exercise free speech and who petition the government for redress of their grievances are not in a class distinguishable from their fellow citizens and therefore not within the realm of classes protected by §1985(3).")

Finally, the plaintiffs have failed to allege sufficient facts to show a conspiracy. County employees can't conspire among themselves. Fowler v. Department of Education, 472 F. Supp. 121, 122 (E.D. Va. 1978).

Given these deficiencies in the plaintiffs' complaint, the defendants' motion for dismissal on the §1985(3) claim should be granted.

42 U.S.C. §1986

In this claim, the plaintiffs allege that the defendants, namely the Board of Supervisors, LaVecchia, Engels and Stanley, knew of the conspiracy against the plaintiffs and did nothing to prevent it. In order to successfully plead a §1986 claim, there must be an underlying §1985(3) claim. See, e.g. Santistevan v. Loveridge, 732 F.2d 116, 118 (10th cir. 1984)(There can be no valid claim under §1986 of neglect to prevent a known conspiracy in the absense of a conspiracy under §1985.) Therefore, you should grant the defendants' motion for dismissal on the §1986 claim.

Conclusion

I beleive you should:

(1) DISMISS plaintiff Kirkpatrick's claim for injunctive and declaratory relief pursuant to the holdings in Younger and Samuels.

(2) STAY plaintiff Kirkpatrick's claim under §1983 pending the outcome of her criminal trial pursuant to the holding in Suggs.

(3) DENY the defendants' motion for summary judgment on plaintiffs Patch's and Wells' §1983 claim and hold off on deciding injunctive and declaratory relief, but DISMISS defendants Engels, Stanley, LaVecchia, and Dahlstedt from this claim.

(4) GRANT defendants' motion for dismissal of the plaintiffs' §1985(3) claim; and

(5) GRANT defendants' motion for dismissal of the §1986 claims.

BENCHMEMO: MURIEL PATCH, et al. v. STACEY L. BURCIN, et al., 87-0689-R, jnov, new trial motion

ATTORNEYS: Plaintiffs-- Malvin Brubaker
Defendants-- Todd Benson, Joe Rapisarda

Judge, this matter is before you on the plaintiffs' motions for judgment notwithstanding the verdict (jnov) or, alternatively, for a new trial, pursuant to Fed. R. Civ. P. 50(b) and 59. The plaintiffs also renew their motion to join Henrico County as a necessary party pursuant to Fed. R. Civ. P. 19.

The plaintiffs' grounds for jnov are (1) the jury's verdict is against the clear weight of the evidence, and (2) the sign ordinance is unconstitutional on its face. They also argue that the jury was incorrectly instructed on the defendants' qualified immunity, and therefore, they are entitled to a new trial. I believe these arguments fail.

JNOV

In deciding a motion for jnov, the question for the Court is "whether there is evidence on which the jury could properly base a verdict." The Fourth Circuit had further defined the standard as follows:

> In determining whether the evidence is sufficient the court is not free to weigh the evidence or to pass on the credibility of witnesses or to substitute its judgment of the facts for that of the jury. Instead it must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence.

Lynch v. Universal Life Church, 775 F.2d 576, 580 (4th Cir. 1985). If after viewing the evidence in this light, if there is any

substantial evidence to support the jury's verdict, the jnov motion should be denied. Evington v. Forbes, III, 742 F.2d 834, 835 (4th Cir. 1984).

In this case, the plaintiffs allege selective enforcement of a sign ordinance. The motivation of the enforcing officers is what is in question. "Only evidence which shows the 'probability' and not mere 'possibility' of discriminatory motivation will allow jury consideration." Foster v. Tandy Corp., 828 F.2d 1052, 1056 (4th Cir. 1987). When the jury is deciding the issue of motivational cause, "the inferences it draws to reach its verdict must be reasonably probable; mere speculation is insufficient." Hill v. BASF Wyandotte Corp., 782 F.2d 1212 (4th Cir. 1986).

The plaintiffs make two points in their selective enforcement argument. First, the plaintiffs note that the sign ordinance was not applied as rigidly against political candidates as it was applied against them. The County Planning Director, Robert Dahlstedt, in his October letter to the political candidates gave them until November 4, after the election, to remove their signs.

In response, the defendants note that Mr. Burcin removed political signs which violated the ordinance--namely the Eddie Dalton sign which he removed from near the Grove Avenue Baptist Church. Mr. Clarke refused to give preferential treatment to politicians--namely Mr. Glover--and in fact was responsible for the removal of numerous politicians' signs.

Second, the plaintiffs argue that Burcin and Clarke responded to complaints about the ladies because of the content of their signs. The plaintiffs cite to letters in common exhibit 1 that refer to their signs as "hate-filled" and "vindictive" and suggest these characterization of the signs can be imputed to the defendants.

The defendants contend that the County responded to all complaints in a uniform manner. They cite to the County Attorney's letters that were mailed to all who complained about the ladies' protest which concludes: "The County is actively seeking to uniformly enforce the ordinance throughout the County including the situation you referenced." Furthermore, neither Burcin nor Clarke received these letters complaining about the ladies. Hence there is no evidence that Burcin or Clarke acted in response to these letters, and the County contends it did not act in response to these letters. It contends the letters were mailed after enforcement began. Finally, an enforcement regime which relies upon "complaints received" is not constitutionally infirm. In Wayte v. United States, 470 U.S. 598 (1985), the Supreme Court upheld the Justice Department's policy of prosecuting only those persons who were reported as having failed to register. The Court held that Wayte had failed to show that the government prosecuted him because of his protest activities. Similarly, the ladies have failed to make that showing here.

Burcin and Clarke also argue that the plaintiffs are barred from making a motion for jnov on the selective enforcement issue because they failed to address this issue in their motion for a

directed verdict at the close of all the evidence. I believe the defendants' characterization is incorrect. On page 8 of the transcript submitted by the defendants, Mr. Brubaker addresses the issue of selective enforcement based on content.

The plaintiffs also move for jnov based on a number of legal arguments. I have addressed those in a draft memorandum opinion which I will give to you shortly. Briefly the challenge is that the ordinance is unconstitutional on its face, is overbroad and vague, and unduly restricts the plaintiffs free exercise of their religious faith. I believe all these arguments are without merit.

I believe there is substantial evidence in the record to support the jury's verdict for the defendants. There is no evidence that the ordinance was enforced against the plaintiffs because of the content of their signs. Burcin and Clarke attempted to enforce the oridinance in a uniform manner. Burcin testified that he had removed other signs, issued 14 written notices in the same vicinity as where the plaintiffs protest, and has sworn out 5 misdemeanor summonses against other persons. Clarke testified that he rejects 60% of sign permit applications for procedural deficiencies just as he rejected the plaintiffs. Neither Burcin nor Clarke were familiar with the content of the plaintiffs' signs. Hence, viewing the evidence in the light most favorable the defendants, the jury's verdict was supported by the evidence, and the plaintiffs' jnov motion should be denied.

New trial

Similarly there is substantial evidence to support the jury's verdict and a new trial is not warranted.

The plaintiffs also suggest that you erroneously instructed the jury on qualified immunity. The plaintiffs failed to object to this instruction when it was given. Hence, I believe they are barred from objecting now.

Even if their objection is not barred, they lose on the merits as well. The plaintiffs argue that their suit is against Henrico County itself since the defendants are sued in their official capacity. The County does not enjoy qualified immunity under 42 U.S.C. §1983 for the good faith acts of its officials. Owen v. City of Independence, 445 U.S. 622 (1980). Hence, Burcin and Clarke, in their official capacities, should not enjoy qualified immunity, argue the plaintiffs.

The plaintiffs' characterization of the holding in Owen is correct, but Owen applies only to the municipality, not the municipality's officers. In fact, the Court goes to great length to distinguish between the municipality and its officers. If the plaintiffs could state a cause of action against the municipality under § 1983, the municipality does not enjoy the qualified immunity defense. The officials continue to enjoy such a defense, however.

Here the plaintiffs failed to name Henrico as a party. Even if they had, I don't believe they could have stated a claim against the County since there was no evidence to support the claim that the County had a custom or policy of selectively enforcing the statute against these three women. The plaintiffs

must establish the custom or policy to prevail against the county under § 1983.

Since there was no error in the instructions, a new trial is not appropriate.

Joinder

The plaintiffs have also moved to join the County as a defendant. You have denied this motion twice before.

The plaintiffs argue that they cannot get complete relief without the County as a party because other County officials could enforce the sign ordinance against them even if Burcin and Clarke were enjoined from doing so.

The plaintiffs also cite to Brandon v. Holt, 469 U.S. 464 (1985) where the Supreme Court allowed the municipality to be named as a defendant although only two officials had been previously named. During the pendency of Holt, the Court decided Monell which allows for municipalities to be sued under § 1983. In Holt, the Chief of Police was sued for negligent supervision. This is the type of claim that would lie against a municipality. There was no similar allegation here that survived the defendants' motion for summary judgment. The defendant's are sued in their official capacities for acts they did. If judgment was entered against them, the County would ultimately have to pay the judgment but the County here is not being sued for its own negligent acts.

The plaintiffs' argument would have some merit if the Court found the sign ordinance unconstitutional as applied or on its face. Here, the ordinance is being upheld. If the Fourths were

to reverse on appeal, they could also order you to add the County as a party at that point.

Given the jury's verdict, the allegations surviving the summary judgment motion, and your denial of injunctive relief (based upon the lack of merit to the plaintiffs' constitutional arguments), I believe joining the County is a needless exercise. Fed. R. Civ. P. 21 grants you discretion to add a party at "any stage of the action and on such terms as are just." Here, I don't believe such joinder is necessary.

Conclusion

I believe you should:

1. DENY the plaintiffs' motion for jnov. There is substantial evidence in the record to support the jury's verdict in favor of the defendants. Furthermore, the ordinance as applied to the defendants is constitutional. That part of the ordinance which applies to the plaintiffs is also constitutional on its face.

2. DENY the plaintiffs' motion for a new trial. The evidence supports the jury's verdict for the defendants. The plaintiffs waived their objection to the qualified immunity instruction, and it was a correct instruction regardless of the waiver.

3. DENY the plaintiffs motion for joining the County as a necessary party. Given that the Court had denied the plaintiffs the injunctive relief they sought, joining the County would serve no purpose. Moreover the allegations surviving the motion for S/J made joining the County unnecessary