

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

CITY OF BLUE ASH,	:	APPEAL NOS. C-080055
		C-080064
Plaintiff-Appellant/Cross-	:	C-080089
Appellee,		TRIAL NO. A-0502326
	:	
vs.		<i>JUDGMENT ENTRY.</i>
	:	
GRASSHOPPER INVESTMENTS, LLC,	:	
	:	
and	:	
	:	
LAMAR ADVANTAGE GP COMPANY,	:	
LLC,	:	
	:	
Defendants-Appellees/Cross-	:	
Appellants.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

In 1983, Joseph H. Gallenstein & Sons (“Gallenstein”) owned property at 10996 Deerfield Road in Blue Ash. Neighboring property owned by Red Roof Inns, Inc., (“Red Roof”) contained a 98-foot pole sign that had been approved by Blue Ash City Ordinance 83-47. In 1984, by special permit pursuant to Blue Ash City Ordinance 84-18, Blue Ash authorized the construction of a free-standing banjo sign on the Gallenstein property to replace the Red Roof sign. Gallenstein leased a portion of its property to Red Roof for the purpose of erecting and maintaining the banjo sign.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Defendant-appellee/cross-appellant Grasshopper Investments, LLC, (“Grasshopper”) now owns the property that contains the sign. Grasshopper leases the property under the sign to the sign’s present owner, defendant-appellee/cross-appellant Lamar Advantage GP Company, LLC (“Lamar”).

Blue Ash amended its zoning code in 1989 so that billboards were no longer permitted. In 2002, prior to buying the property, Grasshopper filed an application for the construction of a self-storage facility on the property. The Blue Ash Board of Site Adjustment approved the construction subject to certain conditions. Blue Ash maintained that one of the conditions was the removal of the sign. Grasshopper disputed that removal of the sign was a condition for construction approval. Blue Ash also contended that the 1984 ordinance permitting the sign had expired, by its terms, in 2004.

Blue Ash filed a complaint for an injunction against Grasshopper and Lamar, seeking removal of the sign. Grasshopper and Lamar filed counterclaims against Blue Ash. In its counterclaim, Lamar alleged a violation of its rights under the First Amendment to the United States Constitution. Stipulations of fact were filed and oral argument was held. The parties agreed to submit the case on cross-motions for summary judgment.

The trial court refused to issue the injunction, holding that the 1989 Blue Ash Zoning Code had not repealed by implication Ordinance 84-18 that allowed the sign. In the alternative, the court held that if the 1989 zoning code had repealed Ordinance 84-18, then the sign had become a lawful nonconforming use that could continue as long as it did not constitute a nuisance. The court found that there was no evidence that the sign was a nuisance. The court also held that removal of the sign was not a condition precedent to the approval of the construction application.

Grasshopper and Lamar filed motions requesting attorney fees, which the trial court denied. Blue Ash has appealed the court's refusal to grant the injunction. Grasshopper and Lamar have appealed the court's denial of their motions for attorney fees.

Blue Ash's assignment of error, alleging that the trial court erred in refusing to grant the injunction and in granting Grasshopper's and Lamar's motions for summary judgment, is overruled. Ordinance 84-18 was never specifically repealed. The 1989 zoning code did not repeal Ordinance 84-18 by implication. The ordinance itself does not state that it expires in 20 years or in any other period of time. Therefore, Ordinance 84-18, allowing the sign by special permit, is still in effect and is the controlling law. Further, the record contains some competent, credible evidence to support the trial court's determination that the removal of the sign was not a condition of the approval of the construction application. The trial court did not abuse its discretion in refusing to grant the injunction.

Grasshopper and Lamar allege that the trial court erred in denying their motions for attorney fees under Section 1988, Title 42, U.S.Code.

Attorney fees may be awarded under Section 1988, Title 42, U.S.Code, in state-court litigation where a party has prevailed on a claim resolved exclusively under state law, if the state claim was joined in an action with a claim based on federal rights, the state claim arose out of a common nucleus of operative fact with the federal claim, and the federal claim, although unaddressed, was otherwise substantial.²

Grasshopper did not assert any federal constitutional claim against Blue Ash in its counterclaim. Lamar asserted a right to freedom of speech under the First

² See *Cleary v. Cincinnati*, 1st Dist. No. C-060410, 2007-Ohio-2797.

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Amendment. We fail to see how the First Amendment was implicated in this case. There was no content-based regulation of the sign. This was simply a state-law zoning case. We hold that there was no substantial federal claim and, therefore, that the trial court did not err in refusing to award attorney fees. The assignments of error are overruled.

Therefore, the judgment of the trial court is affirmed.

Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., DINKELACKER and WINKLER, JJ.

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

To the Clerk:

Enter upon the Journal of the Court on October 29, 2008
per order of the Court _____.
Presiding Judge