

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

DARREL GENE RUSSELBURG,)	
DEBORAH NALLY,)	
)	
Plaintiff,)	3:03-cv-149-RLY-WJH
)	
vs.)	
)	
GIBSON COUNTY, INDIANA,)	
)	
Defendant.)	

ENTRY ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter is before the court on cross motions for summary judgment. For the reasons discussed in this entry, the court finds that summary judgment should be granted in favor of the Plaintiffs.

STIPULATED FACTS

The Defendant, Gibson County, Indiana has its County Courthouse in Princeton, Indiana. Courts and the offices of many of Gibson County's elected officials are housed in the Gibson County Courthouse. Located on the courthouse grounds is a monument given to Gibson County by local Lodge 361 of the Fraternal Order of Eagles. It was presented to the county in 1956. The monument is four feet in height and two feet in width. It is a cleft shaped stone monument and is inscribed with the following version of the Ten Commandments:

The Ten Commandments
I am the Lord thy God

- I. Thou shalt have no other gods before me
- II. Thou shalt not take the Name of the Lord thy God in vain.
- III. Remember the Sabbath day to keep it holy
- IV. Honor thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.
- V. Thou shalt not kill.
- VI. Thou shalt not commit adultery.
- VII. Thou shalt not steal.
- VIII. Thou shalt not bear false witness against thy neighbor
- IX. Thou shalt not covet thy neighbor's house.
- X. Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's.

At the bottom of the Ten Commandments, located in the center of the monument, is the letter X superimposed upon the letter P which is Christ's monogram, forming the first two Greek letters of Jesus name. Below the Ten Commandments text, on either side of the monument, is a Star of David, a well known symbol of the Jewish religion. The text at the bottom of the monument discloses that it was presented to Gibson County by the Princeton Aerie of the Fraternal Order of Eagles. At the top of the monument is a triangle with an eye within it, much like that which is depicted on the one dollar bill. Immediately below the triangle, directly above the text of the Ten Commandments, there is carved into the monument an eagle clutching the American flag in its talons.

The County Courthouse is located in a square formed by North Main Street to the east, North Hart Street to the west, State Street to the north and Broadway to the south. Outside the Courthouse there are grounds bounded by sidewalks bordering the four streets with street lights evenly distributed to illuminate the square and the sidewalk, and there

are a number of monuments of different shapes and sizes in addition to the monument which is the subject of this case. On the grounds on the south side of the courthouse there are separate memorials to fallen officers, Revolutionary War Veterans buried in Gibson County, veterans of World War I and II, and veterans of the Korean and Vietnam conflicts. On the south-east corner of Broadway and Main Street there is a Civil War Monument, as well as a Memorial to Desert Storm and Desert Shield. There are no monuments on the east side of the Courthouse. On the corner of Main and State Streets, on the north-east side of the courthouse, sits the stone monument containing the Ten Commandments (“the monument”) . It sits below a light fixture and is flanked by bushes.

THE RELIEF SOUGHT

Plaintiff Darrel Gene Russelburg formerly owned a business across from the Gibson County Courthouse. When this lawsuit began, he was being prosecuted in the courthouse and had to view the monument whenever he attended court or when he would go to the courthouse for business reasons. He finds the monument and its inscription unwelcome and believes it to be the endorsement of religion by the county. Though no longer a Princeton businessman, he is currently on probation and compelled to fulfill community service obligations which require him to visit Princeton and come into unwelcome contact with the monument.

Plaintiff Deborah Nally is a resident of Gibson County. She frequently comes into contact with the monument when traveling to the courthouse to attend court proceedings

involving her son or to pay property taxes. She often views it when shopping at area stores as well. While she is not offended by the Ten Commandments, she is offended by the fact that the monument is located on government property and believes it violates the separation of church and state called for in the United States Constitution.

Russelburg and Nally filed this action seeking declaratory and injunctive relief. They allege that the public display of the Ten Commandments on Gibson County property is a violation of the Establishment Clause of the First Amendment to the United States Constitution. They are seeking a declaration that the placement of the Ten Commandments on the grounds of the Gibson County Courthouse violates the United States Constitution and are asking the court to enter a permanent injunction against Gibson County, enjoining it from keeping the monument on public property.

STANDARD OF REVIEW

Summary judgment is appropriate when the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Summary judgment is most appropriate in a situation such as this, where the parties have stipulated to the material facts and submitted cross motions for summary judgment. *See, GCIU Employer Retirement Fund v. Chicago Tribune Co.*, 66 F.3d 862, 864 (7th Cir. 1995). All that remains is to decide the dispute through an application of law to the undisputed facts.

APPLICABLE LAW

The foundation for modern day Establishment Clause analysis lies in the Supreme Court decision of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In *Lemon* the Court set forth a three part test for determining if a government entity has violated the Establishment Clause. Under that test, a government action will not violate the Establishment Clause as long as (1) it has a secular purpose, (2) does not have a principal or primary effect that either advances or inhibits religion, and (3) does not foster an excessive government entanglement with religion. Although the Supreme Court applied the three-part *Lemon* test to Establishment Clause claims throughout the 1970s, the test came under increasing scrutiny through the early 1980s. In 1984, Justice O'Connor wrote a concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984) suggesting that the test needed clarification. *Id.* at 687. That "clarification" has come to be known as the endorsement test. *See, e.g., Bauchman for Bauchman v. West High School*, 132 F.3d 542, 551-552 (10th Cir. 1997). The question Justice O'Connor suggests asking when examining an Establishment Clause challenge is whether or not the government action is consistent with the endorsement or disapproval of religion. *Id.* at 688.

The Seventh Circuit has not interpreted Justice O'Connor's suggestion as a change in the test to be applied; rather, it appears to treat it as a more enlightened explanation of the second prong of the *Lemon* test. In its recent applications of the *Lemon* test the Seventh Circuit has emphasized, irrespective of the actual intent of the government, if the government action at issue has the effect of conveying a message of endorsement or disapproval it is in violation of the Establishment Clause. *Freedom from Religion*

Foundation, Inc. v. City of Marshfield, Wisconsin, 203 F.3d 487, 493 (7th Cir. 2000); *Books v. City of Elkhart, In.*, 235 F.3d 292, 302 (7th Cir. 2000); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 773 (7th Cir. 2001). And, in *Books*, the Seventh Circuit found a monument displayed by the City of Elkhart, which was very similar to the one at issue here, to be constitutionally prohibited. *Books*, 235 F.3d at 307- 308.

ANALYSIS

In the 1940's a juvenile court judge from Minnesota, E.J. Ruegemer, lead a campaign to lower the rising number of delinquent youth. Seeking to provide young people with a common code of conduct which would keep them on the straight and narrow, Ruegemer turned to the Ten Commandments as that guide for youth. After deliberating with others, even the renowned producer Cecil B. DeMille who produced "The Ten Commandments" motion picture, Ruegmer sought the help of the Fraternal Order of Eagles ("FOE") in having each of its local chapters finance and provide to the local community a granite monument inscribed with a version of the Ten Commandments. The version of the Ten Commandments inscribed on these monuments was said not to be identified with no single religious group, after review by representatives of Judaism, Catholicism and Protestantism.

Many local FOE chapters across the country joined the effort instigated by Ruegmer, including the FOE chapter in Gibson County, Indiana. The Gibson County FOE chapter donated its monument to Gibson County in 1956 in a ceremony the local paper described as attended by various local celebrities. In attendance at the ceremonial

presentation were the mayor of Princeton, the county commissioners, a judge, county school officials, a reverend and FOE representatives. The newspaper reported that the mayor made some remarks complimenting the local lodge for its support in fighting juvenile delinquency and the judge accepted the monument on behalf of the county.

The local FOE lodge in Elkhart, Indiana also financed the production of a similar monument and donated it to the City of Elkhart in 1958. That monument became the subject of a challenge prior to the challenge at hand here. The United States District Court for the Northern District of Indiana found that the city's purpose in accepting the monument was to promote morality in youth, which was secular in nature. *Books*, 235 F.3d at 298. It went on to find that the city continued to display the monument in order to maintain exhibits of cultural and historical significance which was also a secular reason and therefore the first prong of the *Lemon* test was satisfied. *Id.* The district court went on to find that the second prong was satisfied as well because the display of the monument did not amount to an unconstitutional endorsement of religion when viewed from the perspective of a reasonable observer familiar with the context and history of the display. *Id.*

The Seventh Circuit disagreed. In applying the first prong of the *Lemon* test it found that the Ten Commandments can not be reasonably stripped of their sacred religious significance by a characterization of them as a moral or ethical code. *Id.* at 302. And, while the display of a religious symbol may still have a secular purpose, in the context of Elkhart's ceremonial acceptance of the monument, where it was promoted by

clergy as a code of conduct for the youth and general populace of Elkhart, the court found that it was inescapably aimed at furthering a religious code. *Id.* at 303.

The Seventh Circuit went on to apply the second part of the *Lemon* test to determine the effect of the continued display of the monument. It indicated a court is required to assess the totality of circumstances surrounding the display to determine whether a reasonable person would believe that the display amounted to the endorsement of religion. *Id.* at 304. In doing so the court could not help but give appropriate notice to the fact that the Ten Commandments were sitting on the lawn of the Municipal Building, the seat of local government . *Id.* at 306 . The monument could not be reasonably ascribed to a comprehensive display of cultural heritage; rather, it was a constant and “stark reminder of the specific injunctions contained in the commandments.” *Id.* With the American Eagle proudly displayed alongside the Star of David and the symbol of Christ, the court found the monument could reasonably be seen as impermissibly suggesting that those who did not adhere to its admonitions were outsiders and those that did were favored members of the political community. *Id.* at 306-307.

In the case at bar, Plaintiffs challenge Gibson County’s display of the monument under both the first and second prongs of *Lemon*’s three part test. In essence they maintain that there is no difference between the situation in Princeton and the situation in Elkhart. Both parties have briefed the issues well and Defendant, in particular, has done its best to point to every possible distinction it can find between its situation and the facts of the *Books* case. It notes that in Elkhart the dedication of the monument was marked by

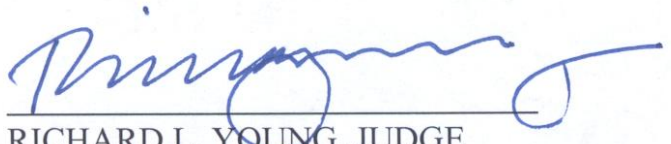
speeches from three different clergymen with a particular focus on the need for all in the community to dedicate themselves to the high ideals and moral law of the Ten Commandments, but no such speeches were made in Princeton. The monuments themselves are of different dimensions, the Elkhart monument being two feet taller and a foot and a half wider than the one in Princeton. Further, Gibson County points out that there are eight other monuments around the courthouse square, causing the one at issue here to draw less attention than the monument in Elkhart which was one of only three on the grounds of the Municipal Building. Other distinctions are suggested as well by Defendant, but neither individually nor in the aggregate do they amount to enough of a difference to cause this court to find that the law, as espoused by the Seventh Circuit in *Books*, should be applied any differently here.¹

In short, while a large majority of those that pass by the monument in Princeton may find its inscription to be consistent with their intentions and beliefs, Plaintiffs and perhaps numerous others do not share that same feeling. Our forefathers strived to craft a Constitution and Bill of Rights which took into account the need for government to be “of all the people,” no matter what religious beliefs they hold or choose not to hold. It is the considered opinion of those that interpret the law in this circuit that the display of a Ten Commandments monument, such as is at issue here, on the lawn of the seat of local

¹While *Books* remains the seminal decision in this circuit, the Supreme Court recently granted certiorari in two cases where the constitutionality of Ten Commandments displays on public property are at issue. *McCreary County, Ky. v. ACLU of Ky.*, 125 S.Ct. 310, 2004 WL 2059432 (Oct. 12, 2004); *Van Orden v. Perry*, 125 S.Ct. 346, 2004 WL 2282082 (Oct. 12, 2004).

government is in violation of the Establishment Clause of the First Amendment to the United States Constitution which dictates that our government not appear to promote, discourage or endorse any particular religious beliefs. Accordingly, Plaintiffs' Motion for Summary Judgment is GRANTED. Defendant's Motion For Summary Judgment is DENIED.

SO ORDERED this 31st day of January, 2005.



RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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