UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

HONORABLE DAVID C. GUADERRAMA	§	**ALL CIVIL CASES**

STANDING ORDER REGARDING BILL OF COSTS

IT IS ORDERED that before any party files a Motion for Bill of Costs, they should first review the following applicable law. Second, they should submit their proposed bill of costs to opposing counsel for their review in light of the applicable law. Third, if there are any areas of disagreement, the parties shall meet, confer, and be prepared to compromise, making every effort to submit an "agreed" bill of costs to the Court. However, if the parties have a legitimate dispute on which they cannot agree, they shall file a motion—in accordance with Federal Rule of Civil Procedure 54 and Local Court Rule CV-54—indicating their areas of disagreement, and the Court will set a hearing at which time **LEAD TRIAL COUNSEL** will be **ORDERED** to appear and explain why they have not been able to resolve their differences.

APPLICABLE LAW

"Under Rule 54(d) of the Federal Rules of Civil Procedure, the party prevailing after judgment recovers costs unless the trial court otherwise directs." *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 351 (1981) (citing Fed. R. Civ. P. 54(d)). "Under this rule, the decision to award costs turns on whether a party, as a practical matter, has prevailed." *Schwarz v. Folloder*, 767 F.2d 125, 130 (5th Cir. 1985).

> While the rule does not prevent a trial court from requiring a prevailing party to bear its own costs, 'the language of the rule reasonably bears the intendment that

> the prevailing party is prima facie entitled to costs and it is incumbent on the losing party to overcome that presumption . . . [since] denial of costs . . . is in the nature of a penalty for some defection on his part in the course of the litigation.' . . . Accordingly, when a trial court exacts such a penalty, it should state reasons for its decision.

Id. at 131 (quoting *Walters v. Roadway Express, Inc.*, 557 F.2d 521, 526 (5th Cir. 1977)).

"There is a strong presumption under Rule 54(d)(1) that the prevailing party will be awarded costs." *Cheatham v. Allstate Ins. Co.*, 465 F.3d 578, 586 (5th Cir. 2006). These costs include:

> (1) Fees of the clerk and marshal;
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of this title;
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920. There are restrictions, however, on the costs that a prevailing party may recover under Rule 54(d). The Fifth Circuit has determined that where

> there is no basis for an award of attorney's fees: 1) absent explicit statutory or contractual authorization to the contrary, courts may not tax items other than those listed in 28 U.S.C. § 1920 as costs against the losing party; 2) Federal Rule of Civil Procedure 54(d) allows trial courts to refuse to tax costs otherwise allowable, but it does not give them the power to tax items not elsewhere enumerated; and 3) insofar as there are statutory limits to the amounts that may be taxed as costs, Rule 54(d) does not empower courts to exceed those limits.

West Wind Africa Line, Ltd. v. Corpus Christi Marine Servs. Co., 834 F.2d 1232, 1236 (5th Cir. 1988) (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441–43 (1987)).

A party seeking costs must affirm that "the amount claimed is correct, the costs were necessarily incurred during the case, and the services giving rise to the costs were actually and necessarily performed." *A & J Elec. Cable Corp. v. Emerson Network Power, Inc.*, No. H–10–

2361, 2013 WL 1290938, at *1 (S.D. Tex. Mar. 26, 2013) (citing 28 U.S.C. § 1924). "Without specific objections, [a party's claimed] costs are presumed valid." *Id.* at *2 (citing *Embotelladora Agral Regiomontana, S.A. de C.V. v. Sharp Capital, Inc.*, 952 F. Supp. 415, 417 (N.D. Tex. 1997)). "In the Fifth Circuit, the preferred exercise of a district court's discretion in awarding costs is 'to exclude from an award of costs those items not specifically mentioned in the statute.'" *Roussel v. Brinker Int'l, Inc.*, Civ. No. H–05–3733, 2010 WL 1881898, at *13 (S.D. Tex. Jan. 13, 2010) (quoting *Hodge v. Seiler*, 558 F.2d 284, 287 (5th Cir. 1977)); *accord Baisden v. I'm Ready Productions, Inc.*, 793 F. Supp. 2d 970, 973 (S.D. Tex. 2011) (citing *Crawford Fitting Co.*, 482 U.S. at 440). The party seeking recovery of costs bears the "burden of justifying the necessity of obtaining the depositions and copies at issue." *Fogleman v. ARAMCO*, 920 F.2d 278, 286 (5th Cir. 1991).

(1) Fees of the clerk and marshal

"[A]bsent exceptional circumstances, the costs of a private process server are not recoverable under Section 1920." *Marmillion v. Am. Int'l Ins. Co.*, 381 F. App'x 421, 431 (5th Cir. 2010) (citing *Cypress–Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 257 (5th Cir. 1997)).

(2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case

Under 28 U.S.C. § 1920(2), "[i]f, at the time it was taken, a deposition could reasonably be expected to be used for trial preparation, rather than merely for discovery, it may be included in the costs of the prevailing party." *Fogleman*, 920 F.2d at 285. Relatedly, costs associated with depositions on written questions are recoverable. *See, e.g.*, *Casarez v. Val Verde Cnty.*, 27 F. Supp. 2d 749, 751 (W.D. Tex. 1998) (determining that depositions on written questions are

recoverable costs); *Hartnett v. Chase Bank of Tex. Nat. Ass'n*, No. 3–98–CV–1061–L, 1999 WL 977757, at *3 (N.D. Tex. Oct. 26, 1999) (holding that costs of depositions upon written questions to several medical providers to obtain medical records were recoverable court costs). "[I]t is not required that a deposition actually be introduced in evidence for it to be necessary for a case—as long as there is a reasonable expectation that the deposition may be used for trial preparation, it may be included in costs." *Stearns Airport Equipment Co., Inc. v. FMC Corp.*, 170 F.3d 518, 536 (5th Cir. 1999).

Whether a deposition or copy was necessarily obtained for use in the case is a factual determination made by the district court. *See Fogleman*, 920 F.2d at 285–86 (citations omitted). The district court is accorded great latitude in this determination. *See id.* at 286. Charges for items that are for the convenience of counsel and not "necessarily obtained for use in the case" are disallowed. *See Burton v. R.J. Reynolds Tobacco Co.*, 395 F. Supp. 2d 1065, 1080 (D. Kan. 2005) (citing *Hutchings v. Kuebler*, No. 96–2487–JWL, 1999 WL 588214, at *3 (D. Kan. July 8, 1999) (costs of ASCII disks and minuscripts not be taxed); *Albertson v. IBP, Inc.*, No. 96–2110–KHV, 1997 WL 613301, at *2 (D. Kan. Oct. 1, 1997) (delivery charges are not taxable as costs); *Ortega v. IBP, Inc.*, 883 F. Supp. 558, 562 (D. Kan. 1995) (postage associated with depositions not taxable)); *Canion v. United States*, No. EP–03–CA–0347–FM, 2005 WL 2216881 at *3 (W.D. Tex. Sept. 9, 2005).

The Fifth Circuit has now implicitly recognized that costs may be allowed for videotapes of depositions. *See S&D Trading Academy, LLC v. AAFIS, Inc.*, 336 F. App'x 443, 450–52 (5th Cir. 2009). However, the prevailing party must make an independent showing that each version of the deposition was reasonably obtained for use in the case. *See Baisden*, 793 F. Supp. 2d at 976–77 (videotape deposition costs and deposition transcripts are both recoverable costs but the

requesting party still bears the burden of showing that the different versions of the deposition were reasonably obtained for use in the case); *see also Petri v. Kestrel Oil & Gas Properties, L.P.*, CIV.A. No. H–09–3994, 2013 WL 265973, at *4 (S.D. Tex. Jan. 17, 2013).

(3) Fees and disbursements for printing and witnesses and Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case

Costs of photocopies necessarily obtained for use in the litigation are recoverable upon proof of necessity. *See* 28 U.S.C. § 1920(4); *Holmes v. Cessna Aircraft Co.*, 11 F.3d 63, 64 (5th Cir. 1994). The party seeking costs need not "identify every xerox copy made for use in the course of legal proceedings." *Fogleman*, 920 F.2d at 286. However, it must demonstrate some connection between the costs incurred and the litigation. *Id.* The general rule is that duplicating expenses are properly taxable only to the extent that the copies were used in support of a successful motion for summary judgment, as exhibits at trial, or were furnished to and used by the Court or opposing counsel. *See, e.g., Perez v. Pasadena Indep. Sch. Dist.*, 165 F.3d 368, 374 (5th Cir. 1999) (not an abuse of discretion for district court to allow prevailing party to recover costs of trial exhibits listed in pretrial order and provided to court in trial notebooks); *Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124, 1133 (5th Cir. 1976). While the losing party "should be taxed for the cost of reproducing relevant documents and exhibits for use in the case, [it] should not be held responsible for multiple copies of documents, attorney correspondence, or any of the other multitude of papers that may pass through a law firm's xerox machines." *Fogleman*, 920 F.2d at 286; *accord Oldham v. Thompson/Ctr. Arms Co., Inc.*, CIV. A. No. 4:12–CV–2432, 2014 WL 1794861, at *4 (S.D. Tex. May 5, 2014). While taxable costs include charges for "copies made as part of discovery and the copies of documents filed with the court," "[e]xtra copies for the convenience of counsel are not considered necessary for these purposes and therefore not taxed

as costs." *Iniekpo v. Avstar Int'l Corp.*, CIV. A. No. SA–07–CA–879–XR, 2010 WL 3909321, at *2 n.21 (W.D. Tex. Sept. 30, 2010).

(4) Docket fees under section 1923 of this title

Section 1923 of Title 28 of the United States Code states that attorney's "docket fees . . . may be taxed as costs [at] $20 on trial . . . in civil . . . cases . . . ." 28 U.S.C. § 1923(a).

(5) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services

In *Taniguchi v. Kan Pacific Saipan, Ltd.*, the Supreme Court held "that the category 'compensation of interpreters' in § 1920(6) does not include costs for document translation." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2007, 182 L. Ed. 2d 903 (2012).

(6) Miscellaneous fees

Miscellaneous expenses such as postage, facsimiles, electronic legal research, and travel expenses are not recoverable under § 1920. *See Home Depot, U.S.A., Inc. v. Fed. Ins. Co.*, No. 4:02–CV–95, 2003 WL 470545, at *1–2 (E.D. Tex. Feb. 24, 2003); *see also Compton v. Taylor*, CIV A. No. H–05–4116, 2006 WL 1789045, at *3 (S.D. Tex. June 27, 2006) (citations omitted). Likewise, reimbursement for attorney travel and meals is not allowed. *See Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 892 (5th Cir. 1993). In addition, the Fifth Circuit has expressly held that mediation fees are not recoverable. *See Mota v. Univ. of Tex. Houston Health Science Ctr.*, 261 F.3d 512, 530 (5th Cir. 2001).

Unless the expert is court appointed, *see* 28 U.S.C. § 1920(6), the only fees that are recoverable as witness fees under § 1920(3) are those allowed by statute for a witness' attendance at court or a deposition. *See* 28 U.S.C. § 1821; *Holmes*, 11 F.3d at 64.

Effective Date

This Standing Order applies to all civil cases pending as of this date.

So ORDERED and SIGNED this 13th day of November, 2015.

DAVID C. GUADERRAMA
UNITED STATES DISTRICT JUDGE