Albert Snyder v. Fred Phelps, Sr. Doc. 88 Att. 1

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 08-1026

ALBERT SNYDER,

Appellee

v.

FRED W. PHELPS, Sr.; WESTBORO BAPTIST CHURCH, INCORPORATED; REBEKAH A. PHELPS-DAVIS; SHIRLEY L. PHELPS-ROPER,

Appellants

BRIEF IN SUPPORT OF OBJECTIONS TO APPELLANT'S BILL OF COSTS

I. STATEMENT OF THE CASE

The facts underlying this case are not in dispute. Presently, after prevailing on their appeal, Appellants requested that their costs in bringing the appeal be taxed to Appellee. In their Bill of Costs, Appellants claim the total amount of $16,510.80, including the cost of copying their Appendix and Brief, as well as a docketing fee of $450. More specifically, the overall total costs claimed by Appellants includes the cost of producing eight copies of Appellants' Appendix, which had 3,840 pages each. Appellants evidently performed their copying in-house, and claim a per-page fee of $0.50.

II. STATEMENT OF THE QUESTION

A. WHETHER THE HONORABLE COURT SHOULD DENY APPELLANTS' REQUEST TO TAX COSTS IN THEIR FAVOR?

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Suggested Answer: In the Affirmative.

B. WHETHER, IN THE ALTERNATIVE, THE HONORABLE COURT SHOULD REDUCE THE COSTS ALLOWABLE TO APPELLANTS?

Suggested Answer: In the Affirmative.

III. ARGUMENT

A. The Honorable Court should deny Appellants' Request to Tax Costs in their favor.

The Honorable Court has the power to assess the costs of litigation as it deems appropriate. Presently, the Court should charge each party with paying its own costs.

As provided in the Affidavit of Albert Snyder, attached hereto as Exhibit "A", Appellee is employed by an electrical company and makes approximately $43,000 per year. Appellee's counsel handled the underlying litigation and appeal on a pro bono basis, as Appellee would not have been financially able to litigate the matter otherwise. Presently, Appellee is unable to pay the costs claimed by Appellants without suffering extreme financial hardship.

Moreover, there is no dispute that the present action arose because Appellants determined to protest the funeral of Appellee's son in order to publicize themselves. Although this Honorable Court determined that Appellants' speech was constitutionally protected, it should not allow the Appellants to add injury to insult by assessing exorbitant costs that Appellee can ill afford. Accordingly, Appellants should be required to pay their own costs.

B. In the alternative, the Honorable Court should reduce the Costs allowable to Appellants.

1. Appellants' stated in-house printing cost of $0.50 per page of the Appendix is excessive, and should be reduced to a reasonable amount.

Local Rule 39(a), which is relied upon by Appellants in claiming costs, provides, "[t]he cost of printing or otherwise producing necessary copies of briefs and appendices shall be

taxable as costs at a rate equal to actual cost, but not higher than $4.00 per page of photographic reproduction of typed material."

Appellants' claim in-house copying costs in the amount of $0.50 per page for their Briefs and Appendix. However Appellants have neglected to state their *actual* cost in producing the copies in-house. By way of comparison, Appellee's printing costs per page were only $0.15. Rule 39 operates to compensate the prevailing party for certain of its costs -- it is not designed to provide an avenue for the prevailing party to enrich itself. Quite frankly, Appellants are not in the copying business, and should not be permitted to profit as such.

Moreover, in similar circumstances, courts applying Federal Rule of Appellate Procedure 39 and corresponding local rules have summarily reduced the prevailing party's per-page copying fee. For example, in *Alexander v. Nat'l Farmers Org.*, 696 A.2d 1210, the Eighth Circuit Court of Appeals determined that a $0.50 cent per page copying cost was unreasonable, and reduced the fee to $0.20 cents per page. *Id*. at 1212 ("We find this per page charge unreasonable in this case, and order these court costs be paid by the defendants only to the extent of twenty cents per page.").

Presently, if the Honorable Court allows Appellants to tax Appellees for certain of their costs, these costs should be assessed in a reasonable manner. At a maximum, Appellants should only be permitted to charge their *actual* cost of copying their Appendix, as provided under Local Rule 39. In the absence of such an accurate statement of costs, the Court should reduce the Appellants' per-page copying fee substantially.

2. Appellants have included charges for copying pages which are unnecessary to exhibit their claims.

Appellants request to tax costs to Appellee is based on Federal Rule of Appellate Procedure 39 and Local Rule 39(a) and (b). Courts interpreting the Federal Rule and

corresponding local rules have concluded that, in order for the prevailing party to tax copying costs on the other party, the items being copied must be "*necessary to exhibit its claims*". As a corollary, the prevailing party cannot charge the other party for copying material that is not necessary to exhibit its claim. This is precisely what Appellants attempt in the present matter.

In *Oliver v. Michigan State Bd. of Educ.*, 519 F.2d 619 (6th Cir. 1975), the Sixth Circuit Court of Appeals determined that the prevailing party had included excessive amounts of irrelevant material in their appendix, and that it was therefore not entitled to recover the cost of copying such material from the other party. *Id*. at 622. In applying the necessity standard, the court specifically catalogued the prevailing party's citations to the appendix in its briefs to determine which material was actually utilized in making out its arguments. The court found that the prevailing party had included in its appendix, among other surplus items, entire deposition and hearing transcripts. *Id*. at 621. In particular, the court noted, "Plaintiffs in their response have not satisfactorily explained their designation of large portions of the transcript and exhibits, which in our judgment were unnecessary." *Id*. at 622. Going even further, the court stressed, "[i]t behooves the lawyers representing the parties to an appeal to be careful not to designate portions of a transcript for printing which are not necessary to exhibit the claims which they are making." *Id*.

The Fourth Circuit Court of Appeals has applied Rule 39 in similar fashion. For example, in *United Construction Workers v. Haislip Baking Co.*, 223 F.2d 872 (4th Cir. 1955), the Court concluded that the defendants had printed more than twice as much material as was necessary to support their brief, and reduced the amount of costs they claimed by half. *Id*. at 879.

Further, the Fourth Circuit's "Requirements for Preparation of Briefs and Appendices" specifically states that a party's appendix must include "***Relevant*** portions of the pleadings, transcript, charge, findings, opinions," as well as the District Court docket sheet, complaint, final order, and notice of appeal. (emphasis added). Moreover, the Requirements specifically provide that, "if either party causes matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on that party."

Presently, Appellants' Appendix was 10 volumes and included ***3,840 pages***. This amounted to a total of 30,720 pages when the Appendix was reproduced 8 times. A summary review of the Appendix reveals that it includes material that is not only unnecessary to support Appellants' arguments on appeal, but is entirely irrelevant to Appellants' claims. Appellants appear to have included each and every filing and transcript from the underlying litigation, as well as orders from the District Court on various matters. Further, throughout the litigation, Appellants consistently filed frivolous motions and other material, many of which were not actually ruled upon by the District Court. There is no legitimate reason why such material should have found its way into Appellants' Appendix.

Moreover, rather than including relevant excerpts from the various documents that comprise its Appendix as counseled by the *Oliver* decision, Appellants have included the entire body of each document. By way of just a few examples, the Appendix includes Appellants' 94 page Motion for Change of Venue, their Post-Trial Motions, and their filed Jury Instructions. In comparison, only a mere fraction of this material is actually cited in Appellants' Briefs.

If their entire Bill of Costs is not stricken entirely, at a minimum, Appellants' costs should be reduced to the reasonable cost of copying only those items actually utilized in Appellants' Briefs.

IV. CONCLUSION

Based on the foregoing law and facts, the Honorable Court should dismiss Appellants' Bill of Costs. In the alternative, the Honorable Court should (i) reduce the per-page copying fee charged by Appellants in their Bill of Costs, and (ii) allow Appellants to assess only those costs incurred in copying material that was necessary to make out Appellants' arguments on appeal.

Respectfully submitted,

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