Albert Snyder v. Fred Phelps, Sr. Doc. 90

No. 08-1026

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ALBERT SNYDER,

Plaintiff/Appellee,
vs.
FRED W. PHELPS, SR., et al.,
Defendants/Appellants,

DEFENDANTS/APPELLANTS' RESPONSE TO OBJECTIONS TO BILL OF COSTS

On September 24, 2009, this Court issued its order reversing the verdict herein, and finding as a matter of law that the lawsuit should be dismissed. In keeping with the Court's rules, on October 6, 2009, Defendants/Appellants filed a Bill of Costs. On October 16, 2009, this Court's mandate issued along with an order taxing costs as set out in the Bill of Costs. On October 23, 2009 – a week out of time – Plaintiff/Appellee filed objections to the Bill of Costs. On October 27, 2009, the Court issued an order for Defendants/Appellants to file a response to the objections by November 3, 2009.

The objections are untimely and thus should not be considered. No cause for the untimeliness of the objections is indicated in the papers submitted by Plaintiff/Appellee, thus there appears to be no justification for the late filing. Rule

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39(d)(2) specifically states: "Objections must be filed within 10 days after service of the bill of costs, unless the court extends the time." The Bill of Costs was filed and served electronically October 6. The objections were not filed until October 23. No request for additional time has been made or granted. Defendants/Appellants therefore submit that the objections are out of time and should not be considered.

Strictly in the alternative, based upon the points made hereinafter, Defendants/Appellants submit that the objections lack any basis in law or fact, and should be overruled. Without waiving the untimeliness of the objections, or their position that the objections should be disregarded as untimely, Defendants/Appellants further respond.

The objections raised are three: First, that 50 cents per page for copies is too high. Second, that the record in the Appendix in this case had irrelevant items so those copies should not be included. Third, that Plaintiff/Appellee is not able to pay the costs.

The rate of 50 cents per page is the rate the undersigned counsel routinely charges in her law practice based on the costs involved in maintaining copying equipment, supplies, etc. It is also the same rate used by this Honorable Court for copies, as reflected at http://www.ca4.uscourts.gov/pdf/feeschedule.pdf (last viewed 10/27/2009). "Fee for Reproducing any Record or Paper, if Produced from Original Document … $.50 per page." It is the rate that was (at least in 1997) included in 28 U.S.C. § 1914(4) for copy charges by the Clerks of the United States District Courts, see, e.g., *Mary M. v. North Lawrence Community Sch. Corp.*, 951 F.Supp. 820, 829,

833 & HN 10 (S.D.Ind. 1997). There has been no effort to make a profit by Defendants/Appellants; rather they have simply stated what the actual copying costs were in this case.

Regarding what was included in the record, the Court's Website contains these directions with regard to preparing the Appendix: "In accordance with Local Rule 10(a), the record is retained in the district court; therefore, the parties should include in the joint appendix all portions of the record necessary to review of the matters presented. Citations in the parties' briefs to portions of the record not included in the appendix is disfavored. The following *must* be included in the appendix:

- **Table of Contents, with page numbers**
- **District Court Docket Sheet**
- **Complaint as finally amended (civil appeals) or Indictment (criminal appeals)**
- **Relevant portions of the pleadings, transcript, charge, findings, opinions**
- **Final Order or Order appealed from**
- **Notice of Appeal**" (Emphasis in original.)

Counsel made every effort to comply with these guidelines, and included only filings, transcripts and rulings that pertained to the issues raised on appeal. No complaint has been made heretofore about the content of the Appendix, and the parties and amici all cited to the Appendix liberally. The only specific items complained about in the objections are the transcripts of the proceedings and "frivolous motions." Rule 10 requires that transcripts of the proceedings be included on appeal; there was a trial in this case, and throughout the trial were discussions and testimony critical to an understanding of the First Amendment issues raised – and

ultimately on which this Court ruled – in this case. As to the "frivolous motions," it should be noted that the motions included in the record were limited to the First Amendment issues raised, and a few related evidentiary issues which were raised on appeal by Defendants/Appellants. And, as this Honorable Court noted in its September 24, 2009, opinion, the motions were granted by the trial court on two of five counts; and the other three should have been granted because as a matter of law the speech at issue in this case is protected speech. It was necessary at each stage of the proceedings for Defendants/Appellants to raise, brief and preserve these critical legal issues; and unfortunately that takes up quite a bit of paper. There is nothing in the objections that reflects any specific items that should not have been in this record for specific reasons, or that were not relevant to the various issues raised on appeal. In a First Amendment case, the obligation of the Court is to review the full record to determine the legal questions about whether the speech is protected; hence the full briefings of First Amendment issues and the full evidentiary record were all required. "Where, as here, the First Amendment is implicated by the assertion of tort claims arising from speech, we have the obligation "to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" [Citations omitted.]" *Snyder v. Phelps*, 580 F.3d 206, 2009 U.S. App. LEXIS 21173 at 24 (2009).

This Court's opinion in *United Construction Workers v. Haislip Baking Co.*, 223 F.2d 872 (4th Cir. 2955), *cert. denied*, 350 U.S. 847, 76 S.Ct. 87, 100 L.Ed. 754 (1955), does not support the outcome Plaintiff/Appellee urges. In that case involving

review of a decision by the trial court denying a union's motion for a directed verdict in an action by the employer to recover damages for alleged breach of a collective bargaining agreement, the bulk of the opinion is about the issues raised by appeal. In the closing of the opinion, the Court says that defendants printed more than twice as much matter as was necessary in the appendix. There is no description of what items were presented which were unnecessary; and in the absence of that analysis that case does not instruct here. The items included in this record were the trial transcript, some hearing transcripts, and the various filings and rulings about First Amendment issues. Those items go to the core of the case and were essential to a review of the full record as required in a First Amendment case. Similarly, the *Oliver v. Michigan State Bd. Of Educ.*, 519 F.2d 619 (6th Cir. 1975) case relied on Plaintiff/Appellee does not support the outcome he seeks, because in that case – where $70,000 was requested for printing costs (vs. $16,000 here) – the Court specifically detailed thousands of pages never referenced or not relevant to issues on appeal. No such showing has been made here; and to the contrary, the full record was not included, but only those showing the trial proceedings, relevant pretrial proceedings, and motions related to First Amendment issues were included in the Appendix (including materials by both sides, thereby making Plaintiff/Appellee able to present his arguments on appeal as well as Defendants/Appellants). And the materials in the Appendix were cited, relied upon and referred to in all of the briefs in substantial measure.

Concerning the claim of inability to pay, Defendants/Appellants submit that no showing of inability to pay has been made. A short declaration from

Plaintiff/Appellant indicates a steady income and limited expenses (though no amounts on any were provided). Further, the Court can take judicial notice of the fact that Plaintiff/Appellee was eligible for death benefits from his son's death. His other children are grown and he is divorced so he has only himself to care for. As for the statement in the declaration that counsel are serving *pro bono*, that is not an established fact in the record; the contract between Plaintiff/Appellant and his counsel has not been provided; and indeed the more common practice is a contingency fee agreement between the plaintiff and counsel in civil litigation. Thus it is not even clear what that statement would mean in this context. Further, what arrangement has been made between them about costs is not relevant to the question of whether costs should be paid. Plaintiff/Appellee has not established indigency or inability to pay.

Further, Plaintiff/Appellee and his counsel have a Website, apparently maintained by counsel, but with content provided by Plaintiff/Appellee. This Website is used to solicit donations and Plaintiff/Appellee has stated that over $10,000 had been raised as of the time of trial. (Since Plaintiff/Appellee has made numerous media appearances about this case, including on Fox news, perhaps the donations have increased.) Plaintiff and his counsel had control of the litigation; they had control of pressing for millions on various tort theories; they initiated most of the depositions taken; and they called most of the witnesses who testified at trial. They did all this knowing there were significant, substantial and serious First Amendment issues in this case; and knowing that litigation is expensive.

In *Smith v. Augustine*, Case No. 07 C 81, 2009 U.S.Dist. LEXIS 51860 (N.D. Ill., June 18, 2009), where the Court taxed costs against an individual plaintiff in the amount of over $35,000, plaintiff claimed she was unable to pay because of her income level and other financial obligations. The Court rejected this claim saying at 2009 U.S. Dist. LEXIS 51860 at 5-6:

> …. Plaintiff cites *Rivera v. City of Chicago*, 469 F.3d 631 (7th Cir. 2006), for the contention that a losing party's claimed inability to pay costs can be enough to overcome the Rule 54(d) presumption and prevent a court from assigning costs. Plaintiff misconstrues the indigency analysis set forth in *Rivera*. *Rivera* requires the court to "make a threshold factual finding that the losing party is incapable of paying the court-imposed costs at this time or in the future" before examining "the amount of costs, the good faith of the losing party, and the closeness and difficulty of the issues raised by a case" to determine whether allowing costs is still reasonable. *Rivera*, 469 F.3d at 635 (internal quotation omitted). Thus, under *Rivera*, the court must first determine whether the losing party meets the threshold of indigence before applying the mitigating factors to reduce costs as necessary. [Citations omitted.]
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> In the instant case, Plaintiff has failed to make a threshold showing of indigence. There is no reason to believe that she cannot pay costs either now or in the future. Plaintiff's self-described average income is $55,000 per year, and she owns a house and a new car. Furthermore, Plaintiff has submitted no evidence that she expects to lose her job or income at any time in the near future. Plaintiff's claim of financial inability to pay costs simply cannot stand. See *Rivera*, 469 F.3d 631 (rejecting claim of indigency where plaintiff was a single mother of four children with a monthly income of $1,800, no real estate or other assets and no source of child support payments).

In *Cherry v. Champion International Corporation*, 186 F.3d 442 (4th Cir. 1999) this Court reversed a trial court order denying costs when a plaintiff claimed modest means and financial hardship. The trial court had taken detailed evidence about the

income and assets of the plaintiff and concluded that she should not be required to pay costs when she had access to marital income of $70,000 per year and had collected $30,000 from a 401(k) some of which she spent on discretionary items like a truck and motorcycle. The Court said that "inability to pay" could be a basis to deny costs – not modest means; not financial hardship. The Court said that it would be inequitable to deny costs with the plaintiff having access to income and assets. Here, Plaintiff/Appellee has indicated he has ongoing income; he has not made any attempt to demonstrate a lack of assets, or overriding costs for daily living. He has not spoken to his overall financial situation, which he is required to do if he wants to avail himself of the exception to the general rule. Rule 54(d)(1) creates a presumption that costs are to be awarded to the prevailing party. See *Bass v. E. I. DuPont de Nemours & Company*, 324 F.3d 761 (4th Cir. 2003). To demonstrate entitlement to an *exception* to this general rule, Plaintiff/Appellee is obligated to show inability to pay. He has not made such a showing. For instance, Plaintiff/Appellee could have provided his tax returns for the last few years; he could have provided a financial statement showing his assets and liabilities; he could have explained what became of the funds he received from his son's death benefits; he could have described any extraordinary medical, family or other obligations he has; he could have discussed any retirement fund in which he may be vested; he could have discussed any vehicles or other significant items he owns, and whether there is any debt on those items remaining; he could have described how much he collected in donations from his Website, and explain how those funds were expended; he could have discussed any

barriers to continued solicitation of donations that he thinks he may exist; etc. Instead, he just made a general unsubstantiated statement that reflects he has ongoing income and typical ongoing expenses, none of which were quantified; and he provided no information about his assets or any other income to which he has access. This is not a sufficient showing to warrant application of the exception to the general rule, particularly given the widely publicized solicitation of donations for costs of litigation in which he and his counsel have engaged. There simply has been no showing of inability to pay, and in fact on the somewhat limited record made, the opposite showing has been made, to wit, he *is*, in fact, able to pay these costs which were incurred by a small church and three individuals, one retired with very limited income through social security checks; the other two with many children still in the home and themselves with modest incomes (all of which was thoroughly documented at the trial court level). There is no equitable basis in this case for shifting the costs which the law presumes will be taxed against the losing party to these Defendants/Appellants.

For all of the foregoing reasons, Defendants/Appellants submit that the objections should not be considered as untimely. In the alternative, the objections should be overruled, because there is no showing that the rate for copies is too high, that items included in the Appendix were unnecessary; or that Plaintiff/Appellee is unable to pay.

Respectfully submitted,

/s/ Margie J. Phelps

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Defendants/Appellants' Response to Objection to Bill of Costs was served by e-mail and through the electronic filing system of the Court on Mr. Sean E. Summers, Esq. and Mr. Craig Trebilcock, Esq., on October 29, 2009.

/s/ Margie J. Phelps

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Margie J. Phelps