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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

PEARL WILSON, Personal Representative of the Estate of Phillip Wilson, deceased; TERRY WILSON and PEARL WILSON, surviving parents of Phillip Wilson,

Plaintiff(s),

v.

MARICOPA COUNTY, a public entity; MARICOPA COUNTY SHERIFF'S OFFICE, a division of Maricopa County; JOSEPH M. ARPAIO, Maricopa County Sheriff, and AVA ARPAIO, his wife; MARIA LEON and JOHN DOE LEON, her husband; MARK W. STUMP and JANE DOE STUMP, his wife; ROCKY MEDINA and JANE DOE MEDINA, his wife; MICKIE CURTIS and JANE DOE CURTIS, his wife; JOHN DOE OFFICERS I-X; JANE DOE OFFICERS I-X; JOHN DOE SUPERVISORS I-X; JANE DOE SUPERVISORS I-X; JOHN DOES I-X; JANE DOES I-X,

Defendant(s).

No. CV-04-2873 PHX DGC

PLAINTIFFS' OBJECTIONS TO DEFENDANTS' BILL OF COSTS

(Assigned to the Honorable David G. Campbell)

Plaintiffs, the Wilsons, hereby file their Objections to Defendants' Bill of Costs. Rule 54 governs any award of costs. This Court ***has the discretion to deny*** and/or reduce any award of the costs enumerated by Rule 54; ***but, it cannot award*** taxable costs not specifically enumerated by the Rule and related statutory provisions. *See Arlington Central Sch. Dist. Bd. of Ed. v. Murphy*, 126 S. Ct. 2455, 2462 (2006) (discussing scope of district court's discretion to award costs under Rule 54 "is defined by the list set out in § 1920"); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987). To this extent, Defendants' Bill of Costs is improper and objectionable because it seeks costs that were unreasonable and unnecessary (*e.g.*, deposition expenses), as well as those that are clearly outside the scope of the taxable costs defined by Rule 54 (*e.g.*, expert witness fees, travel expenses, attorney costs). Thus, Defendants are not entitled to recover them.[1]

I. NON-TAXABLE COSTS ARE NOT RECOVERABLE UNDER RULE 54.

The only costs that may be taxed by the Clerk under Rule 54 are those enumerated by Rule 54 and 28 U.S.C. §§ 1821(b) and 1920. *See Crawford*, 482 U.S. at 439 (holding that, absent "plain evidence of congressional intent," district court had no authority to award taxable costs other than as prescribed by Rule 54, § 1821(b), or §

[1] Although Defendants might have arguably raised some of these "costs" as non-taxable costs under 42 U.S.C. § 1988 in a proper Motion for Attorneys' Fees and Costs, they did not do so within the timeframes and procedures set forth by the Rules. *See* Local Rule 54.1; *Ellenwood v. Exxon Shipping Co.*, 1994 WL 247784, *5 (D. Me. 1994) (citing *Palmigiano v. Garrahy*, 707 F.2d 636, 637 (1st Cir.1983) and noting that "under § 1988, certain out-of-pocket costs incurred by plaintiff's attorneys, including transportation, lodging, parking, food and telephone expenses can be imposed as reasonable and necessary costs and expenses[]. This category is not the same as taxable costs under federal procedural statutes, see 28 U.S.C. § 1920."). They have waived the right to seek such non-taxable costs and fees now. *See Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 889-90 (9th Cir. 2000) (holding failure to file motion for attorneys' fees and costs within 14 days of entry of judgment, as required by Rule 54, waived right to seek fees and nontaxable costs as prevailing party); *Cunningham v. County of Los Angeles*, 879 F.2d 481 (9th Cir. 1988) (finding that failure to follow timeframes in Local Rules for filing Bill of Costs barred recovery of taxable costs as prevailing party).

1920). "***Items proposed by winning parties as costs should always be given careful scrutiny.***" *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 235 (1964) (emphasis added).

The only expenses that may be taxed as "costs" against a losing party are enumerated in 28 U.S.C. § 1920: (1) Fees of the clerk and marshall; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; and (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. *See* 28 U.S.C. § 1920.

As the party seeking costs, ***Defendants bear the burden of establishing that they are both entitled to the costs they seek and that such costs are justified as necessary to the litigation***. *See Berryman v. Hofbauer*, 161 F.R.D. 341, 345 (E.D. Mich. 1995). Defendants have not met their burden. Their Bill of Costs and supporting documentation is not organized and is difficult to follow. Moreover, Defendants' Bill of Costs seeks to recover, under Rule 54, expenses outside those provided by Rule and statute.[2] *See id.* at 444-45 (rejecting argument 42 U.S.C. § 1988 permitted recovery of additional items outside of § 1920 as "costs"). Defendants are not entitled to recover more than $19,355.85, for the reasons set forth herein.

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[2] Nor would Defendants be entitled to recover other non-taxable costs under 42 U.S.C. § 1988. Even if they had not waived their right to seek such costs by their failure to timely file their Motion for fees and costs, they would not be able to establish that Plaintiffs' claims were frivolous or brought in bad faith, as they must do to recover an award under § 1988. *See, e.g., Hughes v. Rowe*, 449 U.S. 5, 15 (1980) (holding that prevailing defendants can only recover attorneys' fees award under § 1988 where they can show plaintiffs' claims were "frivolous, unreasonable, or groundless"). Plaintiffs' claims, in this case, clearly were not so. Thus, Defendants would also not be entitled to these costs under § 1988.

A. Defendants Are Not Entitled to Additional Witness Fees.

By statute, the costs for all witnesses are limited to a flat per diem payment of $40 for testifying at trial. 28 U.S.C. § 1821(b). In this case, Defendants conditioned their acceptance of trial subpoenas for their witnesses upon the receipt from Plaintiffs of the witnesses' $40 per diem fees. Thus, Defendants have already been paid, in advance, for their witness fees at trial. [*See* Correspondence from Anne Slawson, dated March 22, 2007 (attached as Ex. 1).]

Therefore, Defendants' request for "witness fees" of $7,100 is not justified under § 1821. The documents Defendants' referenced in support of their claim show only purported "witness fees" paid to three experts for their depositions: Toni Bair, Dr. Alvin Burstein, and Dr. David McPhee. But expert fees are not recoverable as taxable costs under Rule 54. *See Crawford*, 482 U.S. at 445; *infra*. The Court should, accordingly, deny Defendants' request for $7,100 in "witness fees."

B. Defendants Are Not Entitled to Recover Their Expert Fees.

In their Bill of Costs, Defendants seek to recover $92,856.71 for "compensation of experts." None of these expenses is recoverable as a taxable cost. It is well-established that expert witness fees are not recoverable as taxable costs under Rule 59. *Crawford*, 482 U.S. at 439 (holding that expert fees cannot be shifted as "costs" under Rule 54; only minimum daily witness fee of $40 was recoverable as "costs" under 28 U.S.C. § 1821(b)); *Agredano v. Mutual of Omaha*, 75 F.3d 541, 543-44 (9th Cir. 1996) (citing *Crawford* and discussing that expert fees are not recoverable as taxable "costs" under Rule 54 or statutory provision permitting recovery of reasonable attorneys' fees and costs as a prevailing party).

Here, Defendants seek to recover significant expenses they paid to their own experts, including a consulting expert who was never disclosed and who Plaintiffs never

had the opportunity to depose (Brian Parry). They also seek fees for "professional services rendered" by Investigative Research, Inc. ($9,491.58 without ***any*** explanation of what services were provided and for what purpose) and trial consulting technology experts ($18,625.00), which are also not recoverable as "taxable costs" under § 1920. Whatever fees Defendants paid to their experts, those cannot now be taxed against Plaintiffs.[3] Expert and consulting fees are not recoverable as "taxable costs." The Court should deny Defendants' request for such "costs" in its entirety.

C. Defendants Are Not Entitled to Recover Non-Stenographic Costs of Transcription.

Only the cost of stenographic transcripts may be recovered. *See* 28 U.S.C. § 1920. "No ASCII, Mini/Condensed Transcripts, Per Diem, Rough Drafts, Min-U-Script or Word Indexes allowed." *See* Order, *Agster v. Maricopa County, et al.*, July 14, 2006 at 1. Convenience services, such as expedited transcripts, multiple copies, per diems, and video services, are not within the scope of § 1920. *See, e.g., Paul N. Howard Co. v. P.R. Aqueduct & Sewer Auth.*, 110 F.R.D. 78, 81 (D. P.R. 1986) (citing cases from various circuit and district courts). Nor are they provided by the Local Rules. *See* Local Rule 54.2. The Local Rules also do not provide for the recovery of trial transcripts for Defendants' own use, only if ordered by the Court or by stipulation. Local Rule 54(e)(2).

Here, Defendants seek $59,036.94 in "fees of the court reporter." Their request is not justified. Although the supporting documentation is difficult to follow, a careful review of the invoices attached as support for these "fees" shows that they include costs

[3] Defendants cannot even recover the per diem fee for their experts. Plaintiffs already paid Defendants' experts for testifying in their depositions and Plaintiffs did not call any of Defendants' experts at trial. Moreover, any travel or meal expenses incurred by Defendants' expert, Gary Deland, are also not recoverable. It was Mr. Deland who requested to travel to Las Vegas, Nevada for his deposition, rather than be deposed in his home town, as offered by Plaintiffs' counsel.

incurred for the convenience of the lawyers (such as expedited fees, video costs, per diems, ASCII, indexes, extra copies, etc.), beyond the stenographic costs permitted by § 1920 and the Local Rules. *See, e.g., Jones v. Bd. of Trustees of Community College Dist. No. 508*, 197 F.R.D. 363, 364-65 (N.D. Ill. 2000) ("The defendants are not entitled to recover the charge for ASCII diskettes of deposition transcripts, which are merely for the attorneys' convenience."). Defendants should not be permitted to recover for such convenience charges, particularly where they have not made and cannot make any showing that such expenses were incurred out of necessity for their use in the case. *See Gaddis v. U.S.* 381 F.3d 444, 476 (5th Cir. 2004) (discussing that videotaped depositions and mediator fees are not recoverable).

They also included invoices for transcripts from other cases, including a transcript ($129.40) for the deposition of their undisclosed consulting expert, Brian Parry, in a case that occurred two years before Phillip Wilson was assaulted. And Defendants seek to recover multiple copies of the same deposition transcripts. Defendants are not entitled to recover anything other than the cost of obtaining one copy of relevant transcripts. Attached as Exhibit 2 is a breakdown of the actual "costs" incurred by Defendants for obtaining deposition and trial transcripts, by witness, based on the invoices Defendants submitted. At best, Defendants would be entitled to no more than $19,205.85 in court reporter costs, not the more than $59,000 they requested.

D. Defendants Should Not Be Permitted to Recover the Docket Fee Related to Their Frivolous Appeal.

Plaintiffs object to Defendants' request for the "costs" of filing their interlocutory appeal of the Court's denial of qualified immunity. Plaintiffs argued, and the Court agreed, that the appeal was frivolous. [Order (Dk. #311).] Ultimately, Plaintiffs voluntarily dismissed their claims against Sheriff Arpaio in his individual capacity under § 1983, in order to permit the trial to move forward as scheduled. Given

the frivolous nature of the appeal, the Court should deny Defendants' request for docket fees of $455, associated with the appeal.

E. Defendants' Print/Copy Costs Are Not Recoverable.

Copying charges simply for the convenience of the parties or counsel are not recoverable, but only if necessarily obtained for use in the case or at trial. *See Fogelman*, 920 F.2d at 286 (noting that charges incurred for convenience of lawyers are not recoverable as taxable costs). Print and copy charges may be recoverable as a taxable cost under § 1920, but only if it was "necessarily obtained" for use in the case. 28 U.S.C. § 1920(4).

Here, Defendants have proffered no explanation of why their print and copy charges were necessary or reasonable; indeed, they were not. Defendants' print and copy costs were not "necessarily obtained" for use in the case, but for counsel's convenience. *Compare* Local Rule 54.2(e)(5). Therefore, such expenses are not recoverable under Rule 54 and § 1920. Such expenses includes retrieving and copying of various court documents (D.L. Investigations & Attorney Support (invoice # 06-10282), $90.25), imaging, scanning, and making additional copies of documents already provided by Plaintiffs to Defendants (DupLEX, invoice #36366, $6,635.81) or synchronizing of audio/video (DupLEX, invoice #37187, $505.91), as well as exemplification charges for a demonstrative exhibit not admitted into evidence. It was also not necessary for Defendants to incur $2,305.83 to copy medical and employment records of Pearl and Terry, which were not used at trial and pertained almost entirely to irrelevant issues in the case. Given the lack of necessity of these charges, the Court should deny Defendants' request for these "costs" in their entirety as not reasonable or necessary to the case. Local Rule 54.2.

F. Defendants' Service Costs Were Unnecessary.

Defendants seek nearly $3,000 for court/service fees. But many of these fees were related to the retrieval of unnecessary and irrelevant medical records of Plaintiffs Pearl and Terry Wilson, which were never used at trial. Moreover, the service fees attributed to Plaintiffs' experts, Dr. Burstein, Dr. Trepeta, and Toni Bair, are improper. Plaintiffs' counsel agreed to accept service on behalf of the experts and facilitate their response to the subpoenas by Defendants. And there was no need for any service fee to Pearl Wilson ($109.60), as she has been represented by counsel from the inception of this litigation. There is no basis for such service charges, and no supporting documentation to justify the expenses. Given the lack of support and need for such expenses in this case, the Court should also deny Defendants' request for these "costs."

G. Defendants' Request for Other Costs Such as Attorney Travel Expenses, Mediation Costs, and Other Miscellaneous Expenses Is Unjustified and Unrecoverable.

The party seeking costs bears the burden of establishing that they are both entitled to the costs they seek and that such costs are justified and recoverable. *See Berryman*, 161 F.R.D. 345. With respect to their category of "other costs" or "miscellaneous costs," Defendants have also not met their burden. The costs they seek are neither enumerated by Rule 59 or § 1920, nor reasonable or necessarily obtained for use in this litigation.

"Not all expenses incurred by a party in connection with a lawsuit constitute recoverable costs." *Quy v. Air America, Inc.*, 667 F.2d 1059, 1067 (D.C. Cir. 1981). But here, Defendants seek costs for their travel expenses, courier services, services of a private mediator, and other expenses outside of Rule 54 and § 1920, including the costs of travel, lodging, transportation, and meals/entertainment for counsel (Mr. Bojanowski, Ms. Ivanyi, and Mr. Strohm). Travel expenses, courier and delivery services, mail or

postage, telephone, facsimile, computer research, and other miscellaneous costs not enumerated by Rule 54 or § 1920 are not recoverable. *See Tasakos v. Welliver Mental Products Corp.*, No. CIV 04-6205-AA, 2005 WL 627633, *2 (D. Or. March 16, 2005) (collecting authorities and declining to award such costs); *Scelta v. Delicatessen Support Servs., Inc.*, 203 F. Supp. 2d 1328, 1339 (M.D. Fla. 2002) (holding that other litigation expenses, including attorney travel and lodging and attorney meals are not compensable under § 1920, because these expanses are not enumerated in the statute); *Bishara v. O'Callaghan*, 304 B.R. 887, 891 (Bankr. M.D. Fla. 2003) (denying the prevailing party's motion for costs, which included the attorney's air fare and accommodations). There is no basis for Defendants' request for these expenses.

Nor can Defendants recover for their investigatory service or consulting technology expert fees. Not only have they failed to provide any explanation of the bases for these charges, but these, like their travel and subsistence expenses, are not recoverable "costs." *See* 6 Moore's Federal Practice P 54.70(1) at 1301-02; *see Fogelman v. ARAMCO*, 920 F.2d 278, 286 (5th Cir. 1991) (noting that charges incurred for convenience of lawyers are not recoverable as taxable costs).

Accordingly, Defendants' request for "miscellaneous costs" should be denied in its entirety.

II. THE COURT SHOULD EXERCISE ITS DISCRETION AND DENY COSTS TO DEFENDANTS.

The taxing of costs is governed by the "tandem operation" of Rule 54(d)(1) and § 1920, limiting the Court's power to assess other costs outside of those enumerated. *Gochis v. Allstate Ins. Co.,* 162 F.R.D. 248, 250 (D. Mass. 1995). "The only discretion retained by the court is the power 'to decline to tax, as costs, the items enumerated in § 1920.'" *Id.* (quoting *Crawford*, 482 U.S. at 442). "The awarding of costs ***is not mandatory*** and is left to the sound discretion of the district court." *Id.* (citing

Heddinger v. Ashford Memorial Community Hosp., 734 F.2d 81, 86 (1st Cir.1984) (emphasis added)).

In this case, the Court should exercise its discretion and deny costs to Defendants, for several reasons. First, Defendants' Bill of Costs is confusing, difficult to follow, and includes various expenses that should never have been sought as taxable costs under Rule 54 (like, among others, expensive meals for counsel while traveling for deposition and expert witness fees). Plaintiffs should not have to spend significant amounts of time responding to disorganized and meritless claims for costs.

Moreover, the circumstances of this litigation do not warrant the imposition of costs against the Plaintiffs, the Wilsons. As the Court is well-aware, their claims were well-supported in law and fact, and the issues in this case were hard-fought and litigated. After years of hard-fought litigation, the jury unfairly deprived the Wilsons of the justice of a liability verdict they had fought for so long to achieve. Now deprived of the opportunity for Defendants to stand and account for their responsibility and negligence in the untimely death of Phillip Wilson, it would only be more unfair to force the Wilsons to pay Defendants' costs in this case, under the circumstances of this case and the years of strong evidence and arguments the Court has heard from Plaintiffs. Accordingly, the Court should exercise its discretion and deny Defendants' Bill of Costs, in its entirety.

III. CONCLUSION

For the foregoing reasons and based upon the foregoing authorities, Plaintiffs respectfully request that the Court deny Defendants' request for costs in its entirety or, in the alternative, award them taxable costs of no more than $19,355.85.

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RESPECTFULLY SUBMITTED this 14th day of June, 2007.

STINSON MORRISON HECKER LLP

By: /s/ Sean B. Berberian

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2007, I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing and transmittal of a Notice of Electronic filing to the following CM/ECF registrants:

Daniel P. Struck
Shannon M. Ivanyi
Attorneys for Defendants

I hereby certify that on June 14, 2007, I hand-delivered a copy of the attached document to:

Honorable David G. Campbell
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/s/ Rachel V. Sanders