

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

9

Leanna Smith,

)

No. CV 10-01632-PHX-FJM

10

Plaintiff,

)

ORDER

11

vs.

)

12

Barrow Neurological Institute, et al.,

)

13

Defendants.

)

14

15

On February 12, 2013, we entered an order granting defendants Banner Health System

16

and Scott Elton, M.D.'s motion for sanctions and instructing them to file an application for

17

reasonable attorneys' fees caused by (1) plaintiff's failure to promptly obtain records from

18

the juvenile court and to comply with Rule 26, Fed. R. Civ. P., and (2) plaintiff's motion for

19

leave to file a third amended complaint (doc. 334). We now have before us defendants'

20

application for attorneys' fees re: order granting sanctions (doc. 338), plaintiff's motion to

21

stay or in the alternative response to defendants' application (doc. 346), plaintiff's

22

supplement to the motion to stay (doc. 350), defendants' response to the motion to stay and

23

reply in support of the application (doc. 353), and plaintiff's reply in support of the motion

24

to stay (doc. 358).

25

Plaintiff's motion to stay is based on the contention that we do not have jurisdiction

26

over the application for attorneys' fees because on March 3, 2013 plaintiff filed a notice of

27

appeal incorporating the order granting sanctions. Generally, the filing of a notice of appeal

28

divests the district court of jurisdiction over the matters appealed. Natural Res. Def. Council

1 v. Southwest Marine Inc., 242 F.3d 1163, 1166 (9th Cir. 2001). However, the “rule of
2 exclusive appellate jurisdiction” resulting from an appeal “is a creature of judicial prudence
3 [. . .] and is not absolute.” Masalosalo by Masalosalo v. Stonewall Ins. Co., 718 F.2d 955,
4 956 (9th Cir. 1983)(citations omitted). An appeal from the merits does not foreclose an
5 award of attorneys' fees by the district court. Id. Allowing the district court to retain the
6 power to award attorneys’ fees after the notice of appeal had been filed, “may prevent delay
7 and duplication at the appellate level” because, “[i]f a district court decides a fee issue early
8 in the course of a pending appeal on the merits, and the fee order is appealed, the appeals
9 may be consolidated.” Id.

10 Deciding defendants’ application for attorneys’ fees at this time would conserve
11 appellate resources because, assuming plaintiff files a notice of appeal from this order, that
12 appeal can be consolidated with the pending appeal. Therefore, we deny plaintiff’s motion
13 to stay and consider defendants’ application for attorneys’ fees.

14 Plaintiff next requests reconsideration of our order granting defendants’ motion for
15 sanctions (doc. 334). A court “will ordinarily deny a motion for reconsideration of an Order
16 absent a showing of manifest error or a showing of new facts or legal authority that could not
17 have been brought to its attention earlier with reasonable diligence.” LRCiv 7.2(g)(1).
18 Plaintiff has not met her burden. Plaintiff largely restates facts and arguments that were
19 presented when we considered defendants’ motion for sanctions, and fails to explain why she
20 could not have raised new arguments earlier with reasonable diligence. Therefore, we deny
21 plaintiff’s request for reconsideration. We consider only the reasonableness of the attorneys’
22 fees requested pursuant to our order granting sanctions.

23 Defendants seek an award of attorneys fees for: (1) \$19,571.00 spent in connection
24 with plaintiff’s failure to promptly obtain records from the juvenile court and comply with
25 Rule 26, Fed. R. Civ. P.; (2) \$15,154.00 spent responding to plaintiff’s filing of the third
26 amended complaint; (3) \$23,080.00 incurred in connection with the motion for sanctions; and
27 (4) \$5,908.50 expended on this application for attorneys’ fees. Defendants have submitted
28 a supporting declaration and an itemization and description of the work performed by their

1 counsel. Plaintiff's counsel did not object to the reasonableness of defense counsel's hourly
2 billing rate, which ranges between \$160.00 per hour to \$285.00 per hour. Based on the
3 billing information provided and our familiarity with the legal market, we conclude that the
4 hourly rates are reasonable.

5 **I**

6 Plaintiff objects on several grounds to defendants' request for attorneys' fees resulting
7 from plaintiff's failure to promptly obtain records from the juvenile court. First, plaintiff
8 argues that defendants are not entitled to \$6,894 in fees for work between July 20, 2011 and
9 March 29, 2012 because that activity was not caused by plaintiff's violation of any court
10 order. We disagree. The record reflects that Judge Campbell first ordered plaintiff to initiate
11 an action in juvenile court to obtain access to records of the juvenile court proceeding on
12 April 22, 2011. See Doc. 57. Judge Campbell ordered plaintiff to obtain the juvenile court
13 records again on June 30, 2011 and November 2, 2011. See Docs. 70, 85. Therefore, the
14 fees defendants incurred in connection with obtaining access to the juvenile records between
15 July 2011 and April 2012 are recoverable. Second, plaintiff objects to specific time entries
16 reflecting communication between the parties concerning access to juvenile records.
17 Plaintiff's objection is without merit because the time entries specifically reference accessing
18 the juvenile court records. Third, plaintiff objects to the redaction of certain time entries.
19 Because the redactions preclude us from determining whether the time entries are related to
20 gaining access to juvenile records, we reduce the fees requested by the dollar amounts of
21 those entries (\$96.00+\$48.00+\$72.00+\$72.00+\$84+\$672 = \$1,044).¹ Fourth, plaintiff
22 contends that defendants inappropriately seek attorneys' fees for drafting and filing a motion
23 to stay in October 2011 because it was denied and not related to violation of any court order.
24 Defendants' motion to stay was related both to the proceedings pending in the Superior Court
25 of Arizona in Maricopa County and plaintiff's failure to obtain an order from the Superior

26
27 ¹ See Doc. 338-2 entries dated 10/7/2011, 3/5/2012, 3/22/2012, 3/29/2012, 5/23/2012,
28 and 5/25/2012.

1 Court releasing the juvenile records. Therefore, we reduce by half the fees requested in
2 connection with the motion to stay ($\$2,073/2 = \$1,036.50$). Next, plaintiff argues that
3 defendants' counsel is not entitled to seek fees for reviewing and accessing the juvenile court
4 rulings. This argument is without merit. The specific entries plaintiff objects to are related
5 to plaintiff's failure to obtain the juvenile court records.² However, defendants are not
6 entitled to fees for reviewing juvenile court rulings that plaintiff promptly disclosed ($\$681$).³
7 Plaintiff also objects to a series of time entries by generally stating that they are not justified.
8 See Doc. 346 at 7. However, our review of the record reveals that they are related to
9 accessing the juvenile records. Finally, plaintiff argues that she should not be sanctioned for
10 records she allegedly did not possess. But plaintiff, a party to the juvenile proceeding, had
11 access to all records. Defendants did not.

12 Plaintiff also objects to defendants' request for attorneys' fees in connection with
13 plaintiff's failure to comply with Rule 26, Fed. R. Civ. P. Plaintiff challenges a series of
14 billing entries referencing communications about expert disclosures between defendants'
15 counsel and plaintiff's counsel, without stating why these are inappropriate. The fees related
16 to the entries are recoverable because they are related to plaintiff's failure to meet the Rule
17 26 expert disclosure requirements. Plaintiff also argues that defendants are inappropriately
18 seeking attorneys' fees for preparation of the motion to compel filed on July 24, 2012. Even
19 though the motion became moot after we granted defendants' motion for summary judgment
20 on July 31, 2012, the effort that went into the motion resulted from plaintiff's failure to
21 comply with Rule 26. Therefore, the fees associated with preparation of the motion are
22 recoverable. However, we agree that the $\$670$ in fees associated with entries in August 2012
23 relating to the motion to compel are not recoverable because the summary judgment order
24 mooted any further work on the motion to compel. Accordingly, we award defendants fees

26 ² See Doc. 338-2 entries dated 10/3/2011, 10/27/2011, 12/1/2011, 12/16/2011, and
27 1/25/2012.

28 ³ See Doc. 338-2 entries dated 2/2/2012.

1 in the amount of \$16,139.50 (\$19,571.00 less \$3,431.50 in inappropriate fees) in connection
2 with plaintiff's failure to promptly obtain records from the juvenile court and to comply with
3 Rule 26, Fed. R. Civ. P.

4 II

5 Next, plaintiff challenges the \$15,154.00 in fees defendants request in connection with
6 plaintiff's motion to file a third amended complaint. Plaintiff argues that any fees incurred
7 before she filed her third amended complaint on November 11, 2011 are inappropriate. We
8 disagree. Plaintiff informed defendants of her intention to file a third amended complaint
9 before November 2011. Therefore, the fees defendants incurred before November 2011 in
10 preparing to oppose the frivolous filing are reasonable. Plaintiff also objects to several
11 entries that have been partially redacted, but it is clear that those entries are related to the
12 third amended complaint.⁴ Finally, plaintiff objects to numerous entries on the bases that the
13 fees are unreasonable and excessive. However, she has failed to meet her burden to provide
14 evidence demonstrating the excessive or unreasonable nature of the fees. See McGrath v.
15 County of Nevada, 67 F.3d 248, 255 (9th Cir. 1995). Accordingly, the fees defendants seek
16 in connection with the third amended complaint are reasonable. These fees are recoverable
17 against plaintiff's attorney. See 28 U.S.C. § 1927 ("Any attorney . . . thereof who so
18 multiplies the proceedings in any case unreasonably and vexatiously may be required by the
19 court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred
20 because of such conduct.").

21 III

22 Finally, plaintiff argues that defendants are not entitled to attorneys' fees for preparing
23 the motion for sanctions and this application for attorneys' fees. Attorneys' fees for
24 preparing the motion for sanctions are recoverable under our order because the fees related
25 to the preparation of the motion for sanctions resulted from plaintiff's discovery failures and
26 frivolous filing. However, we agree with plaintiff that fees in the amount of \$23,080.00 are

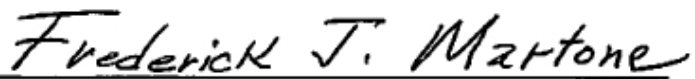
27
28 ⁴ See Doc. 338-2 entries dated 11/4/11, 11/11/11, 12/6/11, and 1/20/12.

1 excessive. A significant amount of the factual research required for the motion for sanctions
2 should have been readily available from other discovery motions. Moreover, the legal issues
3 presented were not overly complex. Therefore, we believe an award of half of the fees
4 sought, in the amount of \$11,540 is appropriate. Defendants are also entitled to recover fees
5 for their work in seeking attorneys' fees. Time spent preparing the fees application "must be
6 included in calculating a reasonable fee because uncompensated time spent on petitioning
7 for a fee automatically diminishes the value of the fee eventually received." Anderson v.
8 Director, Office of Workers Compensation Programs, 91 F.3d 1322, 1325 (9th Cir. 1996).
9 Based on our experience with attorneys' fees motions, we believe the amount of \$5,908.50
10 is reasonable.

11 **IT IS ORDERED DENYING** plaintiff's motion to stay (doc. 346).

12 **IT IS FURTHER ORDERED GRANTING** defendants' application for attorneys'
13 fees (doc. 338). **IT IS ORDERED** that defendants are awarded attorneys' fees in the amount
14 of \$15,154.00 against Keith Knowlton and Keith M. Knowlton LLC, jointly and severally.
15 **IT IS FURTHER ORDERED** that defendants are awarded attorneys' fees in the amount
16 of \$16,139.50, \$11,540.00, and \$5,908.50 for a total amount of \$33,588.00 against plaintiff,
17 Keith Knowlton, and Keith M. Knowlton LLC, jointly and severally.

18 DATED this 28th day of May, 2013.

19
20 

21 **Frederick J. Martone**
22 **Senior United States District Judge**
23
24
25
26
27
28