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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Richard Brubaker, et al.,

10 Plaintiffs,

11 v.

12 City of Tucson, et al.,

13 Defendants.
14

No. CV-10-00649-TUC-SMM

ORDER

15 Pending before the Court is Plaintiff's Motion for Review of Judgment on Taxation
16 of Costs. (Doc. 329).

17 **I. Background**

18 On March 6, 2020, on the final day of a four-day jury trial, the Court granted
19 Defendants' Motion for Judgment as a Matter of Law, whereupon the Clerk entered
20 judgment in Defendants' favor. (Doc. 197). On March 27, 2020, Plaintiff appealed the case
21 to the Ninth Circuit. (Doc. 200). On July 16, 2020, with Plaintiff's appeal pending, the
22 Clerk of the Court awarded Defendants \$4,282.65 in taxable costs. (Doc. 217). On
23 November 3, 2020, upon review, the Court reduced Defendants' taxable costs to \$3,674.35.
24 (Doc. 226).

25 On August 19, 2021, the Ninth Circuit reversed in part and affirmed in part the
26 Court's grant of judgment as a matter of law in favor of Defendants, remanding the case
27 back to the District Court. (Doc. 230). This Court held a jury trial from August 15, 2022,
28 to August 18, 2022.

1 Following the 2022 trial, Defendants presented a Bill of Costs (Doc. 322) and
2 accompanying Affidavit (Doc. 323), this time seeking \$5,007.18. Plaintiff filed an
3 Opposition to Defendants' Affidavit of Taxable Costs (Doc. 324) and Defendants
4 responded to this Objection. (Doc. 326). On September 21, 2022, the Clerk of the Court
5 awarded Defendants taxable costs of \$4,172.68. (Doc. 327). On September 23, 2022,
6 Plaintiff filed a Motion for Review of Judgment on Taxation of Costs. (Doc 329).
7 Defendants have filed their Response (Doc. 330) and Plaintiff has filed his reply. (Doc.
8 331).

9 **II. Legal Standard**

10 28 U.S.C. § 1920 authorizes a judge or clerk of the district court to tax costs. Fed.
11 R. Civ. P. 54(d)(1) creates a presumption that favors the prevailing party's recovery of
12 authorized costs. It is incumbent upon the party opposing the recovery of costs to overcome
13 that presumption. See Stanley v. Univ. S. Cal., 178 F.3d 1069, 1079 (9th Cir. 1999). Upon
14 motion for review of a clerk's taxation of costs, a district court reviews de novo the clerk's
15 judgment. United States ex rel. Lindenthal v. Gen. Dynamics Corp., 61 F.3d 1402, 1412
16 n.13 (9th Cir. 1995). "The general rule on the taxation of costs is that the district court has
17 discretion to fix the costs." Johnson v. Pac. Lighting Land Co., 878 F.2d 297, 298 (9th Cir.
18 1989). Such discretion, however, does not allow a court to tax costs beyond those
19 authorized by statute. Id.

20 The Court's taxation of costs must also comport with the Local Rules. Importantly,
21 Local Rule 54.1(e) specifies the items that the prevailing party may receive as taxable costs.

22 A party seeking the taxation of costs must provide "a memorandum of the costs and
23 necessary disbursements, so itemized that the nature of each can be readily understood,
24 and, where available, documentation of requested costs in all categories must be attached."
25 LRCiv. 54.1(a). The Local Rules provide an exhaustive list of taxable costs, although items
26 outside of this list may be taxed with prior court approval. Id.

27 Relevant here, LRCiv 54.1(e)(5) allows the prevailing party to recover costs for
28 "exemplifications and copies of papers" as follows:

1 The reasonable cost of copies of papers necessarily obtained
2 from third-party records custodians is taxable. The reasonable
3 cost of documentary exhibits admitted into evidence at hearing
4 or trial is also taxable, including the provision of additional
5 copies for the Court and opposing parties. The cost of copies
6 submitted in lieu of originals because of the convenience of
7 offering counsel or client are not taxable. All other copy costs
8 are not taxable except by prior order of the Court.

9 **III. Discussion**

10 As a preliminary matter, Plaintiff argues that the Ninth Circuit’s vacatur of judgment
11 also vacated the costs awarded following the 2020 trial. (Doc. 329 at 2). Defendants do not
12 dispute this. (Doc. 330 at 2). Instead, Defendants insist that vacatur of the award of costs
13 did not vacate the Court’s ruling as to what those costs consisted of. (*Id.*) Defendants point
14 out that Plaintiff did not raise any objection to the award of taxable costs on appeal and
15 consider the matter waived. (*Id.*) Neither side cites caselaw to support their position and
16 the Court is unable to locate any opinions within the Ninth Circuit that deal with this precise
17 scenario.

18 The Court rejects Defendants’ argument that Plaintiff waived any objection to the
19 Court’s award of costs by not raising the issue on appeal to the Ninth Circuit. Plaintiff
20 appealed the District Court’s judgment before taxable costs were awarded. As such,
21 Plaintiff was unable to raise the issue on appeal and cannot be considered to have waived
22 the issue. Further, neither Defendants nor the Clerk have treated the 2020 award of taxable
23 costs as unmodifiable. In its recent 2022 award of taxable costs, the Clerk noted that
24 “[D]efendants have...conceded that \$620.80 previously awarded [for taking and
25 transcribing statements from various Tucson police officers] is not properly taxable.”

26 Regardless, and as previously stated, a court may review a clerk’s taxation of costs
27 de novo. Defendant will be awarded those costs granted by the Clerk that Plaintiff has not
28 challenged. For those costs that Plaintiff has challenged, covering both trials, this Court

1 will review de novo the Clerk’s taxation of costs.

2 A. TV News Clips

3 First, Plaintiff challenges Defendants’ request for \$595.00 to procure TV news clips
4 as a records expense. (Doc. 329 at 2-3) Plaintiff argues that this expense was not taxable
5 pursuant to either 28 U.S.C. § 1920 or LRCiv 54.1(e). (Id.) Defendants do not address any
6 of Plaintiff’s arguments as to this cost. In their 2020 Reply in Support of Defendants’
7 Motion for Attorneys’ Fees and Taxable Costs, however, Defendants argued that this cost
8 was taxable under § 1920 because it went toward obtaining news coverage of the case,
9 which Plaintiff had “specifically fought to introduce into evidence” and, as such, was
10 “plainly obtained for use in this case.” (Doc. 206 at 6-7).

11 Of course, this cost must be taxable under LRCiv 54.1 in addition to § 1920. Under
12 Local Rule 54.1(e), Defendants have two routes to recover this expense. First, if they can
13 demonstrate that the expense was for “documentary evidence admitted into evidence.”
14 Here, these new clips were not admitted into evidence. That leaves the second route—for
15 “copies of papers necessarily obtained from third-party records custodians.” Here, the clips
16 were obtained from a third-party records custodian—News Exposure—and were
17 necessarily obtained for trial, as news coverage of the case was relevant at the time the
18 clips were procured. However, these clips were not “papers.” As a result, these expenses
19 do not fall under any category provided by the Local Rules and are not taxable.

20 B. Investigation Expenses

21 Second, Plaintiff challenges Defendants’ request for \$1366.90 for investigation
22 expenses relating to Donald Deal. (Doc. 329 at 2-3). Plaintiff argues that Deal was not
23 called to testify and that investigative costs such as these may not recovered under § 1920
24 or LRCic 54.1(e). (Id.) As Plaintiff points out, Defendants have themselves conceded in
25 the past that investigative expenses are not recoverable. (Doc. 206 at 7). Defendants’
26 Response does not address Plaintiff’s argument as to this cost. (Docs. 326 and 330).

27 The Court accepts Plaintiff’s argument and determines these investigative expenses
28 to be nontaxable.

1 C. Trial Exhibits for 2020 Trial

2 Third, Plaintiff challenges Defendants' three separate expenses (of \$331.68, \$17.25,
3 and \$241.00) for color copies of photos and exhibits used during the 2020 trial. (Doc. 329
4 at 3-4). Plaintiff argues that Defendant is not entitled to recovery of costs for the
5 photographs because such recovery is only possible for photographs that were admitted
6 into evidence and Defendants have failed to identify which of these photographs were
7 introduced into evidence. (Id.)

8 The Court finds that Defendants' affidavit and receipts sufficiently identify the
9 exhibits to which they correspond. In the 2020 trial, Defendants admitted five exhibits of
10 photos and one seven-page transcript. (Doc. 196). The costs documented in the attached
11 receipts appear reasonable for the acquisition of these exhibits, including for "copies for
12 the Court and opposing parties." These costs are therefore taxable.

13 D. Trial Exhibits for 2022 Trial

14 Finally, Plaintiff challenges Defendants' request for \$529.73 for preparing exhibits
15 for the second trial. (Doc. 329 at 4). Defendants should not be awarded these costs, Plaintiff
16 argues, because they did not identify which exhibits were admitted. (Id.) In response,
17 Defendants assert that these costs meet the relevant standard under LRCiv 54.1(e)(5). (Doc.
18 330 at 2-3).

19 Defendants' affidavit simply describes this cost as "Trial Exhibits." (Doc. 323 at 3).
20 Unlike the trial exhibit costs for the 2020 trial which were described as photographs,
21 Defendants' costs for the 2022 trial do not specify what type(s) of media the costs consist
22 of. (Id.) Defendants' affidavit does not specify to which admitted exhibits these costs
23 correspond. (Id.) Neither does the receipt attached to the affidavit. (Doc. 321-1 at 22). The
24 receipt indicates that Defendants ordered three copies of an 1118-page document printed
25 on bond paper and 3 copies of a 3-page document printed on a more expensive paper.

26 Defendants' affidavit and receipt do not provide enough information for the Court
27 to determine to which exhibits these costs correspond. Defendants admitted into evidence
28 only two printed exhibits. (Docs. 312 and 316). First, a seven-page transcript of Sergeant

1 Wakefield’s interview of Deal. (Id.) Second, the transcript of Officer Pelton’s phone call
2 with the magistrate judge, which is presumably seven pages long, as it was when it was
3 admitted into evidence during the 2020 trial. (Id.; Doc. 196). Neither of these exhibits
4 clearly correspond with the receipt attached to Defendant’s affidavit. As such, Defendants
5 have failed to provide “a memorandum of the costs and necessary disbursements, so
6 itemized that the nature of each can be readily understood.” These costs are therefore not
7 taxable.

8 For the foregoing reasons,

9 **IT IS HEREBY ORDERED granting in part and denying in part** Plaintiff’s
10 Motion for Review of Judgment on Taxation of Costs (Doc. 329). Defendants are awarded
11 \$1681.05 in taxable costs. This order modifies the Taxation Judgment (Doc. 327) entered
12 on September 21, 2022.

13 Dated this 31st day of October, 2022.

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16 Honorable Stephen M. McNamee
17 Senior United States District Judge
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